TEXAS REGISTER

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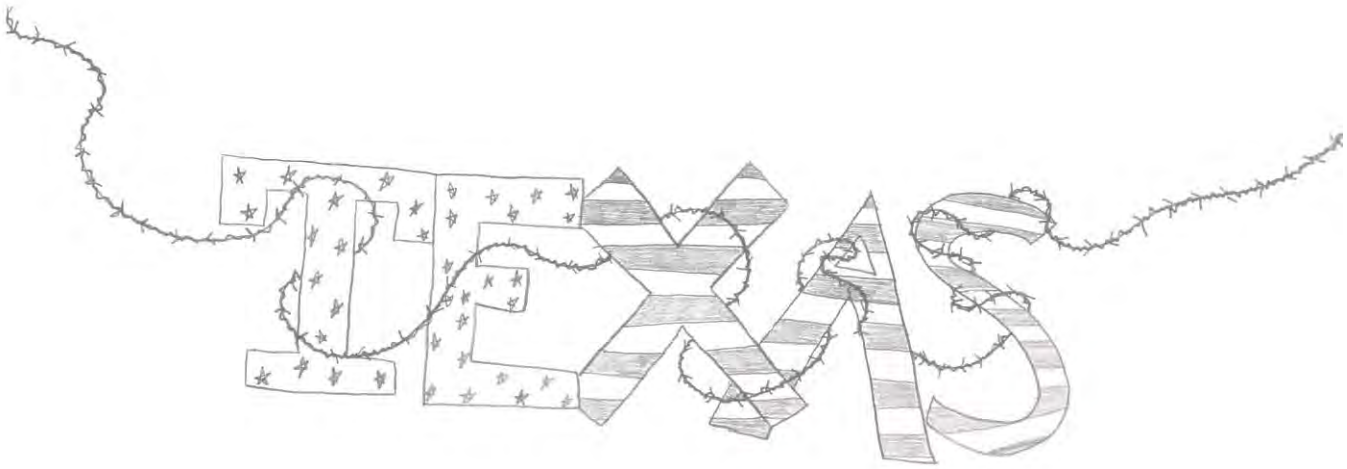
Mikayla Perkins
8th Grade



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

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

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IN THIS ISSUE

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.

THE GOVERNOR

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

Proclamation 41-3237

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, the resignation of the Honorable Carl H. Isett has caused a vacancy to exist in the Texas House of Representatives District No. 84, which consists of part of Lubbock County; and

WHEREAS, Article III, Section 13 of the Texas Constitution and Section 203.002 of the Texas Election Code require that a special election be ordered upon such vacancy; and

WHEREAS, Section 3.003 of the Texas Election Code requires the election to be ordered by proclamation of the governor;

NOW, THEREFORE, I, RICK PERRY, GOVERNOR OF TEXAS, under the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special election to be held in House District No. 84 on Tuesday, November 2, 2010, for the purpose of electing a state representative to serve out the remainder of the term of the Honorable Carl H. Isett.

Candidates who wish to have their names placed on the special election ballot must file their applications with the secretary of state no later than 5 p.m. on Friday, August 27, 2010.

Early voting by personal appearance shall begin on Monday, October 18, 2010, in accordance with Section 85.001 of the Texas Election Code.

A copy of this order will be mailed immediately to the county judge of Lubbock County, and all appropriate writs will be issued and all proper proceedings will be followed for the purpose that said election may be held to fill the vacancy in House District No. 84 and its result proclaimed in accordance with the law.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 10th day of June, 2010.

Rick Perry, Governor of Texas

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-201003428

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0892-GA

Requestor:

The Honorable Chuck Hopson

Chair, Committee on General Investigating and Ethics

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a member of the city council of Texarkana, Texas, may simultaneously serve as a paid municipal fire fighter in Texarkana, Arkansas (RQ-0892-GA)

Briefs requested by July 15, 2010

RQ-0893-GA

Requestor:

The Honorable Leticia Van de Putte

Chair, Veterans Affairs & Military Installations

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether the Edgewood Independent School District may change the date of its general election for school trustees to the uniform election date set by statute in May of odd-numbered years (RQ-0893-GA)

Briefs requested by July 16, 2010

RQ-0894-GA

Requestor:

The Honorable Donald W. Allee

Kendall County Attorney

201 E. San Antonio Street, Suite 306

Boerne, Texas 78006-2050

Re: Whether a county may impose a sales tax on internet service provided to residents of a different county (RQ-0894-GA)

Briefs requested by July 16, 2010

RQ-0895-GA

Requestor:

The Honorable Richard J. Miller

Bell County Attorney

Post Office Box 1127

Belton, Texas 76513

Re: Whether a local governmental body subject to the Public Funds Investment Act, chapter 2256, Government Code, may invest in money market accounts (RQ-0895-GA)

Briefs requested by July 21, 2010

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

TRD-201003597
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: June 23, 2010

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 12. SWORN COMPLAINTS
SUBCHAPTER C. INVESTIGATION AND PRELIMINARY REVIEW

1 TAC §12.81

The Texas Ethics Commission (the Commission) proposes new §12.81, relating to the procedures for investigating and resolving technical and clerical violations of laws within the Commission's jurisdiction as provided by §571.0631 of the Government Code.

Section 12.81 describes procedures used for investigating and resolving technical and clerical violations of laws within the Commission's jurisdiction.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the Commission concerning the proposed rule may do so at any Commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a Commission meeting when the Commission considers final adoption of the proposed rule. Information concerning the date, time, and location of Commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The new §12.81 is proposed under Government Code, Chapter 571, §571.062, which authorizes the Commission to adopt rules concerning the laws administered and enforced by the Commission.

The new §12.81 affects §571.0631 of the Government Code.

§12.81. Technical, Clerical, or De Minimis Violations.

(a) A technical, clerical, or de minimis violation for purposes of §571.0631 of the Government Code, may include a first-time allegation against a respondent for:

(1) Typographical or incomplete information on a campaign finance report that is not misleading or does not substantially affect disclosure;

(2) Failure to include a disclosure statement on political advertising;

(3) Failure of a non-incumbent to use the word "for" in a campaign communication, where the communication is not otherwise misleading;

(4) Failure to include the highway right-of-way notice on political advertising;

(5) Filing a late campaign finance report if the total amount of political contributions does not exceed $2,500, the total amount of political expenditures does not exceed $2,500, and the report is not a report due 30 or 8 days before an election, or a special pre-election report;

(6) Filing an incomplete or corrected campaign finance report that is not a report due 30 or 8 days before an election or a special pre-election report if:

(A) the total amount of incomplete or incorrectly reported political contributions does not exceed the lesser of 10% of the total amount of political contributions on the corrected report, or $5,000;

(B) the total amount of incomplete or incorrectly reported political expenditures does not exceed the lesser of 10% of the total amount political expenditures on the corrected report, or $5,000; or

(C) the total amount of incomplete or incorrectly reported political contributions or political expenditures does not exceed the amount of the filing fee for place on the ballot for the office sought or held by the respondent during the period covered by the report at issue, or, if there is not a set filing fee, $500; or

(7) Failure to timely file a campaign treasurer appointment if, before filing the campaign treasurer appointment, the total amount of political contributions accepted does not exceed $2,500 and the total amount of political expenditures made or authorized does not exceed $2,500.

(b) During the review of a sworn complaint under Chapter 571, Subchapter E of the Government Code, if the commission determines that the only alleged violations are technical, clerical, or de minimis, the commission may enter into an assurance of voluntary compliance with the respondent. Before entering into an assurance of voluntary

compliance, the commission may require a respondent to correct the violations.

(c) An assurance of voluntary compliance is confidential under §571.140 of the Government Code.

(d) An assurance of voluntary compliance may include a penalty not to exceed $500.

(e) The executive director may resolve a sworn complaint as provided under this section.

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

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003404
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-5800

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CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

1 TAC §22.5

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Ethics Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Ethics Commission (the Commission) proposes the repeal of §22.5, relating to direct campaign expenditures.

The repeal of §22.5 would repeal the rule relating to restrictions on direct campaign expenditures. The rule is no longer applicable.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the repeal is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the repeal as proposed. Mr. Reisman has also determined that the repeal will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the repeal is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed repeal from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the Commission concerning the proposed repeal may do so at any Commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a Commission meeting when the Commission considers final adoption of the proposed repeal. Information concerning the date, time, and location of Commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The repeal of §22.5 is proposed under Government Code, Chapter 571, §571.062, which authorizes the Commission to adopt rules concerning the laws administered and enforced by the Commission.

The repeal of §22.5 affects Title 15 of the Election Code.

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

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003406
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-5800

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1 TAC §22.6

The Texas Ethics Commission (the Commission) proposes new §22.6, relating to the reporting of direct campaign expenditures.

Section 22.6 would clarify the requirement to disclose direct campaign expenditures as articulated in Ethics Advisory Opinion No. 489 (2010).

David A. Reisman, Executive Director, has determined that for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the Commission concerning the proposed rule may do so at any Commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a Commission meeting when the Commission considers final adoption of the proposed rule. Information concerning the date, time, and location of Commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The new §22.6 is proposed under Government Code, Chapter 571, §571.062, which authorizes the Commission to adopt rules

concerning the laws administered and enforced by the Commission.

The new §22.6 affects Title 15 of the Election Code.

§22.6. Reporting Direct Campaign Expenditures.

(a) A person making a direct campaign expenditure that exceeds $100:

(1) Shall comply with Chapter 253, Subchapter C of Title 15 of the Election Code as if the person were an individual; and

(2) Is not required to file a campaign treasurer appointment as a political committee, but is required to use the reporting forms and schedule prescribed by Chapter 254 of Title 15 of the Election Code as if the person were a campaign treasurer of a general-purpose committee that does not file under the monthly reporting schedule option in §254.155 of the Election Code.

(b) A person is not required to file a report as required by this section if:

(1) The person is required to disclose the expenditure in another report required by Title 15 of the Election Code; and

(2) The report is required to be filed within the time prescribed for a direct campaign expenditure required to be filed under this section.

(c) A person making a direct campaign expenditure consisting of the person's personal travel expenses is not required to disclose the expenditures under this section, provided that the person receives no reimbursement for the expenditures.

(d) A political committee is subject to the restrictions in Title 15 of the Election Code.

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

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003405
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-5800

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 12. LOANS AND INVESTMENTS

SUBCHAPTER B. LOANS

7 TAC §12.33

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes to amend §12.33, concerning debt cancellation contracts and debt suspension agreements. The amended rule is proposed to correct references to statutes that have been renumbered since the rule was adopted.

The amendment to §12.33 arises from the renumbering of sections of the Business and Commerce Code. Effective April 1, 2009, the Legislature repealed the Uniform Electronic Transactions Act (UETA), Business and Commerce Code Chapter 43, and recodified it as Business and Commerce Code Chapter 322. Section 12.33 refers to the UETA with its old statutory citation. The proposed amendment would update the reference to the new chapter of the Business and Commerce Code.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rule.

Mr. Bacon also has determined that, for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing the rule is an updated and accurate rule.

For each year of the first five years that the rule will be in effect, there will be no economic costs to persons required to comply with the rule as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed amended section must be submitted no later than 5:00 p.m. on August 2, 2010. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

The amendment is proposed under Finance Code, §31.003, which authorizes the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code Chapters 11, 12, and 13.

Finance Code, Chapter 31, and Business and Commerce Code, Chapter 322, are affected by the proposed amended section.

§12.33. Debt Cancellation Contracts and Debt Suspension Agreements.

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

(g) Affirmative election to purchase and acknowledgment of receipt of disclosures required.

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

(4) Special rule for electronic election. The affirmative election and acknowledgment may be made electronically in a manner consistent with the requirements of the Uniform Electronic Transactions Act, Texas Business & Commerce Code Chapter 322 [~~43~~], and the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq.

(h) - (i) (No change.)

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003445

A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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CHAPTER 15. CORPORATE ACTIVITIES
SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes the repeal of §15.8, concerning corporate filings before January 1, 2010, and proposes to amend §15.9, concerning corporate filings after January 1, 2010. The repealed and amended rules are proposed to eliminate transitional language no longer needed.

The proposed repeal of §15.8 arises from the Legislature's 2003 enactment of the Texas Business Organizations Code (TBOC). Finance Code §32.008(a) makes the TBOC generally applicable to banking associations. The commission adopted §15.8 pursuant to Finance Code §32.008(d), which authorized the commission to establish rules permitting banking associations formed before the effective date of the TBOC, January 1, 2006, to choose to be governed by the former law until January 1, 2010. Finance Code §32.008(d) expired on January 1, 2010. The purpose of §15.8 was to clarify that until January 1, 2010, banking associations formed before January 1, 2006 were permitted to file corporate documents pursuant to the former law. Because January 1, 2010 has passed and the TBOC is therefore applicable to all banking associations, regardless of when formed, the transitional instructions in this section are no longer needed.

In proposed §15.9 transition language related to that in §15.8 is deleted because, as described previously, the transition period has passed, and therefore the language is no longer needed.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rules.

Mr. Bacon also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules are updated and clarified provisions.

For each year of the first five years that the rules will be in effect, there will be no economic costs to persons required to comply with the rules as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed repealed and amended sections must be submitted no later than 5:00 p.m. on August 2, 2010. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

7 TAC §15.8

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under Finance Code, §31.003, which authorizes the Commission to adopt rules to accomplish the purposes of the banking statutes, and under Finance Code, §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under Chapter 32.

Finance Code, Chapters 31 and 32 are affected by the proposed repealed section.

§15.8. Corporate Filings before January 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 June 18, 2010.

TRD-201003446
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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7 TAC §15.9

The amendments are proposed under Finance Code, §31.003, which authorizes the Commission to adopt rules to accomplish the purposes of the banking statutes, and under Finance Code, §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under Chapter 32.

Finance Code, Chapters 31 and 32 are affected by the proposed amended section.

§15.9. Corporate Filings [~~after January 1, 2010~~].

[~~(a) This section is applicable to:~~]

[~~(1) all state banks organized after January 1, 2006;~~]

[~~(2) all state banks organized before January 1, 2006 that have elected to be governed by the provisions of the Texas Business Organizations Code to the extent not inconsistent with Title 3, Subtitle A of the Texas Finance Code; and~~]

[~~(3) effective, January 1, 2010, all state banks no matter what their date of organization.~~]

(a) [~~(b)~~] In accordance with the applicable provisions of the Finance Code, Title 3, Subtitle A or G, the following corporate forms regarding a state bank, along with the applicable filing fees, must be filed with the banking commissioner:

(1) a certificate of correction as authorized by Texas Business Organizations Code (TBOC), §4.101;

(2) articles of amendment under the Finance Code, §32.101;

(3) restated, or, amended and restated, articles of association under the Finance Code, §32.101, and TBOC §3.059 and §21.052;

(4) articles of merger under the Finance Code, §32.301 et seq, as supplemented by the TBOC §10.151;

(5) certificate of exchange under TBOC, §10.151;

(6) statement of event or fact pursuant to TBOC §4.055;

(7) establishment of a series of shares by the board of directors under the Finance Code, §32.102, as supplemented by TBOC §21.155 and §21.156;

(8) statement regarding a restriction on the transfer of shares under TBOC, §21.212; and

(9) abandonment of a merger or interest exchange prior to its effective date under TBOC §4.057.

(b) [~~(c)~~] For purposes of corporate filings with the banking commissioner under subsection(a) [~~(b)~~] of this section, state banks may utilize a modified version of forms promulgated by the secretary of state if the banking commissioner or the finance commission has not promulgated an appropriate corporate form; however, the banking commissioner may require the submission of additional information. The modified corporate forms must:

(1) specifically reference the applicable provisions of the Finance Code;

(2) change references from "corporation" to "association"; and

(3) change the references to "stated capital" and similar terms defined in the TBOC to an appropriate reference to terms defined in the Finance Code.

(c) [~~(d)~~] In accordance with the applicable provisions of the Finance Code and the TBOC, a state bank may file the following corporate forms with the secretary of state as instructed in the Finance Code or the TBOC:

(1) name registrations under TBOC §§5.151 - 5.155;

(2) assumed name certificates under TBOC §5.051;

(3) a statement appointing an agent authorized to receive service of process under Finance Code §201.103;

(4) an amendment to a statement appointing an agent to receive service of process under Finance Code §201.103; and

(5) a cancellation of the appointment of an agent to receive service of process under Finance Code §201.103.

(d) [~~(e)~~] The following corporate forms are inapplicable to state banks and are not required to be filed by a state bank with either the secretary of state or the banking commissioner:

(1) changes of registered office or agent under TBOC §5.202 or §5.203;

(2) name reservations under TBOC §5.101;

(3) certificate of termination under TBOC §11.101; and

(4) certificate of reinstatement under TBOC §11.202.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003447

A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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CHAPTER 21. TRUST COMPANY CORPORATE ACTIVITIES
SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes the repeal of §21.8, concerning corporate filings before January 1, 2010, and proposes to amend §21.9, concerning corporate filings after January 1, 2010. The repealed and amended rules are proposed to eliminate transitional language no longer needed.

The proposed repeal of §21.8 arises from the Legislature's 2003 enactment of the Texas Business Organizations Code (TBOC). Finance Code §182.009(a) makes the TBOC generally applicable to trust associations. The commission adopted §21.8 pursuant to Finance Code §182.009(d), which authorized the commission to establish rules permitting trust associations formed before the effective date of the TBOC, January 1, 2006, to choose to be governed by the former law until January 1, 2010. Finance Code §182.009(d) expired on January 1, 2010. The purpose of §21.8 was to clarify that until January 1, 2010, trust associations formed before January 1, 2006 were permitted to file corporate documents pursuant to the former law. Because January 1, 2010 has passed and the TBOC is therefore applicable to all trust associations, regardless of when formed, the transitional instructions in this section are no longer needed.

In proposed §21.9 transition language related to that in §21.8 is deleted because, as described previously, the transition period has passed, and therefore the language is no longer needed.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rules.

Mr. Bacon also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules are updated and clarified provisions.

For each year of the first five years that the rules will be in effect, there will be no economic costs to persons required to comply with the rules as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed repealed and amended sections must be submitted no later than 5:00 p.m. on August 2, 2010. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

7 TAC §21.8

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under Finance Code, §181.003, which authorizes the Commission to adopt rules to accomplish the purposes of Subtitle F.

Finance Code, Chapters 181 and 182, are affected by the proposed repealed section.

§21.8. Corporate Filings before January 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 June 18, 2010.

TRD-201003448
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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7 TAC §21.9

The amendments are proposed under Finance Code, §181.003, which authorizes the Commission to adopt rules to accomplish the purposes of Subtitle F.

Finance Code, Chapters 181 and 182, are affected by the proposed amended section.

§21.9. Corporate Filings [~~after January 1, 2010~~].

~~[(a) This section is applicable to:]~~

~~[(1) all state trust companies organized after January 1, 2006;]~~

~~[(2) all state trust companies organized before January 1, 2006 that have elected to be governed by the provisions of the Texas Business Organizations Code to the extent not inconsistent with the Trust Company Act; and]~~

~~[(3) effective, January 1, 2010, all state trust companies no matter what their date of organization.]~~

(a) [~~(b)~~] In accordance with the applicable provisions of the Trust Company Act, the following corporate forms regarding a state trust company, along with the applicable filing fees, must be filed with the banking commissioner:

(1) a certificate of correction as authorized by Texas Business Organizations Code (TBOC), §4.101;

(2) articles of amendment under the Finance Code, §32.101;

(3) restated, or, amended and restated, articles of association under the Finance Code, §32.101, and TBOC §3.059 and §21.052;

(4) articles of merger under the Finance Code, §32.301 et seq, as supplemented by the TBOC §10.151;

(5) certificate of exchange under TBOC, §10.151;

(6) statement of event or fact pursuant to TBOC §4.055;

(7) establishment of a series of shares by the board of directors under the Finance Code, §32.102, as supplemented by TBOC §21.155 and §21.156;

(8) statement regarding a restriction on the transfer of shares under TBOC, §21.212; and

(9) abandonment of a merger or interest exchange prior to its effective date under TBOC §4.057.

(b) [~~(c)~~] For purposes of corporate filings with the banking commissioner under subsection (a) [~~(b)~~] of this section, state trust companies may utilize a modified version of forms promulgated by the secretary of state if the banking commissioner or the finance commission has not promulgated an appropriate corporate form; however, the banking commissioner may require the submission of additional information. The modified corporate forms must:

(1) specifically reference the applicable provisions of the Finance Code;

(2) change references from "corporation" to "association"; and

(3) change the references to "stated capital" and similar terms defined in the TBOC to an appropriate reference to terms defined in the Finance Code.

(c) [~~(d)~~] In accordance with the applicable provisions of the Finance Code and the TBOC, a state trust company may file the following corporate forms with the secretary of state as instructed in the Finance Code or the TBOC:

(1) name registrations under TBOC §§5.151 - 5.155;

(2) assumed name certificates under TBOC §5.051;

(3) a statement appointing an agent authorized to receive service of process under Finance Code §201.103;

(4) an amendment to a statement appointing an agent to receive service of process under Finance Code §201.103; and

(5) a cancellation of the appointment of an agent to receive service of process under Finance Code §201.103.

(d) [~~(e)~~] The following corporate forms are inapplicable to state trust companies and are not required to be filed by a state trust company with either the secretary of state or the banking commissioner:

(1) changes of registered office or agent under TBOC §5.202 or §5.203;

(2) name reservations under TBOC §5.101;

(3) certificate of termination under TBOC §11.101; and

(4) certificate of reinstatement under TBOC §11.202.

This 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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A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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CHAPTER 35. CHECK VERIFICATION ENTITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes to amend §§35.1, 35.13, 35.31, 35.52 - 35.57, 35.59, and 35.72, concerning check verification entities. The amended rules are proposed to correct references to statutes that have been renumbered since the rules were adopted.

All the proposed amendments to Chapter 35 arise from the renumbering of sections of the Business and Commerce Code. Effective April 1, 2009, the Legislature repealed Business and Commerce Code §35.595, and recodified it as Business and Commerce Code §523.052. Chapter 35 contains 25 references to the old statutory sections. The proposed amendments would update citations to refer to the new sections of the Business and Commerce Code.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rules.

Mr. Bacon also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules are updated and accurate statutory citations in Department rules.

For each year of the first five years that the rules will be in effect, there will be no economic costs to persons required to comply with the rules as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed amended sections must be submitted no later than 5:00 p.m. on August 2, 2010. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §35.1

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended section.

§35.1. Definitions.

In this subchapter:

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

(3) Electronic notification system--The secure e-mail or other secure system established under § [~~Section~~] 11.309, Finance Code, and used by financial institutions to notify check verification entities as required by §523.052 [~~Section 35.595~~], Business & Commerce Code.

(4) Financial institution--A financial institution as defined by §523.052(a)(2) [~~Section 35.595(a)(2)~~], [~~Texas~~] Business & Commerce Code.

(5) (No change.)

(6) Sworn statement--The sworn statements referred to in §523.052(b)(2) [~~Section 35.595(b)(2)~~] and §523.052(e)(2)(B) [~~Section 35.595(e)(2)(B)~~], Business & Commerce Code, except when the term is specifically limited to one of the sworn statements.

(7) Written authorization--The written authorization referred to in §523.052(b)(3) [~~Section 35.595(b)(3)~~], Business & Commerce Code.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003454
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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SUBCHAPTER B. REGISTRATION OF CHECK VERIFICATION ENTITIES

7 TAC §35.13

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended section.

§35.13. What must a check verification entity do to register in Texas?

(a) A check verification entity must complete and submit the registration form prescribed by the banking commissioner, which at a minimum, must include:

(1) (No change.)

(2) the full legal name, title, business telephone number, facsimile number, and e-mail address of the following persons associated with the check verification entity:

(A) (No change.)

(B) the person responsible for compliance with the requirements of §523.052 [~~§35.595~~], Business & Commerce Code.

(3) - (5) (No change.)

(b) (No change.)

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

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A. Kaylene Ray
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1300

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SUBCHAPTER C. RESPONSIBILITIES OF THE BANKING COMMISSIONER

7 TAC §35.31

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended section.

§35.31. What is the banking commissioner required to do with respect to the electronic notification system?

(a) The banking commissioner is required to establish an electronic notification system, through secure email or another secure system, to be used by a financial institution to notify check verification entities as required by §523.052 [~~Section 35.595~~], Business & Commerce Code.

(b) (No change.)

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

Filed with the Office of the Secretary of State on June 18, 2010.

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A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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SUBCHAPTER D. PROCEDURE FOLLOWING A CUSTOMER REPORT OF AN OFFENSE UNDER SECTION 32.51, PENAL CODE

7 TAC §§35.52 - 35.57, 35.59

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended sections.

§35.52. What must a financial institution or check verification entity do when a person reports to it that the person was the victim of an offense under Section 32.51, Penal Code?

(a) When a customer reports to a financial institution that they have been the victim of an offense under §32.51, Penal Code, the financial institution is encouraged to provide the customer with a sworn statement form under §523.052(b)(2) [~~§35.595(b)(2)~~], Business & Commerce Code, and a written authorization form under §523.052(b)(3) [~~§35.595(b)(3)~~].

(b) When a person reports to a check verification entity that they have been the victim of an offense under §32.51, Penal Code, the check verification entity is encouraged to provide the person with a sworn statement form under §523.052(e)(2)(B) [~~§35.595(e)(2)(B)~~], Business & Commerce Code.

(c) (No change.)

§35.53. Will the department provide model forms for the sworn statement and written authorization required by Section 523.052(b)(2) [~~35.595(b)(2)~~] and (3), Business & Commerce Code?

(a) The department has provided a model form combining the sworn statement under §523.052(b)(2) [~~§35.595(b)(2)~~], Business & Commerce Code, and the written authorization under §523.052(b)(3) [~~§35.595(b)(3)~~] for use by financial institutions.

(b) The department has provided a model form sworn statement under §523.052(e)(2)(B) [~~§35.595(e)(2)(B)~~], Business & Commerce Code, for use by check verification entities.

(c) A financial institution or check verification entity may use and accept:

(1) (No change.)

(2) other forms that contain spaces for persons to provide the information required by §523.052 [~~§35.595~~], Business & Commerce Code, and this Chapter.

(d) - (e) (No change.)

§35.54. What information must appear on the sworn statement required by Section 523.052(b)(2) [~~35.595(b)(2)~~], Business & Commerce Code, for use when a person contacts a financial institution with the intent to send information through the electronic notification system?

The sworn statement form required by §523.052(b)(2) [~~§35.595(b)(2)~~], Business & Commerce Code, must include:

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

§35.55. What information must appear on the written authorization required by Section 523.052(b)(3) [~~35.595(b)(3)~~], Business & Commerce Code?

The written authorization form provided to a customer by a financial institution must contain:

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

§35.56. What information must appear on the sworn statement required by Section 523.052(e)(2)(B) [~~35.595(e)(2)(B)~~], Business & Commerce Code, for use with a person who contacts a check verification entity directly?

The sworn statement required by §523.052(e)(2)(B) [~~§35.595(e)(2)(B)~~], Business & Commerce Code, must include:

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

§35.57. When must a financial institution submit customer information through the electronic notification system?

A financial institution must submit the information required by §523.052(d) [~~§35.595(d)~~], Business & Commerce Code, to the electronic notification system not later than the second business day after the date the customer:

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

(3) presents to the home office, if in Texas, or to any branch of the financial institution in Texas:

(A) (No change.)

(B) the sworn statement required by §523.052(b)(2) [~~§35.595(b)(2)~~], Business & Commerce Code; and

(C) the written authorization required by §523.052(b)(3) [~~§35.595(b)(3)~~], Business & Commerce Code.

§35.59. What procedures must a check verification entity maintain to prevent recommending approval of a check or similar sight order after receipt of a notification of an offense under Section 32.51, Penal Code?
A check verification entity must process a notification received through the electronic notification system or pursuant to §523.052(e)(2) [~~§35.595(e)(2)~~], Business & Commerce Code, in the same manner as it processes information received from its usual sources, including information received from its business customers.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003457
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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SUBCHAPTER E. PROCEDURES WHEN INCORRECT INFORMATION IS REPORTED TO THE CHECK VERIFICATION ENTITY

7 TAC §35.72

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended section.

§35.72. What must a check verification entity do when it receives notice directly from a person pursuant to Section 523.052(e)(2) [~~35.595(e)(2)~~], Business & Commerce Code, or from a financial institution through the electronic notification system that information the check verification entity received was erroneous?
Subject to other applicable state or federal law, a check verification entity that is notified that information it received through the electronic notification system is not complete or accurate must process the notice in the same manner as it processes such notices received from its usual sources, including information received from its business customers.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003458
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES
SUBCHAPTER G. EXAMINATIONS

7 TAC §84.708

The Finance Commission of Texas (commission) proposes amendments to 7 TAC §84.708, concerning Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts).

The purpose of the amendments to 7 TAC §84.708 is to return inadvertently omitted language to the required account record information outlined in §84.708(e)(3)(A). When this rule was last amended by the commission in December 2009 (effective January 7, 2010), the commission intended on readopting the provisions in question without change, as included in the proposal published in September 2009. It was recently discovered that two lists concerning payment history information (subclauses (I) and (II) under §84.708(e)(3)(A)(iv)) and collection contact history (subclauses (I) - (IV) under §84.708(e)(3)(A)(vi)) were mistakenly omitted when submitting the full text of the rule as amended to the *Texas Register.* Thus, these proposed amendments merely return this language, as had been previously published and adopted by the commission when the rule was first enacted in November 2008.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

For each year of the first five years the amendments are in effect, Commissioner Pettijohn has also determined that the public benefit anticipated as a result of the proposed amendments will be that the commission's rules will be more accurate and will be more easily understood. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the

date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The amendments are proposed under Texas Finance Code §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the proposed amendments are contained in Texas Finance Code, Chapter 348.

§84.708. Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts).

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

(e) Records required.

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

(3) Account record for each retail installment sales contract (including payment and collection contact history). A separate paper, or an electronic record, must be maintained covering each retail installment sales contract. The paper or electronic account record must be readily available by reference to either a retail buyer's name or account number.

(A) Required information. The account record for each retail installment sales contract must contain at least the following information, unless stated otherwise:

(i) - (iii) (No change.)

(iv) payment history information:

(I) itemized payment entries showing date payment received; dual postings are acceptable if date of posting is other than date of receipt;

(II) if requested during an examination or investigation, a payoff amount that denotes amounts applied to principal, time price differential, default, deferment, or other authorized charges;

(v) (No change.)

(vi) collection contact history, including a written record of:

(I) all collection contacts made by a licensee with the retail buyer or any other person in connection with the collection of amounts due under a motor vehicle retail installment sales contract;

(II) all collection contacts made by the retail buyer with the licensee in connection with the collection of amounts due under a motor vehicle retail installment sales contract;

(III) for the collection contacts in subclauses (I) and (II) of this clause, the written record must include the date, method of contact, contacted party, person initiating the contact, and a summary of the contact;

(IV) copies of individual collection notices or letters or references to standard collection letters sent to the retail buyer.

(B) - (C) (No change.)

(4) - (9) (No change.)

(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 June 18, 2010.

TRD-201003460
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

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CHAPTER 90. CHAPTER 342, PLAIN LANGUAGE CONTRACT PROVISIONS

The Finance Commission of Texas (commission) proposes amendments, to 7 TAC Chapter 90, §§90.104, 90.201 - 90.204, 90.301 - 90.304, 90.401 - 90.404, 90.501 - 90.503, 90.601 - 90.604, 90.701 - 90.703, and 90.706 concerning Chapter 342, Plain Language Contract Provisions. The proposed changes affect rules contained in Subchapter A, concerning General Provisions; Subchapter B, concerning Secured Consumer Installment Loans (Chapter 342, Subchapter E); Subchapter C, concerning Signature Loans (Chapter 342, Subchapter F); Subchapter D, concerning Second Lien Home Equity Loans (Chapter 342, Subchapter G); Subchapter E, concerning Second Lien Purchase Money Loans (Chapter 342, Subchapter G); Subchapter F, concerning Second Lien Home Improvement Contracts (Chapter 342, Subchapter G); and Subchapter G, concerning Spanish Disclosures.

The purpose of the amendments to these rules governing plain language contract provisions for Chapter 342 transactions is to implement technical corrections resulting from the commission's review of Chapter 90 under Texas Government Code, §2001.039. The agency circulated these proposed changes to interested stakeholders and did not receive any informal precomments. The notice of intention to review 7 TAC Chapter 90 was published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4477). The comment period on the notice of intention will be pending at the time this proposal is presented to the commission at its June meeting. The agency received very little feedback, either positive or negative, during the precomment process. Due to the technical nature of these nonsubstantive changes and the lack of written precomments received, the agency anticipates few, if any, comments on the notice of intention to review. Should any comments be received on the notice, the commission will incorporate into the adoption any changes with which it agrees, respond to suggestions with which it does not agree, or propose separate amendments if required by law. Please note that the comment period on the notice of intention is separate and distinct from the 31-day comment period on the amendments contained in this proposal. Any comments received on these proposed amendments as published will also be handled appropriately under the Administrative Procedure Act.

Some of the corrections, including changes to three figures, relate to the removal of references to the Texas Residential Construction Commission (TRCC). The TRCC was abolished by the Sunset Commission and continued in existence until September 1, 2010, to conclude its business. Revisions related to the deletion of the TRCC disclosures are contained in §90.602(1)(N),

(3)(V), and (5)(HH); §90.603(b)(14), (d)(22), and (f)(34); and the figures contained in 7 TAC §90.604(a)(12), (14), and (16). Additionally, appropriate renumbering or relettering of the surrounding provisions is also proposed.

The remaining corrections relate to improvements in consistency, grammar, punctuation, and formatting. Additional changes provide clarification and updated legal citations. With regard to consistency, the term "licensee" will be used throughout the rules in connection with compliance issues. The term "lender" will be used when necessary to maintain parallel language with the title of a model clause or frequent use within a model clause. Any Chapter 90 rule not included in this proposal will be maintained in its current form.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the amendments to these rules are in effect, there will be no fiscal implications for state or local government as a result of administering the amendments.

For each year of the first five years the amendments to these rules are in effect, Commissioner Pettijohn has also determined that the public benefits anticipated as a result of the proposed amendments will be that the commission's rules will be more easily understood. Another public benefit of these rule amendments will be increased uniformity and consistency in credit contracts.

Additional economic costs may be incurred by a person required to comply with this proposal. These costs, however, are required by the Sunset Commission's discontinuation of the TRCC; the proposed amendments merely serve to implement the Sunset Commission's decision. As the TRCC disclosures being removed were only required when the particular registrations were required, not all home improvement contracts even contained these disclosures. For those who will be required to comply by deleting the TRCC disclosures, the anticipated costs would include the costs associated with copying a contract or new forms, and costs attributable to the loss of obsolete forms inventory. Additional copy costs are estimated to be approximately $0.30-$0.40 per contract or new form.

Some licensees who use or lease specialized computer software programs for their loan business may experience some additional costs. These costs are impossible to predict. The agency has attempted to lessen these costs by providing the software programmers with the text of the forms. Whether programmers will use the proposed forms or create their own non-standard contract submission is not predictable. Whether the programmers will charge an additional fee for a document they do not have to draft is also not predictable.

The agency is not aware of any adverse economic effect on small businesses as compared to the effect on large businesses resulting from this proposal. But in order to obtain more complete information concerning the economic effect of these rule amendments, the agency invites comments from interested stakeholders and the public on any economic impact on small businesses, as well as any alternative methods of achieving the purpose of these proposed amendments should that effect be adverse to small businesses.

The rules contained in Chapter 90 provide model clauses and model contracts. Licensees are not required to adopt the model language contained in the rules. For those licensees utilizing the model contracts, the prior model language is acceptable and the agency will permit licensees to use the prior model language (without a non-standard contract submission) until February 1, 2012, to deplete supplies of existing forms during a transition period after the effective date of the rules.

Comments on the proposed amendments may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §90.104

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.104. Non-Standard Contract Filing Procedures.

(a) Non-standard contracts. A non-standard contract is a contract that does not use the model contract provisions. Non-standard contracts submitted in compliance with the provisions of Texas Finance Code, §341.502(c) will be reviewed to determine that the contract is written in plain language. Non-standard contracts submitted for review may gain certain protections under the provisions of Texas Finance Code, §341.502.

(b) Certification of readability. Contract filings subject to this chapter must be accompanied by a certification signed by an officer of the licensee [~~creditor~~] or the entity submitting the form on behalf of the licensee [~~creditor~~]. The certification must state that the contract is written in plain language (i.e., that the contract can be easily understood by the average consumer). The certification must also state that the contract is printed in an easily readable font and type size.

(c) Filing requirements. Contract filings must be identified as to the transaction type. Contract filings must be submitted on paper that is suitable for permanent record storage and imaging. Handwritten forms or handwritten corrections will not be accepted. In addition to the paper submission, the licensee must also submit the contract filings in an electronic version. The electronic version must be submitted in a Corel WordPerfect (.wpd), MS Word (.doc), or a text (.txt) format.

(d) Contact person. One person shall be designated as the contact person for each filing submitted. Each submission should provide the name, address, phone number, and fax number, if available, of the contact person for that filing. If the contracts are submitted by anyone other than the licensee [~~company~~] itself, the contracts must be accompanied by a dated letter which contains a description of the anticipated users of the contracts and designates the legal counsel or other designated contact person for that filing.

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

Filed with the Office of the Secretary of State on June 18, 2010.

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

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SUBCHAPTER B. SECURED CONSUMER INSTALLMENT LOANS (SUBCHAPTER E)

7 TAC §§90.201 - 90.204

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.201. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter E transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. The use of the "plain language" model contract by a licensee is not mandatory. The licensee, however, may not use a contract other than a model contract unless the licensee has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter E contract; however, a licensee is not limited to the contract provisions addressed by these rules.

§90.202. Contract Provisions.

A Chapter 342, Subchapter E contract may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include the provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, if a licensee does not take a security interest in the borrower's personal property, the provisions addressing security interests are not required. A licensee may also exclude non-relevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those non-applicable portions of the model clause. A Chapter 342, Subchapter E contract may contain the following provisions:

(1) Identification of the parties, including the name and address of each party;

(2) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(3) An itemization of amount financed box;

(4) A definitions section specifying the pronouns that designate the borrower and the lender;

(5) A promise to pay;

(6) A late charge provision;

(7) A provision for after maturity interest;

(8) A provision specifying that prepayment is permitted;

(9) A provision specifying the finance charge earnings and refund method;

(10) A provision authorizing deferments;

(11) A provision contracting for a fee for a dishonored check;

(12) A provision specifying the conditions causing default;

(13) A provision regarding [~~relating to~~] property insurance;

(14) A provision regarding [~~relating to~~] credit insurance;

(15) A provision regarding the mailing of notices to the borrower;

(16) Statement of truthful information;

(17) A waiver of notice of intent to accelerate and waiver of notice of acceleration;

(18) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(19) A collection expenses clause;

(20) A clause providing for joint liability;

(21) A usury savings clause;

(22) A savings clause stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid; and

(23) Complaints and inquiries notice.

§90.203. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter E secured consumer installment loan contract.[~~:~~]

(1) Pronoun designation of parties. The model clauses refer to the Borrower as "I" or "me." The Lender is referred to as "you" or "your."

(2) Itemization of amount financed box. Two model clauses for the itemization of amount financed are presented in this paragraph. One is for use when the licensee finances an administrative fee. The other is for use when the administrative fee is paid in cash by the borrower. A licensee may delete portions applicable to any insurance premiums that are not financed and may also delete other inapplicable portions. The model clause options regarding the itemization of the amount financed read:

(A) For use when the administrative fee is financed:
Figure: 7 TAC §90.203(b)(2)(A) (No change.)

(B) For use when the administrative fee is paid in cash:
Figure: 7 TAC §90.203(b)(2)(B) (No change.)

(3) Promise to pay. The model clause for the borrower's promise to pay reads:

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you, the Lender. I will make the payments at your address above. I

will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you, the Lender. I will make the payments at your address above. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(4) Late charge. At the licensee's [~~lender's~~] option, the late charge provision may be made applicable to loans with more than one installment. Alternatively, a licensee [~~lender~~] may omit the late charge provision for loans with a single repayment. The late charge model clause reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(5) After maturity interest. The after maturity interest model clause reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(6) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(7) Finance charge earnings and refund method. The model finance charge earnings and refund method clause options read:

(A) For contracts using the scheduled installment earnings method, Texas Finance Code, §342.201(a):
Figure: 7 TAC §90.203(b)(7)(A) (No change.)

(B) For contracts using the scheduled installment earnings method, Texas Finance Code, §342.201(d): "The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid cash advance. The unpaid cash advance does not include the administrative fee, late charges, and returned check charges. If I prepay my loan in full before the final payment is due, I may save a portion of the Finance Charge. I will not get a refund if the refund would be less than $1.00. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. My final payment may be larger or smaller than my regular payment."

(C) For contracts using the scheduled installment earnings method, Texas Finance Code, §342.201(e):
Figure: 7 TAC §90.203(b)(7)(C) (No change.)

(D) For contracts using the true daily earnings method, Texas Finance Code, §342.201(d): "The annual rate of interest is _____%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the cash advance. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. You will apply payments on the date they are received. This may result in a different Finance Charge or Total of Payments. My final payment may be larger or smaller than my regular payment."

(E) For contracts using the true daily earnings method, Texas Finance Code, §342.201(e):
Figure: 7 TAC §90.203(b)(7)(E) (No change.)

(8) Deferment clause. The deferment model clause reads:

(A) "If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules."

(B) Optional language for unilateral deferment(s): "You may extend one or more of my payments without my permission. You have to wait six months to do it again."

(9) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~An authorized lender~~] may always choose a lesser amount. The fee for dishonored check model clause reads: "I agree to pay you a fee of up to $30 for a returned check. You can add the fee to the amount I owe or collect it separately."

(10) Default clause. The model default clause reads: "I will be in default if: I do not timely make a payment; I break any promise I made in this agreement; I allow a judgment to be entered against me or the collateral; I sell, lease, or dispose of the collateral; I use the collateral for an illegal purpose; or you believe in good faith that I am not going to keep any of my promises. If there is more than one Borrower, each Borrower agrees to keep all of the promises in the loan documents."

(11) Property insurance disclosure box. The model provision for the disclosure of property insurance reads:
Figure: 7 TAC §90.203(b)(11) (No change.)

(12) Credit insurance disclosure box. The model provision for the disclosure of credit insurance reads:
Figure: 7 TAC §90.203(b)(12) (No change.)

(13) Mailing of notices to borrower. The model agreement regarding the mailing of notices to the borrower reads: "You can mail any notice to me at my last address in your records. Your duty to give me notice will be satisfied when you mail it."

(14) Statement of truthful information. The following clause is sufficient as the borrower's agreement that the information provided to the licensee is true: "I promise that all information I gave you is true."

(15) Waiver of notice of intent to accelerate and waiver of notice of acceleration clause. The waiver of notice of intent to accelerate and waiver of notice of acceleration clause reads: "If I am in default, you may require me to repay the entire unpaid principal balance, and any accrued interest at once. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe."

(16) No waiver of lender's rights. The model agreement regarding the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(17) Collection expenses clause. The model provision relating to the collection of expenses if default occurs reads: "If this debt is referred to an attorney for collection, I will pay any attorney fees set by the court plus court costs."

(18) Joint liability clause. The model joint liability clause reads: "I understand that you may seek payment from only me without first looking to any other Borrower."

(19) Usury savings clause. The model usury savings clause reads: "I don't have to pay interest or other amounts that are more than the law allows."

(20) Savings clause. The model savings clause reads: "If any part of this contract is declared invalid, the rest of the contract remains valid."

(21) Final agreement and modifications in writing. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model agreement requiring any change to be in writing reads: "This written loan agreement is the final agreement between you and me and may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this loan agreement. Any change to this agreement must be in writing. Both you and I have to sign written agreements."

(22) Security agreement clause. The model clause for the security agreement reads: "If I am giving collateral for this loan, I will see the separate security agreement for more information and agreements."

(23) Application of law. The model agreement regarding the law to be applied to the contract reads: "Federal law and Texas law apply to this contract."

(24) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints: "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, www.occc.state.tx.us, (800) 538-1579."

(25) Clause describing collateral. In the Truth in Lending Act [~~TILA~~] disclosure box, the model clause describing the collateral reads: "You will have a security interest in the following described collateral _____."

(26) Clause relating to prepayment. In the Truth in Lending Act [~~TILA~~] disclosure box, the model clause options for prepayment read:

(A) For contracts using the scheduled installment earnings method: "Prepayment: If I pay off early, I may be entitled to a refund of part of the Finance Charge and I will not have to pay a penalty."

(B) For contracts using the true daily earnings method: "Prepayment: If I pay off early, I will not have to pay a penalty."

(27) Security agreement. If the loan is secured, a separate security agreement should be used.

(A) The model clause stating the secured nature of the agreement reads: "To secure this loan, I give you a security interest in the collateral. The collateral includes the property listed below, improvements and attachments to the property, insurance refunds, and proceeds."

(B) Prohibition on transfer and collateral free of encumbrance. The model agreement keeping the collateral free from encumbrance and against transferring it reads: "I own the collateral. I won't sell or transfer it without your written permission. I won't allow anyone else to have an interest in the collateral except you."

(C) Location and restrictions on movement or relocation [~~transfer~~] of collateral. The model agreement regarding the location of the collateral reads: "I will keep the collateral at my address shown above. I will promptly tell you in writing if I change my address. I won't permanently remove the collateral from Texas unless you give me written permission."

(D) Upkeep and use of collateral. The model agreement regarding the upkeep and use of the collateral reads: "I will timely pay all taxes and license fees on the collateral. I will keep it in good repair. I won't use the collateral illegally."

(E) Modifications in writing. The model agreement regarding changes made to the security agreement reads: "Any change to this security agreement has to be in writing. Both you and I have to sign it."

(F) Any default is a default of the security agreement. The model agreement in the security agreement regarding defaults reads: "Any default under my agreements with you will be a default of this security agreement."

(G) Default clause. The model clause setting out the security agreement in case of default reads: "If there is a default, you can take the collateral. You will only do this lawfully and without a breach of the peace. If you take my collateral, you will tell me how much I have to pay to get it back. If I don't pay you to get the collateral back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. My right to get the collateral back ends when you sell it. You can use the money you get from selling it to pay amounts the law allows and to reduce the amount I owe. If any money is left, you will pay it to me. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest."

§90.204. Permissible Changes.

(a) A licensee [~~licensed lender~~] may consider making the following types of changes to the secured consumer installment loans plain language model clauses:

(1) Adding information related to information set forth in the model clauses that is not otherwise prohibited by law;

(2) Substituting another term for "Lender" or "Borrower" that has the same meaning, or using pronouns such as "you," "we," and "us";

(3) Presenting the model clauses in any order, and combining or further segregating the model clauses;

(4) Inserting descriptive headings or number provisions;

(5) Changing the case of a word if otherwise permitted by the Texas Finance Code; or

(6) Making other changes that [~~which~~] do not affect the substance of the disclosures.

(7) A sample model contract using the scheduled installment earnings method is presented in the following example.
Figure: 7 TAC §90.204(a)(7) (No change.)

(8) A sample model contract using the true daily earnings method is presented in the following example.
Figure: 7 TAC §90.204(a)(8) (No change.)

(9) A sample model security agreement is presented in the following example.
Figure: 7 TAC §90.204(a)(9) (No change.)

(b) A [~~An authorized~~] licensee has considerable flexibility to arrange the format of the model form if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003462
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

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SUBCHAPTER C. SIGNATURE LOANS (SUBCHAPTER F)

7 TAC §§90.301 - 90.304

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.301. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter F transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. The use of the "plain language" model contract by a licensee [~~creditor~~] is not mandatory. The licensee [~~creditor~~], however, may not use a contract other than a model contract unless the licensee [~~creditor~~] has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee [~~creditor~~] may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter F contract; however, a licensee [~~creditor~~] is not limited to the contract provisions addressed by these rules.

§90.302. Contract Provisions.

A Chapter 342, Subchapter F contract may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee [~~lender~~] desires to exercise its rights under one of the following provisions, it must include the provision in the contract. A licensee [~~lender~~] who does not desire to apply a provision is not required to include it in the contract. For example, if a licensee [~~lender~~] does not take a security interest in the borrower's personal property, the provisions addressing security interests are not required. A Chapter 342, Subchapter F contract may contain the following provisions:

(1) Identification of the parties, including the name and address of each party;

(2) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(3) A definitions section specifying the pronouns that designate the borrower and the lender;

(4) A promise to pay;

(5) A late charge provision;

(6) A provision for after maturity interest;

(7) A provision specifying that prepayment is permitted;

(8) A provision specifying the finance charge earnings and refund method;

(9) A provision authorizing deferments;

(10) A provision specifying the conditions causing default;

(11) A waiver of notice of intent to accelerate and waiver of notice of acceleration;

(12) A provision contracting for a fee for a dishonored check;

(13) A signature block;

(14) A security agreement including provisions addressing:

(A) a statement that the collateral is free from encumbrances;

(B) the location and restrictions on movement or transfer of the collateral; and

(C) a statement that the borrower will appropriately maintain and use the collateral;

(15) A provision regarding the mailing of notices to the borrower;

(16) Statement of truthful information;

(17) A provision expressing no waiver of the lender's rights;

(18) A clause stating that all modifications to the contract must be in writing;

(19) A provision stating Texas law and federal law will apply to the contract;

(20) A clause providing for joint liability;

(21) A usury savings clause;

(22) Complaints and inquiries notice;

(23) An arbitration agreement; and

(24) A savings clause stating that if any part of the contract is invalid, all other parts remain valid.

§90.303. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter F signature loan contract.[~~:~~]

(1) Pronoun designation of parties. The model clauses refer to the Borrower as "I" or "me." The Lender is referred to as "you" or "your."

(2) Promise to pay. The model clause for the borrower's promise to pay reads: "I promise to pay the Total of Payments to the order of you, the Lender. I will make the payments at your address above. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(3) Late charge. At the licensee's [~~lender's~~] option, the late charge clause may be made applicable only to loans with more than one installment. As other options, a licensee [~~lender~~] may include one of the model late charge clause options, as set out in [~~the~~] subparagraphs (A) and (B) of this paragraph [~~below~~], in both single and multiple installment loans, so long as the licensee [~~lender~~] does not collect a default charge on a single payment loan or omit [~~the lender omits~~] the late charge clause for loans with a single repayment. The licensee [~~lender~~] may use one of the following late charge model provisions:

(A) Option 1: "If I don't pay all of the payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."; or [~~Or~~]

(B) Option 2: "If I don't pay all of the payment within 10 days after it is due, you can charge me a late charge. If the amount financed is less than $100, the late charge will be 5% of the amount of the installment. If the amount financed is $100 or more, the late charge will be the greater of $10 or 5% of the amount of the installment."

(4) After maturity interest. The after maturity interest model clause reads: "If I don't pay all I owe by the date the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be at a rate of 18% per year and will begin the day after the final payment becomes due."

(5) Prepayment clause. The model prepayment clause reads: "I can make a whole payment early."

(6) Finance charge earnings and refund method.

(A) The model finance charge earnings and refund method clause reads: "The acquisition charge on this loan will not be refunded if I pay off early. If I pay all I owe before the beginning of the last monthly period, I will save part of the installment account handling charge. You will figure the amount I save by the sum of the periodic balances method. This method is explained in the Finance Commission rules. You don't have to refund or credit any amount less than $1.00."

(B) At the licensee's [~~lender's~~] option, the licensee [~~lender~~] may include the following model finance charge and refund method language if the licensee [~~lender~~] makes loans of $30 or less: "The acquisition charge on this loan will not be refunded if I pay off early. If this loan is for more than $30 and I pay all I owe before the beginning of the last monthly period, I will save part of the installment account handling charge. You will figure the amount I save by the sum of the periodic balances method. This method is explained in the Finance Commission rules. You don't have to refund or credit any amount less than $1.00."

(7) Deferment clause. The deferment model clause reads: "If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules."

(8) Default clause. The model default clause reads: "If I break any of my promises in this document, you can demand that I immediately pay all that I owe. You can also do this if you in good faith believe that I am not going to be willing or able to keep all of my promises."

(9) Waiver of notice of intent to accelerate and waiver of notice of acceleration clause. The model waiver of notice of intent to accelerate and waiver of notice of acceleration clause reads: "I agree that you don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe."

(10) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. The licensee [~~lender~~] may always choose a lesser amount. The fee for dishonored check model clause reads: "I agree to pay you a fee of up to $30 for a returned check. You can add the fee to the amount I owe or collect it separately."

(11) Signature block. At the licensee's [~~lender's~~] option, a witness signature block may be added.

(12) Clause describing collateral.

(A) In the Truth in Lending Act [~~TILA~~] disclosure box, the model clause describing the collateral reads: "You will have a security interest in the following described collateral _____."

(B) At the licensee's [~~creditor's~~] option, if the promissory note is unsecured, the licensee [~~lender~~] may use the following clause: "This note is unsecured."

(13) Security agreement clause. The model clause setting out the security agreement in case of default reads: "If I am giving collateral for this loan, I will see the separate security agreement for more information and agreements."

(14) Mailing of notice to borrower. The model agreement regarding the mailing of notices to the borrower reads: "You can mail any notice to me at my last address in your records. Your duty to give me notice will be satisfied when you mail it."

(15) Statement of truthful information. The following clause is sufficient as the borrower's agreement that the information provided to the licensee [~~lender~~] is true: "I promise that all information I gave you is true."

(16) No waiver of lender's rights. The model agreement regarding the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(17) Modifications in writing. The model agreement requiring any change to be in writing reads: "Any change to this agreement has to be in writing. Both you and I have to sign it."

(18) Application of law. The model clause regarding the law to be applied to the contract reads: "Federal law and Texas law apply to this contract."

(19) Joint liability. The model joint liability agreement reads: "I will keep all of my promises in this document. If there is more than one Borrower, each Borrower agrees to keep all of the promises in the loan document."

(20) Usury savings clause. The model usury savings clause reads: "I don't have to pay interest or other amounts that are more than the law allows."

(21) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints: "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207; www.occc.state.tx.us; (800) 538-1579."

(22) Security agreement. The model clause setting out the security agreement reads: "We are entering into this security agreement

at the same time that we are entering into a loan. In exchange for the loan referenced above, I agree to the follow terms and conditions: To secure this loan, I give you a security interest in the collateral. The collateral includes the property listed below, anything that becomes attached to it, and all proceeds of the collateral. This security interest also secures all other debt I owe you now. I understand that all collateral that I have given to secure loans may also be used to secure this and any other loans you may make to me. I own the collateral. I won't sell or transfer it without your written permission. I won't allow anyone else to have an interest in the collateral except you. I will keep the collateral at my address shown above. I will promptly tell you in writing if I change my address. I won't permanently remove the collateral from Texas unless you give me written permission. I will timely pay all taxes and license fees on the collateral. I will keep it in good repair. I won't use the collateral illegally. Any change to this security agreement has to be in writing. Both you and I have to sign it. Any default under my agreements with you will be a default of this security agreement. Federal law and Texas law apply to this security agreement. If I don't keep any of my promises, you can take the collateral. You will only take the collateral lawfully and without a breach of the peace. If you take my collateral, you will tell me how much I have to pay to get it back. If I don't pay you to get the collateral back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. My right to get the collateral back ends when you sell it. You can use the money you get from selling it to pay amounts the law allows, and to reduce the amount I owe. If any money is left, you will pay it to me. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest."

§90.304. Permissible Changes.

(a) A licensee [~~An authorized lender~~] may consider making the following types of changes to the signature loans plain language model clauses:

(1) Adding information related to information set forth in the model clauses that is not otherwise prohibited by law;

(2) Substituting another term for "Lender" or "Borrower" that has the same meaning, or using pronouns such as "you," "we," and "us";

(3) Presenting model clauses in any order, and combining or further segregating the model clauses;

(4) Inserting descriptive headings or number provisions;

(5) Changing the case of a word if otherwise permitted by the Texas Finance Code; or

(6) Making other changes that [~~which~~] do not affect the substance of the disclosures.

(7) A sample model contract is presented in the following example.
Figure: 7 TAC §90.304(a)(7) (No change.)

(8) A sample model security agreement is presented in the following example.
Figure: 7 TAC §90.304(a)(8) (No change.)

(b) A licensee [~~An authorized lender~~] has considerable flexibility to arrange the format of the model form if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003463
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

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SUBCHAPTER D. SECOND LIEN HOME EQUITY LOANS (SUBCHAPTER G)

7 TAC §§90.401 - 90.404

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.401. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter G (secondary mortgage loans with an effective rate of greater than 10%) home equity loan transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a licensee is not mandatory. The licensee, however, may not use a contract other than a model contract unless the licensee has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter G home equity loan contract; however, a licensee is not limited to the contract provisions addressed by these rules.

§90.402. Contract Provisions.

(a) A Chapter 342, Subchapter G home equity loan contract may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include that provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, a licensee who does not assess a fee for dishonored checks may omit the fee for dishonored check clause. A licensee may also exclude nonrelevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those nonapplicable portions of the model clause. A Chapter 342, Subchapter G second lien home equity loan contract may contain the following provisions:

(1) Identification of the parties, including the name and address of each party and specifying the pronouns that designate the borrower and the lender;

(2) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(3) An itemization of amount financed box;

(4) A promise to pay;

(5) A late charge provision;

(6) A provision for after maturity interest;

(7) A prepayment clause;

(8) A provision specifying the finance charge earnings and refund method;

(9) A provision contracting for a fee for a dishonored check;

(10) A provision specifying the conditions causing default;

(11) A provision regarding property insurance;

(12) A credit insurance disclosure box;

(13) A provision regarding the mailing of notices to the borrower;

(14) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(15) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(16) A collection expenses clause;

(17) A provision providing for joint liability;

(18) A usury savings clause;

(19) A savings clause stating that if any part of the loan agreement is [~~declared~~] invalid, the rest remains valid;

(20) An integration clause stating that the contract supersedes all prior agreements and that the contract may not be changed by oral agreement;

(21) A provision stating that the homestead described in the loan agreement is subject to the lien of the security document;

(22) A provision specifying that federal law and Texas law apply to the contract;

(23) Complaints and inquiries notice;

(24) A provision describing the collateral; and

(25) Signature blocks.

(b) The security document for a Chapter 342, Subchapter G second lien home equity loan contract may contain the following provisions:

(1) A definitions section;

(2) A provision regarding the secured nature of the agreement;

(3) A provision regarding the transfer of rights in the property;

(4) Borrower and Lender's promise;

(5) A provision regarding late charges and prepayment of principal and interest;

(6) A provision regarding the funds for escrow items;

(7) A provision regarding charges and liens;

(8) A provision regarding property insurance;

(9) A provision stating that the borrower occupies the property as the borrower's [~~his~~] homestead;

(10) A provision regarding preservation, maintenance, protection, and inspection of the property;

(11) A provision specifying the conditions causing actual fraud;

(12) A provision regarding protection of the lender's interest in the property and rights under the security document;

(13) A provision regarding the assignment of miscellaneous proceeds and forfeiture;

(14) A provision specifying that the borrower is not released from liability if the licensee [~~lender~~] modifies the payment schedule;

(15) A provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns;

(16) A provision regarding the extension of credit charges;

(17) A provision regarding the delivery of notices;

(18) A provision regarding the law governing the contract, stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid;

(19) A provision regarding rules of clause construction;

(20) A provision specifying that the licensee [~~lender~~] will give the borrower a copy of all signed documents at the time the loan agreement is made;

(21) A provision regarding a transfer of interest in the property;

(22) A provision regarding the borrower's right to reinstate after acceleration;

(23) A provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply;

(24) A provision regarding hazardous substances;

(25) A provision regarding acceleration and remedies;

(26) A provision regarding the power of sale;

(27) A provision regarding the release of the lien securing the loan agreement;

(28) A provision specifying that the loan agreement is given without personal liability against each owner of the homestead and the spouse of each owner;

(29) A provision specifying that the borrower has not been required to repay another debt with the proceeds of the loan;

(30) A provision specifying that the borrower has not assigned wages as security for the loan agreement;

(31) A provision specifying that the licensee [~~lender~~] and the borrower have agreed in writing to the fair market value of the homestead;

(32) A provision regarding trustees and trustee liability;

(33) A provision regarding the licensee's [~~lender's~~] waiving additional collateral;

(34) A default provision;

(35) Signature blocks;

(36) A non-purchase disclosure; and

(37) A provision regarding notice of confidentiality rights.

§90.403. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home equity loan contract.[~~:~~]

(1) Identification. The model identification clause lists the account or contract number, the name and address of the [~~creditor or~~] lender, the date of the note, and the name and address of the borrower. The model clause identifying the pronouns used for the borrower and the lender reads: "A word like "I" or "me" means each person who signs as a Borrower. A word like "you" or "your" means the Lender or "Note Holder." The Lender is _____. The Lender may sell or transfer this Note. The Lender or anyone who is entitled to receive payments under this Note is called the "Note Holder." You will tell me in writing who is to receive my payments."

(2) Truth in Lending Act [~~(TILA)~~] disclosure box. The model Truth in Lending Act [~~(TILA)~~] disclosure box reads:
Figure: 7 TAC §90.403(b)(2) (No change.)

(3) Itemization of amount financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth in Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

(4) Promise to pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the Texas scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The model clause for the borrower's promise to pay reads: "This loan is an Extension of Credit defined by Section 50(a)(6), Article XVI of the Texas Constitution."

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(5) Late charge. The model late charge provision for contracts using the scheduled installments earnings method or the true daily earnings method reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(6) After maturity interest. The model provision for after maturity interest reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(7) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(8) Finance charge earnings and refund method. The model provision options specifying the finance charge earnings and refund method read:

(A) For contracts using the scheduled installment earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.403(b)(8)(A) (No change.)

(B) For contracts using the scheduled installment earnings method with prepayments option - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.403(b)(8)(B) (No change.)

(C) For contracts using the true daily earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.403(b)(8)(C) (No change.)

(9) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~licensed lender~~] may always choose a lesser amount. The fee for dishonored check model clause reads: "I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately."

(10) Default clause. The model provision specifying the conditions causing default reads:
Figure: 7 TAC §90.403(b)(10) (No change.)

(11) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.403(b)(11) (No change.)

(12) Credit insurance. If single premium credit insurance is allowable, a permissible change to the disclosure can be to offer a single charge for the entire term of the loan. The term for the single premium charge should be shown for the original term of the loan, unless otherwise specified. The licensee has the option of including language that reads: "The insurance will cancel on the date when the total past due premiums equal or exceed (insert number) times the first month's premium." The industry standard regarding the relationship between total past due premiums and the first month's premium in this equation appears to be four [~~(4)~~] times. However, if a different time frame is more appropriate, that time frame may be used. The model credit insurance disclosure box reads:
Figure: 7 TAC §90.403(b)(12) (No change.)

(13) Mailing of notices to borrower. The model provision regarding the mailing of notices to the borrower reads: "You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it by first class mail."

(14) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration reads:

"If all or any interest in the homestead is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law. If you exercise this option, you will give me notice of acceleration (i.e., payment of all I owe at once). This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement."

(15) No waiver of lender's rights. The model provision expressing no waiver of the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(16) Collection expenses clause. The model collection expenses clause reads: "If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by law, including Section 50(a)(6), Article XVI of the Texas Constitution. These expenses include, for example, reasonable attorneys' fees. I understand that these fees are not for maintaining or servicing this Loan Agreement."

(17) Joint liability. The model provision providing for joint liability reads: "I understand that you may seek payment from only me without first looking to any other Borrower. You can enforce your rights under this Loan Agreement solely against the homestead. This Loan Agreement is made without personal liability against each owner of the homestead and the spouse of each owner unless the owner or spouse obtained this loan by actual fraud. If this loan is obtained by actual fraud, I will be personally liable for the debt, including a judgment for any deficiency that results from your sale of the homestead for an amount less than is owed under this Loan Agreement."

(18) Usury savings clause. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than the law allows."

(19) Savings clause. The model savings clause stating that if any part of the contract is invalid, the rest remains valid reads: "If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with any law, that law will control. The part of the Loan Agreement that conflicts with any law will be modified to comply with the law. The rest of the Loan Agreement remains valid."

(20) Contract supersedes prior agreements. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model integration clause providing that the contract supersedes prior agreements reads: "This written Loan Agreement is the final agreement between you and me and may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this Loan Agreement. Any change to this Loan Agreement must be in writing. Both you and I have to sign written agreements."

(21) Security document. The model provision stating that the homestead described in the loan agreement is subject to the lien of the security document reads: "The homestead described above by the property address is subject to the lien of the Security Document. I will see the separate Security Document for more information about my rights and responsibilities."

(22) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this Loan Agreement. The Texas Constitution will be applied to resolve any conflict between the Texas Constitution and any other law."

(23) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints [~~The model complaints and inquiries notice reads~~]: "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems. Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, www.occc.state.tx.us, (800) 538-1579."

(24) Clause describing collateral. The model provision describing the collateral reads: "The homestead described above by the property address is subject to the lien of the Security Document."

(25) Signature blocks. The licensee may also provide additional signature lines for witness signatures. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.403(b)(25) (No change.)

(c) Model clauses for [~~For~~] the security document for a Chapter 342, Subchapter G second lien home equity loan contract.[~~:~~]

(1) The model definitions section reads:

(A) [~~"~~]"Loan Agreement" means the Note, Security Document, deed of trust, any other related document, or any combination of those documents, under which you have extended credit to me.

(B) "Security Document" means this document, which is dated _____, together with all Riders to this document.

(C) "I" or "me" means _____, the grantor under this Security Document and the person who signed the Note ("Borrower").

(D) "You" means _____, the Lender and any holder entitled to receive payments under the Note. Your address is _____. You are the beneficiary under this Security Document.

(E) "Trustee" is _____. Trustee's address is _____.

(F) "Note" means the promissory Note signed by me and dated _____. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____ (maturity date).

(G) "My Homestead" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Extension of Credit" means the debt evidenced by the Note, as defined by Section 50(a)(6), Article XVI of the Texas Constitution and all the documents executed in connection with the debt.

(I) "Riders" means all Riders to this Security Document that I execute.
Figure: 7 TAC §90.403(c)(1)(I) (No change.)

(J) "Applicable Law" means all controlling applicable federal, Texas and local constitutions, statutes, regulations, administrative rules, local ordinances, judicial and administrative orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or My Homestead by a condominium association, homeowners association, or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section ___ of this Security Document.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: damage or destruction of My Homestead; condemnation or other taking of all or any part of My Homestead; conveyance instead of condemnation; or misrepresentations or omissions related to the value or condition of My Homestead.

(O) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amounts under this Security Document.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Document, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of me" means any party that has taken title to My Homestead, whether or not that party has assumed my obligations under the Loan Agreement.

(R) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Security Document. Such an arrangement usually takes the form of a long-term "ground lease."

(2) Secured agreement. The model provision regarding the secured nature of the agreement reads: "To secure this loan, I give you a security interest in My Homestead including existing and future improvements, easements, fixtures, attachments, replacements and additions to the property, insurance refunds, and proceeds. This security interest is intended to be limited to the homestead property and not other collateral, as required under the Texas Constitution."

(3) Transfer of rights in [~~the~~] property. The model provision regarding a transfer of rights in the property reads:
Figure: 7 TAC §90.403(c)(3) (No change.)

(4) Borrower and Lender's promise. The model provision regarding the borrower and lender's promise to comply with the terms of the security document reads: "YOU AND I PROMISE:".

(5) Late charges and prepayment. The model provision regarding late charges and prepayment of principal and interest reads:
Figure: 7 TAC §90.403(c)(5) (No change.)

(6) Funds for escrow items. The model provision regarding the funds for escrow items reads:
Figure: 7 TAC §90.403(c)(6) (No change.)

(7) Charges and liens. The model provision regarding charges and liens reads:
Figure: 7 TAC §90.403(c)(7) (No change.)

(8) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.403(c)(8) (No change.)

(9) Homestead. The model provision stating that the borrower occupies the property as the borrower's [~~his~~] homestead reads: "I now occupy and use the property secured by this Security Document as my Texas homestead."

(10) Preservation, maintenance, protection, and inspection of [~~the~~] property. The model provision regarding preservation, maintenance, protection, and inspection of the property reads: "I will not destroy, damage or impair My Homestead, allow it to deteriorate, or commit waste. Whether or not I live in My Homestead, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to My Homestead to avoid further deterioration or damage unless you and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring My Homestead only if you release the insurance or condemnation proceeds for the damage to or the taking of My Homestead. You may release proceeds for the repairs and restoration in a single payment or in a series of payments as the work is completed. I still am obligated to complete repairs or restoration of My Homestead even if there are not enough proceeds to complete the work. You or your agent may inspect My Homestead. You may inspect the interior of My Homestead with reasonable cause. You will give me notice stating reasonable cause when or before the interior inspection occurs."

(11) Conditions causing actual fraud. The model provision specifying the conditions causing actual fraud reads:
Figure: 7 TAC §90.403(c)(11) (No change.)

(12) Protection of lender's interest in [~~the~~] property and rights under [~~the~~] security document. The model provision regarding the protection of the lender's interest in the property and rights under the security document reads:
Figure: 7 TAC §90.403(c)(12) (No change.)

(13) Assignment of miscellaneous proceeds and forfeiture. The model provision regarding the assignment of miscellaneous proceeds and forfeiture reads:
Figure: 7 TAC §90.403(c)(13) (No change.)

(14) Forbearance not a waiver. The model provision specifying that the borrower is not released from liability if the licensee [~~lender~~] modifies the payment schedule reads: "My successors and I will not be released from liability if you extend the time for payment or modify the payment schedule. If I pay late, you will not have to sue me or my successor to require timely future payments. You may refuse to extend time for payment or modify this Loan Agreement even if I request it. If you do not enforce your rights every time, you may enforce them later."

(15) Joint and several liability, security document execution, successors obligated. The model provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns reads:
Figure: 7 TAC §90.403(c)(15) (No change.)

(16) Extension of credit charges. The model provision regarding the extension of credit charges reads:
Figure: 7 TAC §90.403(c)(16) (No change.)

(17) Delivery of notices. The model provision regarding the delivery of notices reads: "Under the Loan Agreement, you and I will give notices to each other in writing. Any notice under the Loan Agreement will be considered given to me when it is mailed by first class mail or when actually delivered to me at my address if given by another means. You will give notice to My Homestead address unless I provide you a different address. I will notify you promptly of any change of address. I will comply with any reasonable procedure for giving a change of address that you provide. There will only be one address for notice under the Loan Agreement. Notice to me will be considered notice to all persons who are obligated under the Loan Agreement unless Applicable Law requires a separate notice. I may give you notice by delivering or mailing it by first class mail to the address provided by you, unless you require a different procedure. You, however, will not receive notice under the Loan Agreement until you actually receive it. Legal requirements governing notices subject to the Loan Agreement will prevail over conditions in the Loan Agreement."

(18) Governing law and severability. The model provision regarding the law governing the contract, stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid reads: "The Loan Agreement will be governed by Texas law and federal law. If any provision in the Loan Agreement conflicts with any legal requirement, all non-conflicting provisions will remain effective."

(19) Rules of construction. The model provision regarding rules of clause construction reads:
Figure: 7 TAC §90.403(c)(19) (No change.)

(20) Loan agreement copies. The model provision specifying that the lender will give the borrower a copy of all signed documents at the time the loan agreement is made reads: "At the time the Loan Agreement is made, you will give me copies of all documents I sign."

(21) Transfer of interest in property. The model provision regarding a transfer of interest in the property reads: ""Interest in My Homestead" means any legal or beneficial interest. This term includes those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement (the intent of which is the transfer of title by me at a future date to a purchaser). If any part of My Homestead is sold or transferred without your prior written permission, you may require immediate payment of all I owe. You will not exercise this option if disallowed by Applicable Law. If you accelerate, you will give me notice. The notice of acceleration will allow me at least 21 days from the date the notice is given to pay all I owe. If I fail to timely pay all I owe, you may pursue any remedy allowed by the Loan Agreement without further notice or demand."

(22) Borrower's right to reinstate after acceleration. The model provision regarding the borrower's right to reinstate after acceleration reads:
Figure: 7 TAC §90.403(c)(22) (No change.)

(23) Sale of note, change of loan servicer, notice of grievance, and lender's right to comply. The model provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply reads:
Figure: 7 TAC §90.403(c)(23) (No change.)

(24) Hazardous substances. The model provision regarding hazardous substances reads:
Figure: 7 TAC §90.403(c)(24) (No change.)

(25) Acceleration and remedies. The model provision regarding acceleration and remedies reads:
Figure: 7 TAC §90.403(c)(25) (No change.)

(26) Power of sale. The model provision regarding the power of sale reads:
Figure: 7 TAC §90.403(c)(26) (No change.)

(27) Release. The model provision regarding the release of the lien securing the loan agreement reads: "You will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the lien to a lender that is refinancing the Loan Agreement. I will pay only the cost of recording the release of lien. My acceptance of the release or endorsement and assignment will end all of your duties under Section 50(a)(6), Article XVI of the Texas Constitution."

(28) Non-recourse liability. The model provision specifying that the loan agreement is given without personal liability against each owner of the homestead and the spouse of each owner reads:
Figure: 7 TAC §90.403(c)(28) (No change.)

(29) Proceeds. The model provision specifying that the borrower has not been required to repay another debt with the proceeds of the loan reads: "I am not required to apply the proceeds of the Loan Agreement to repay another debt except a debt secured by My Homestead or a debt to another lender."

(30) No assignment of wages. The model provision specifying that the borrower has not assigned wages as security for the loan agreement reads: "I have not assigned wages as security for the Loan Agreement."

(31) Acknowledgment of fair market value. The model provision specifying that the licensee [~~lender~~] and the borrower have agreed in writing to the fair market value of the homestead reads: "You and I agreed in writing to the fair market value of My Homestead on the date of the Loan Agreement."

(32) Trustees and trustee liability. The model provision regarding trustees and trustee liability reads:
Figure: 7 TAC §90.403(c)(32) (No change.)

(33) Waiver of additional collateral. The model provision regarding the licensee's [~~lender's~~] waiving additional collateral reads:
Figure: 7 TAC §90.403(c)(33) (No change.)

(34) Default. The model default provision reads: "Any default of my agreements with you will be a default of this Security Document."

(35) Signature blocks. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.403(c)(35) (No change.)

(36) Non-purchase disclosure. The model provision indicating that the security document does not finance a purchase transaction should appear at the beginning of the document, below the heading and prior to the definitions section. The model non-purchase disclosure provision reads: "This Security Document is not intended to finance Borrower's acquisition of the Property."

(37) Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice

of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

§90.404. Permissible Changes.

(a) A licensee [~~licensed lender~~] may consider making the following types of changes to the second lien home equity loans plain language model clauses:

(1) Adding information related to information set forth in the model clauses that is not otherwise prohibited by law;

(2) Substituting another term for "Lender" or "Borrower" that has the same meaning, or using pronouns such as "you," "we," and "us";

(3) Presenting the model clauses in any order, and combining or further segregating the model clauses;

(4) Inserting descriptive headings or number provisions;

(5) Changing the case of a word if otherwise permitted by the Texas Finance Code; or

(6) Making other changes that [~~which~~] do not affect the substance of the disclosures.

(7) A sample model note is presented in the following example.
Figure: 7 TAC §90.404(a)(7) (No change.)

(8) A sample model security document is presented in the following example.
Figure: 7 TAC §90.404(a)(8) (No change.)

(b) A [~~An authorized~~] licensee has considerable flexibility to arrange the format of the model form if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003464
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER E. SECOND LIEN PURCHASE MONEY LOANS (SUBCHAPTER G)

7 TAC §§90.501 - 90.503

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.501. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter G purchase money loan transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a licensee is not mandatory. The licensee, however, may not use a contract other than a model contract unless the licensee has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter G purchase money loan contract; however, a licensee is not limited to the contract provisions addressed by these rules.

§90.502. Contract Provisions.

(a) A Chapter 342, Subchapter G purchase money loan transaction may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include that provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, a licensee who does not assess a fee for dishonored checks may omit the fee for dishonored check clause. A licensee may also exclude non-relevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those non-applicable portions of the model clause. A Chapter 342, Subchapter G second lien purchase money loan transaction may contain the following provisions:

(1) Identification of the parties, including the name and address of each party and specifying the pronouns that designate the borrower and the lender, and the property address;

(2) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(3) An itemization of amount financed box;

(4) A promise to pay;

(5) A late charge provision;

(6) A provision for after maturity interest;

(7) A prepayment clause;

(8) A provision specifying the finance charge earnings and refund method;

(9) A provision contracting for a fee for a dishonored check;

(10) A provision specifying the conditions causing default;

(11) A provision regarding property insurance;

(12) A credit insurance disclosure box;

(13) A provision regarding the mailing of notices to the borrower;

(14) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(15) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(16) A collection expenses clause;

(17) A provision providing for joint liability;

(18) A usury savings clause;

(19) A savings clause stating that if any part of the loan agreement is [~~declared~~] invalid, the rest remains valid;

(20) An integration clause stating that the contract supersedes all prior agreements and that the contract may not be changed by oral agreement;

(21) A provision stating that the property described in the loan agreement is subject to the lien of the security document;

(22) A provision specifying that federal law and Texas law apply to the contract;

(23) Complaints and inquiries notice;

(24) A provision describing the collateral; and

(25) Signature blocks.

(b) The security document for a Chapter 342, Subchapter G second lien purchase money loan contract may contain the following provisions:

(1) A definitions section;

(2) A provision regarding the secured nature of the agreement;

(3) A provision regarding the transfer of rights in the property;

(4) Borrower and Lender's promise;

(5) A provision regarding late charges and prepayment of principal and interest;

(6) A provision regarding the funds for escrow items;

(7) A provision regarding charges and liens;

(8) A provision regarding property insurance;

(9) A provision regarding preservation, maintenance, protection, and inspection of the property;

(10) A provision regarding protection of the lender's interest in the property and rights under the security document;

(11) A provision regarding the assignment of miscellaneous proceeds and forfeiture;

(12) A provision specifying that the borrower is not released from liability if the licensee [~~lender~~] modifies the payment schedule;

(13) A provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns;

(14) A provision regarding the extension of credit charges;

(15) A provision regarding the delivery of notices;

(16) A provision regarding the law governing the contract, stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid;

(17) A provision regarding rules of clause construction;

(18) A provision specifying that the licensee [~~lender~~] will give the borrower a copy of all signed documents at the time the loan agreement is made;

(19) A provision regarding a transfer of interest in the property;

(20) A provision regarding the borrower's right to reinstate after acceleration;

(21) A provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply;

(22) A provision regarding hazardous substances;

(23) A provision regarding acceleration and remedies;

(24) A provision regarding the assignment of rents, appointment of receiver, and the lender in possession;

(25) A provision regarding the power of sale;

(26) A provision regarding the release of the lien securing the loan agreement;

(27) A provision regarding the lender's rights and the borrower's responsibilities;

(28) A provision regarding trustees and trustee liability;

(29) A default provision;

(30) A provision regarding subrogation;

(31) A provision regarding what happens if the sum secured and other charges violate applicable law;

(32) A request for notice of default and foreclosure under superior mortgages or security documents provision;

(33) Signature blocks;

(34) An acknowledgment; and

(35) A provision regarding notice of confidentiality rights.

§90.503. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien purchase money loan contract.[~~:~~]

(1) Identification. The model identification clause lists the account or contract number, the name and address of the [~~creditor or~~] lender, the date of the note, the name and address of the borrower, and the property address. The model clause identifying the pronouns used for the borrower and the lender reads: A word like "I" or "me" means each person who signs as a Borrower. A word like "you" or "your" means the Lender or "Note Holder". The Lender is _____. The Lender may sell or transfer this Note. The Lender or anyone who is entitled to receive payments under this Note is called the "Note Holder." You will tell me in writing who is to receive my payments."

(2) Truth in Lending Act [~~(TILA)~~] disclosure box. The model Truth in Lending Act [~~(TILA)~~] disclosure box reads:
Figure: 7 TAC §90.503(b)(2) (No change.)

(3) Itemization of amount financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth in Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

(4) Promise to pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The model clause options for the borrower's promise to pay read:

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(5) Late charge. The model late charge provision for contracts using the scheduled installment earnings method or the true daily earnings method reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(6) After maturity interest. The model clause specifies the maximum interest rate allowed by law for after maturity interest. A licensee [~~creditor~~] may always choose a lower rate. The model provision for after maturity interest reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(7) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(8) Finance charge earnings and refund method. The model provision options specifying the finance charge earnings and refund method read:

(A) For contracts using the scheduled installment earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.503(b)(8)(A) (No change.)

(B) For contracts using the scheduled installment earnings method with prepayments option - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.503(b)(8)(B) (No change.)

(C) For contracts using the true daily earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.503(b)(8)(C) (No change.)

(9) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~creditor~~] may always choose a lesser amount. The model fee for dishonored check provision reads: "I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately."

(10) Default clause. The model provision specifying the conditions causing default reads:
Figure: 7 TAC §90.503(b)(10) (No change.)

(11) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.503(b)(11) (No change.)

(12) Credit insurance. If single premium credit insurance is offered, a permissible change to the disclosure can be to offer a single charge for the entire term of the loan. The term for the single premium charge should be shown for the original term of the loan, unless otherwise specified. The licensee has the option of including language that reads: "The insurance will cancel on the date when the total past due premiums equal or exceed (insert number) times the first month's premium." The industry standard regarding the relationship between total past due premiums and the first month's premium in this equation appears to be four [~~(4)~~] times. However, if a different time frame is more appropriate, that time frame may be used. The model credit insurance disclosure box reads:
Figure: 7 TAC §90.503(b)(12) (No change.)

(13) Mailing of notices to borrower. The duty to give notice is satisfied when it is mailed by first class mail. The model provision regarding the mailing of notices to the borrower reads: "You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it."

(14) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration reads: "If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law. If you exercise this option, you will give me notice that you are demanding immediate payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement."

(15) No waiver of lender's rights. The model provision expressing no waiver of the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(16) Collection expenses clause. The model collection expenses clause reads: "If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by Applicable Law. These expenses include, for example, reasonable attorneys' fees."

(17) Joint liability. The model provision providing for joint liability reads: "I understand that you may seek payment from only me without first looking to any other Borrower."

(18) Usury savings clause. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than Applicable Law allows."

(19) Savings clause. The model savings clause stating that if any part of the contract is invalid, the rest remains valid reads: "If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with any law, that law will control. The part of the Loan Agreement that conflicts with any law will be modified to comply with the law. The rest of the Loan Agreement remains valid."

(20) Contract supersedes prior agreements. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model integration clause providing that the contract supersedes prior agreements reads: "This written Loan Agreement is the final agreement between you and me and may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this Loan Agreement. Any change to this Loan Agreement must be in writing. Both you and I have to sign written agreements."

(21) Security document. The model provision stating that the property described in the loan agreement is subject to the lien of the security document reads: "In addition to the protections given to the Note Holder under this Note, a Security Document, dated _____, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. The Security Document describes how and under what conditions I may be required to make immediate payment in full of any amounts that I owe under this Note."

(22) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this Loan Agreement."

(23) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints [~~The model complaints and inquiries notice reads~~]: "The (name of Lender or Note Holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of Lender or Note Holder) should contact the Office of Consumer Credit Commissioner through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Austin, Texas 78705-4207; Telephone No.: (800) 538-1579; Fax No.: (512) 936-7610; E-mail: consumer.complaints@occc.state.tx.us; Website: www.occc.state.tx.us."

(24) Clause describing collateral. The model provision describing the collateral reads: "The collateral described above by the property address is subject to the lien of the Security Document."

(25) Signature blocks. The licensee may also provide additional signature lines for witness signatures. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.503(b)(25) (No change.)

(c) Model clauses for a [~~For the~~] security document for a Chapter 342, Subchapter G second lien purchase money loan contract.[~~:~~]

(1) The model definitions section reads:

(A) "Loan Agreement" means the Note, Security Document, deed of trust, any other related document, or any combination of those documents, under which you have made a loan to me.

(B) "Security Document" means this document, which is dated _____, together with all Riders to this document.

(C) "I" or "me" means _____, the grantor under this Security Document and the person who signed the Note ("Borrower").

(D) "You" means _____, the Lender and any holder entitled to receive payments under the Note. Your address is _____. You are the beneficiary under this Security Document.

(E) "Trustee" is _____. Trustee's address is _____.

(F) "Note" means the Purchase Money Note signed by me and dated _____. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____ (maturity date).

(G) "Property" means the real estate that is described below under the heading "Transfer of Rights in the Property."

(H) "Riders" means all Riders to this Security Document that I execute.
Figure: 7 TAC §90.503(c)(1)(H) (No change.)

(I) "Applicable Law" means all controlling applicable federal, Texas and state constitutions, statutes, regulations, administrative rules, local ordinances, judicial and administrative orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or the Property by a condominium association, homeowners association, or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section ___ of this Security Document.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: damage or destruction of the Property; condemnation or other taking of all or any part of the Property; conveyance instead of condemnation; or misrepresentations or omissions related to the value or condition of the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amounts under this Security Document.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Document, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(P) "Successor in Interest of me" means any party that has taken title to the Property, whether or not that party has assumed my obligations under the Loan Agreement.

(Q) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Security Document. Such an arrangement usually takes the form of a long-term "ground lease."[~~".~~]

(2) Secured agreement. The model provision regarding the secured nature of the agreement reads: "To secure this Loan Agreement, I give you a security interest in the Property including existing and future improvements, easements, fixtures, attachments, replacements and additions to the Property, insurance refunds, and proceeds."

(3) Transfer of rights in [~~the~~] property. The model provision regarding a transfer of rights in the property reads:
Figure: 7 TAC §90.503(c)(3) (No change.)

(4) Borrower and Lender's promise. The model provision regarding the borrower and lender's promise to comply with the terms of the security document reads: "YOU AND I PROMISE:"

(5) Late charges and prepayment. The model provision regarding late charges and prepayment of principal and interest reads:
Figure: 7 TAC §90.503(c)(5) (No change.)

(6) Funds for escrow items. The model provision regarding the funds for escrow items reads:
Figure: 7 TAC §90.503(c)(6) (No change.)

(7) Charges and liens. The model provision regarding charges and liens reads:
Figure: 7 TAC §90.503(c)(7) (No change.)

(8) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.503(c)(8) (No change.)

(9) Preservation, maintenance, protection, and inspection of [~~the~~] property. The model provision regarding preservation, maintenance, protection, and inspection of the property reads: "I will not destroy, damage or impair the Property, allow it to deteriorate, or commit waste. Whether or not I live in the Property, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to the Property to avoid further deterioration or damage unless you and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring the Property only if you release the insurance or condemnation proceeds for the damage to or the taking of the Property. You may release proceeds for the repairs and restoration in a single payment or in a series of payments as the work is completed. I still am obligated to complete repairs or restoration of the Property even if there are not enough proceeds to complete the work. If this Security Document secures a unit in a condominium or planned unit development, I will perform all of my obligations under the declaration or covenants creating or governing the condominium or planned unit development, and any other relevant document. You or your agent may inspect the Property. You may inspect the interior of the Property with reasonable cause. You will give me notice stating reasonable cause when or before the interior inspection occurs."

(10) Protection of lender's interest in [~~the~~] property and rights under [~~the~~] security document. The model provision regarding the protection of the lender's interest in the property and rights under the security document reads:
Figure: 7 TAC §90.503(c)(10) (No change.)

(11) Assignment of miscellaneous proceeds and forfeiture. The model provision regarding the assignment of miscellaneous proceeds and forfeiture reads:
Figure: 7 TAC §90.503(c)(11) (No change.)

(12) Forbearance not a waiver. The model provision specifying that the borrower is not released from liability if the licensee [~~lender~~] modifies the payment schedule reads: "My successors and I will not be released from liability if you extend the time for payment or modify the payment schedule. If I pay late, you will not have to sue me or my successor to require timely future payments. You may refuse to extend time for payment or modify this Loan Agreement even if I request it. If you do not enforce your rights every time, you may enforce them later."

(13) Joint and several liability, security document execution, successors obligated. The model provision regarding joint and several liability and specifying that the person who signs the contract grants his ownership in the property and binds his successors and assigns reads:
Figure: 7 TAC §90.503(c)(13) (No change.)

(14) Extension of credit charges. The model provision for the extension of credit charges reads:
Figure: 7 TAC §90.503(c)(14) (No change.)

(15) Delivery of notices. The model provision regarding the delivery of notices reads: "Under the Loan Agreement, you and I will give notices to each other in writing. Any notice under the Loan Agreement will be considered given to me when it is mailed by first class mail or when actually delivered to me at my address if given by another means. You will give notice to the Property address unless I provide you a different address. I will notify you promptly of any change of address. I will comply with any reasonable procedure for giving a change of address that you provide. There will only be one address for notice under the Loan Agreement. Notice to me will be considered notice to all persons who are obligated under the Loan Agreement unless Applicable Law requires a separate notice. I may give you notice by delivering or mailing it by first class mail to the address provided by you, unless you require a different procedure. You, however, will not receive notice under the Loan Agreement until you actually receive it. Legal requirements governing notices subject to the Loan Agreement will prevail over conditions in the Loan Agreement."

(16) Governing law and severability. The model provision regarding the law governing the contract, stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid reads: "The Loan Agreement will be governed by Texas law and federal law. If any provision in the Loan Agreement conflicts with any legal requirement, all non-conflicting provisions will remain effective."

(17) Rules of construction. The model provision regarding rules of clause construction reads:
Figure: 7 TAC §90.503(c)(17) (No change.)

(18) Loan agreement copies. The model provision specifying that the lender will give the borrower a copy of all signed documents at the time the loan agreement is made reads: "At the time the Loan Agreement is made, you will give me copies of all documents I sign."

(19) Transfer of interest in property. The model provision regarding a transfer of interest in the property reads: "Interest in the Property" means any legal or beneficial interest. This term includes those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement (the intent of which is the transfer of title by me at a future date to a purchaser). If any part of the Property is sold or transferred without your prior written

permission, you may require immediate payment of all I owe. You will not exercise this option if disallowed by Applicable Law. If you accelerate, you will give me notice. The notice of acceleration will allow me at least 21 days from the date the notice is given to pay all I owe. If I fail to timely pay all I owe, you may pursue any remedy allowed by the Loan Agreement without further notice or demand.["]

(20) Borrower's right to reinstate after acceleration. The model provision regarding the borrower's right to reinstate after acceleration reads:
Figure: 7 TAC §90.503(c)(20) (No change.)

(21) Sale of note, change of loan servicer, notice of grievance, and lender's right to comply. The model provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply reads: "A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect my monthly payment and will comply with other servicing conditions required by the Loan Agreement or Applicable Law. In some cases, the company servicing or handling the Loan Agreement may change even if the Loan Agreement is not sold. If the company servicing or handling the Loan Agreement is changed, I will be given written notice of the change. The notice will state the name and address of the new company, the address to which my payments should be made, and any other information required by RESPA. Any notice of acceleration and opportunity to cure under the Loan Agreement will satisfy the notice and opportunity to address the alleged violation provisions of this Section. No agreement between you and me or any third party will limit your ability to comply with your duties under the Loan Agreement and the Applicable Law. You and I are limiting all agreements so that all current or future interest or fees in connection with this Loan Agreement will not be greater than the highest amount allowed by Applicable Law. You and I intend to conform the Loan Agreement to the provisions of Applicable Law. If any part of the Loan Agreement is in conflict with the Applicable Law, then that part will be corrected or removed. This correction will be automatic and will not require any amendment or new document. Your right to correct any violation will survive my paying off the Loan Agreement. My right to correct will override any conflicting provision of the Loan Agreement. Your right to comply as provided in this Section will survive the payoff of the Loan Agreement. The provisions of this Section will supersede any inconsistent provision of the Loan Agreement."

(22) Hazardous substances. The model provision regarding hazardous substances reads:
Figure: 7 TAC §90.503(c)(22) (No change.)

(23) Acceleration and remedies. The model provision regarding acceleration and remedies reads:
Figure: 7 TAC §90.503(c)(23) (No change.)

(24) Assignment of rents, appointment of receiver, and lender in possession. The model provision regarding assignment of rents, appointment of receiver, and the lender in possession reads: "As additional security, I assign to you the rents of the Property, provided that I have the right, prior to acceleration or abandonment of the Property, to collect and retain the rents as they become due. Upon acceleration or abandonment, you, by agent or by court-appointed receiver, will be entitled to enter, take possession, manage the Property, and collect due and past due rents. All rents you or the court-appointed receiver collect will be applied first to payment of the costs of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorneys' fees, and then to the sums secured by this Security Document. You and the receiver will be liable to account only for rents received."

(25) Power of sale. The licensee [~~lender~~] has the option to choose wording to indicate that a Trustee's deed will convey good title to the Property that cannot be defeated. The model provision regarding the power of sale reads:
Figure: 7 TAC §90.503(c)(25) (No change.)

(26) Release. If the licensee [~~lender~~] cannot return the note to the borrower, the licensee [~~lender~~] may provide the borrower with a discharge and release of all obligations under the loan. The discharge must meet the requirements of Texas Finance Code, §342.454. The model provision regarding the release of the lien securing the loan agreement reads: "Upon payment of all that I owe under this Loan Agreement, you will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the lien to a lender that is refinancing the Loan Agreement. If you cannot, you will provide me with a discharge and release of all obligations under the loan. I will pay only the cost of recording the release of lien."

(27) Lender's rights and borrower's responsibilities. The model provision specifying that each person who signs the document is responsible for each promise and duty in the security document reads:
Figure: 7 TAC §90.503(c)(27) (No change.)

(28) Trustees and trustee liability. The model provision regarding trustees and trustee liability reads:
Figure: 7 TAC §90.503(c)(28) (No change.)

(29) Default. The model default provision reads: "Any default of my agreements with you will be a default of this Security Document."

(30) Subrogation. The model provision regarding subrogation reads: "If I ask, you will use proceeds from the Loan Agreement to pay off all valid outstanding liens against the Property. You will then own all rights, superior titles, liens, and interests owned or claimed by any owner or holder of an outstanding lien or debt. You own these things whether the lien or debt is transferred to you or whether it is released by the holder upon payment."

(31) Partial invalidity. The model provision regarding what happens if the sums secured and other charges violate applicable law reads: "If any portion of the sums secured by this Security Document cannot be lawfully secured, payments minus those sums will be applied first to the portions not secured. If any charge provided for in this Loan Agreement, separately or together with other charges that are considered part of this Loan Agreement, violates Applicable Law, the charge is reduced to the extent necessary to eliminate the violation. Lender will refund the amount of interest or other charges paid to Lender in excess of the amount permitted by Applicable Law. At Lender's option, the amount in excess will either be refunded directly to me or will be applied to reduce the principal of the debt."

(32) Request for notice of default and foreclosure under superior mortgages or security documents. The model provision regarding the lender and borrower's request for notice of default and foreclosure under superior mortgages or security documents reads:
Figure: 7 TAC §90.503(c)(32) (No change.)

(33) Signature blocks. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.503(c)(33) (No change.)

(34) Acknowledgment. The model provision regarding the acknowledgment reads:
Figure: 7 TAC §90.503(c)(34) (No change.)

(35) Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003465
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER F. SECOND LIEN HOME IMPROVEMENT CONTRACTS (SUBCHAPTER G)

7 TAC §§90.601 - 90.604

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.601. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter G home improvement transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a licensee is not mandatory. The licensee, however, may not use a contract other than a model contract unless the licensee has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee may not claim the commissioner's failure to disapprove a contract constitutes approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter G home improvement transaction; however, a licensee is not limited to the contract provisions addressed by these rules.

§90.602. Contract Provisions.

A Chapter 342, Subchapter G second lien home improvement loan transaction may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include that provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, a licensee who does not assess a fee for dishonored checks may omit the fee for dishonored check clause. A licensee may also exclude non-relevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those non-applicable portions of the model clause. A Chapter 342, Subchapter G home improvement loan transaction may contain the following provisions:

(1) For a contract for use in a transaction that does not allow withdrawals or multiple advances:

(A) An identification clause;

(B) A definitions section;

(C) A provision regarding construction of improvements;

(D) A clause regarding the contract price;

(E) A transfer of lien clause;

(F) A provision specifying that completion is made by the contractor, not the lender;

(G) A partial lien clause;

(H) A provision regarding changes and extras;

(I) A provision regarding receipts and releases;

(J) A provision specifying that no work has been done prior to execution of the contract;

(K) A provision regarding the trustee's duties;

(L) A notice specifying the preservation of claims and defenses;

(M) A notice specifying that the owner and the contractor are responsible for meeting the terms of the contract;

[~~(N) Texas Residential Construction Commission disclosures;~~]

(N) [~~(O)~~] An assignment; and

(O) [~~(P)~~] A provision regarding notice of confidentiality rights.

(2) For a promissory note for use in a transaction that does not allow withdrawals or multiple advances:

(A) An identification clause;

(B) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(C) An itemization of amount financed box;

(D) A security for payment provision;

(E) A definitions section;

(F) A promise to pay;

(G) A late charge provision;

(H) A provision for after maturity interest;

(I) A prepayment clause;

(J) A provision specifying the finance charge earnings and refund method;

(K) A deferment clause;

(L) A provision contracting for a fee for a dishonored check;

(M) A provision specifying the conditions causing default;

(N) A provision regarding property insurance;

(O) A credit insurance disclosure box;

(P) A provision regarding the mailing of notices to the borrower;

(Q) A provision specifying that the borrower's statements are truthful;

(R) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(S) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(T) A collection expenses clause;

(U) A provision providing for joint liability;

(V) A usury savings clause;

(W) A savings clause stating that if any part of the loan agreement is [~~declared~~] invalid, the rest remains valid;

(X) An integration clause stating that the contract supersedes all prior agreements and that the contract may not be changed by oral agreement;

(Y) A provision specifying that federal law and Texas law apply to the contract;

(Z) Complaints and inquiries notice;

(AA) A provision describing the collateral;

(BB) A notice regarding the preservation of claims and defenses; and

(CC) Signature blocks.

(3) For a contract for use in a transaction that allows for withdrawals or multiple advances:

(A) An identification clause;

(B) A definitions section;

(C) A provision regarding construction of improvements;

(D) A clause regarding the contract price;

(E) A clause regarding the note payable to the lender;

(F) A clause regarding the note being secured by the lien;

(G) A transfer of lien clause;

(H) A clause regarding exceptions to conveyance and warranty;

(I) A provision specifying that completion is made by the contractor, not the lender;

(J) A partial lien clause;

(K) A provision regarding changes and extras;

(L) A provision regarding receipts and releases;

(M) A provision specifying that no work has been done prior to execution of the contract;

(N) A provision regarding the owner's promises and rights;

(O) A provision regarding the owner's duties;

(P) A provision regarding the contractor's duties;

(Q) A provision regarding the contractor's rights;

(R) A provision regarding the trustee's duties;

(S) General provisions;

(T) A notice specifying the preservation of claims and defenses;

(U) A notice specifying that the owner and the contractor are responsible for meeting the terms of the contract;

[~~(V) Texas Residential Construction Commission disclosures;~~]

(V) [~~(W)~~] An assignment; and

(W) [~~(X)~~] A provision regarding notice of confidentiality rights.

(4) For a promissory note for use in a transaction that allows for withdrawals or multiple advances:

(A) An identification clause;

(B) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(C) An itemization of amount financed box;

(D) A security for payment provision;

(E) A definitions section;

(F) A promise to pay;

(G) A late charge provision;

(H) A provision for after maturity interest;

(I) A prepayment clause;

(J) A provision specifying the finance charge earnings and refund method;

(K) A deferment clause;

(L) A provision contracting for a fee for a dishonored check;

(M) A provision specifying the conditions causing default;

(N) A provision regarding property insurance;

(O) A credit insurance disclosure box;

(P) A provision regarding the mailing of notices to the borrower;

(Q) A provision specifying that the borrower's statements are truthful;

(R) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(S) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(T) A collection expenses clause;

(U) A provision providing for joint liability;

(V) A usury savings clause;

(W) A savings clause stating that if any part of the loan agreement is [~~declared~~] invalid, the rest remains valid;

(X) An integration clause stating that the contract supersedes all prior agreements and that the contract may not be changed by oral agreement;

(Y) A provision specifying that the note is secured by a deed of trust;

(Z) A provision specifying that federal law and Texas law apply to the contract;

(AA) Complaints and inquiries notice;

(BB) A provision describing the collateral;

(CC) A notice regarding the preservation of claims and defenses; and

(DD) Signature blocks.

(5) For a deed of trust for use in a transaction that allows for withdrawals or multiple advances:

(A) A definitions section;

(B) A provision regarding the transfer of rights in the property;

(C) A provision regarding late charges and prepayment of principal and interest;

(D) A provision regarding the funds for escrow items;

(E) A provision regarding charges and liens;

(F) A provision regarding property insurance;

(G) A provision regarding preservation, maintenance, protection, and inspection of the property;

(H) A provision regarding protection of the lender's interest in the property and rights under the deed of trust;

(I) A provision regarding the assignment of miscellaneous proceeds and forfeiture;

(J) A provision expressing no waiver of the lender's rights;

(K) A provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns;

(L) A usury savings clause;

(M) A provision regarding the mailing of notices to the borrower;

(N) A provision specifying that federal law and Texas law apply to the contract;

(O) A provision regarding rules of clause construction;

(P) A provision specifying that the licensee [~~lender~~] will give the borrower a copy of all signed documents at the time the loan agreement is made;

(Q) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(R) Lender, contractor, and borrower's promise and agreement;

(S) A provision regarding acceleration and remedies;

(T) A provision regarding the power of sale;

(U) A provision regarding the borrower's right to reinstate after acceleration;

(V) A provision regarding the assignment of rents, appointment of receiver, and the lender in possession;

(W) A provision regarding release of the lien;

(X) A provision regarding trustees and trustee liability;

(Y) A provision regarding the assignment of the contractor's lien and commencement of the work;

(Z) A provision regarding subrogation;

(AA) A provision regarding what happens if the sum secured and other charges violate applicable law;

(BB) A provision regarding the renewal and extension of the note secured by the deed of trust;

(CC) A provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply;

(DD) A provision regarding hazardous substances;

(EE) A provision regarding the lender's rights and the borrower's responsibilities;

(FF) A provision regarding default;

(GG) A provision regarding the lender and the borrower's request for notice of default and foreclosure under superior mortgages or deeds of trust;

[~~(HH) Texas Residential Construction Commission disclosures;~~]

(HH) [~~(II)~~] Signature blocks; and

(II) [~~(JJ)~~] A provision regarding notice of confidentiality rights.

§90.603. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan contract for use in a transaction that does not allow for withdrawals or multiple advances.[:]

(1) Identification. The model identification clause reads: Figure: 7 TAC §90.603(b)(1) (No change.)

(2) Definitions. The model definitions section reads:

(A) [~~"~~]"Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker. "I" or "me" means the Owner.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies. "You" or "your" means the Contractor.

(C) "Lender" means (name of Lender), whose address is (address of Lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement and Power of Sale.[~~"~~]

(3) Construction of improvements. The model clause regarding construction of improvements reads: "You agree to furnish and pay for all labor and material needed to complete the Work within _____ days from the date of this Contract. The Work will be performed on the Property in a good and workmanlike manner."

(4) Contract price. The model clause establishing the contract price reads: "I agree to pay, or cause to be paid, to you, or to your order, the sum of _____ dollars (U.S. $_____) when the Work is completed."

(5) Transfer of lien. The model clause regarding the transfer of the lien reads: "You transfer to Lender all of your rights and interests in this Contract."

(6) Completion by contractor, but not lender. The model clause specifying that the lender is not responsible for completing the construction reads: "You will complete the Work by the Completion Date. Lender is not responsible for completing the Work. Lender is not a guarantor of your performance. You will indemnify and hold Lender harmless against all claims related to the Work."

(7) Partial lien. The model clause regarding a partial lien reads: "If you do not complete the Work by the Completion Date in a good and workmanlike manner, then Lender will have a valid lien for the contract price, less the amount reasonably necessary to complete the Work. As an alternative, Lender may choose to complete the Work and the lien will be valid for the contract price."

(8) Changes and extras. The model clause regarding changes and extras reads: "All labor or material furnished outside of this Contract must be agreed upon in writing or it will be considered as performed under the original Contract and you will receive no extra money."

(9) Receipts and releases. The model clause regarding receipts and releases reads: "If I ask, you will give me valid receipts and releases for the Work from any subcontractor, worker, and supplier."

(10) No work commenced. The model clause specifying that no work has commenced prior to execution of the contract reads: "This Contract is executed, acknowledged, and delivered before any labor has been performed and any material has been furnished for the Work."

(11) Trustee's duties. The model clause regarding the trustee's duties reads:
Figure: 7 TAC §90.603(b)(11) (No change.)

(12) Preservation of claims and defenses. In accordance with the Federal Trade Commission's Holder in Due Course Rule (16 C.F.R. §433), it is an unfair or deceptive act or practice to take or receive a consumer credit contract in connection with the sale or lease of goods or services to consumers that does not include the following notice. The notice regarding the preservation of claims and defenses reads: "NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(13) Owner and contractor responsible. Texas Property Code, §41.007 specifies that a home improvement contract must contain a notice specifying that the owner and the contractor are responsible for meeting the terms of the contract. This notice must appear either in this contract or in the residential construction contract. The Property Code requires that the notice must be conspicuously printed, stamped, or typed in a font size equal to at least 10-point boldfaced type or computer equivalent and appear next to the owner's signature line on the contract. The wording of the notice is specified by the Property Code, which uses the pronouns "you" and "your" to refer to the owner. Licensees are encouraged to explain in the contract, prior to the notice, that "you" and "your" refer to the owner in this notice. The parties' signatures must be notarized. The licensee may use a different notary acknowledgment without having to submit the contract to the agency as a non-standard contract. The notice specifying that the owner and the contractor are responsible for meeting the terms of the contract, the model explanatory clause regarding the use of "you" and "your" in the notice, and the signature blanks read:
Figure: 7 TAC §90.603(b)(13) (No change.)

[~~(14) Texas Residential Construction Commission (TRCC) disclosures.~~]

[~~(A) TRCC home improvement contract notice. If a contract for the construction of a new home or an improvement to an existing home is required to be registered under the Texas Residential Construction Commission Act, Texas Property Code, §426.003, the contract must contain a TRCC home improvement contract notice. The disclosure or notice must contain:~~]

[~~*(i)* the builder's name and certificate of registration number; and~~]

[~~*(ii)* the notice required by the Texas Residential Construction Commission Act, Texas Property Code, §420.001, including the telephone number of the TRCC, in at least 10-point bold type or the computer equivalent.~~]

[~~(B) TRCC builder notice. If the contractor is required to register as a builder with the TRCC, the contract for improvements to an existing residence must incorporate a TRCC builder notice. The disclosure or notice must contain:~~]

[~~*(i)* the contractor's certificate of registration number; and~~]

[~~*(ii)* the address and telephone number at which the owner may file a complaint with the TRCC about the conduct of the contractor.~~]

[~~(C) Omission permitted if not applicable. The TRCC home improvement contract notice may be omitted if the contract is not required to be registered under Texas Property Code, §426.003. The TRCC builder notice may be omitted if the contractor is not required to register with the TRCC.~~]

(14) [~~(15)~~] Assignment. The parties may use a different assignment or a separate document for the assignment without having to submit the contract to the agency as a non-standard contract. The model assignment in which the contractor transfers and assigns the lien to the licensee [~~lender~~] reads:

Figure: 7 TAC §90.603(b)(14)
[~~Figure: 7 TAC §90.603(b)(15)~~]

(15) [~~(16)~~] Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

(c) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan promissory note for use in a transaction that does not allow for withdrawals or multiple advances.[~~:~~]

(1) Identification. The model identification clause lists the account or contract number, the name and address of the [~~creditor or~~] lender, the date of the note, the name and address of the borrower, the property address, the principal amount, and the terms of payment. The model clause identifying the pronouns used for the borrower and the lender reads:
Figure: 7 TAC §90.603(c)(1) (No change.)

(2) Truth in Lending Act [~~(TILA)~~] disclosure box. The model Truth in Lending Act [~~(TILA)~~] disclosure box reads:
Figure: 7 TAC §90.603(c)(2) (No change.)

(3) Itemization of amount financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth in Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

(4) Security for payment. The model clause relating to the security for payment reads: "Liens created in the Contract secure this Note."

(5) Definitions. The model definitions section reads:

(A) [~~"~~]"Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies.

(C) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement and Power of Sale dated _____ between Contractor and Owner.

(D) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(E) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular periodic payments and to pay the debt in full not later than _____.[~~"~~]

(6) Promise to pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The model clause options for the borrower's promise to pay read:

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(7) Late charge. The model late charge provision for contracts using the scheduled installment earnings method or the true daily earnings method reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(8) After maturity interest. The model clause specifies the maximum interest rate allowed by law for after maturity interest. A licensee [~~creditor~~] may always choose a lower rate. The model provision for after maturity interest reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(9) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(10) Finance charge earnings and refund method. The model provision options specifying the finance charge earnings and refund method read:

(A) For contracts using the scheduled installment earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(c)(10)(A) (No change.)

(B) For contracts using the scheduled installment earnings method with prepayments option - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(c)(10)(B) (No change.)

(C) For contracts using the true daily earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(c)(10)(C) (No change.)

(11) Deferment. The model provision regarding deferment reads: "If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules."

(12) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~creditor~~] may always choose a lesser amount. The model fee for dishonored check provision reads: "I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately."

(13) Default. The model provision specifying the conditions causing default reads:
Figure: 7 TAC §90.603(c)(13) (No change.)

(14) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.603(c)(14) (No change.)

(15) Credit insurance. If single premium credit insurance is offered, a permissible change to the disclosure can be to offer a single charge for the entire term of the loan. The term for the single premium charge should be shown for the original term of the loan, unless otherwise specified. The licensee has the option of including language that reads: "The insurance will cancel on the date when the total past due premiums equal or exceed (insert number) times the first month's premium." The industry standard regarding the relationship between total past due premiums and the first month's premium in this equation appears to be four times. However, if a different time frame is more appropriate, that time frame may be used. The model credit insurance disclosure box reads:
Figure: 7 TAC §90.603(c)(15) (No change.)

(16) Mailing of notices to borrower. The duty to give notice is satisfied when it is mailed by first class mail. The model provision regarding the mailing of notices to the borrower reads: "You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it."

(17) Statement of truthful information. The model provision specifying that the borrower gave truthful information reads: "I promise that all information I gave you is true."

(18) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration reads: "If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this loan agreement. You will not exercise this option if prohibited by law. If you exercise this option, you will give me notice that you are demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this loan agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the loan agreement."

(19) No waiver of the lender's rights. The model provision expressing no waiver of the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(20) Collection expenses. The model collection expenses clause reads: "If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this loan agreement to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys' fees."

(21) Joint liability. The model provision providing for joint liability reads: "I understand that you may seek payment from only me without first looking to any other Borrower."

(22) Usury savings clause. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than applicable law allows."

(23) Savings clause. The savings model clause stating that if any part of the contract is invalid, the rest remains valid reads: "If any part of this loan agreement is declared invalid, the rest of the loan agreement remains valid. If any part of this loan agreement conflicts with any law, that law will control. The part of the loan agreement that conflicts with any law will be modified to comply with the law. The rest of the loan agreement remains valid."

(24) Prior agreements. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model clause stating that there are no prior agreements between the parties regarding the loan agreement reads: "This written loan agreement is the final agreement between you and me. It may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this loan agreement. Any change to this loan agreement must be in writing. Both you and I have to sign written agreements."

(25) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this loan agreement."

(26) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints [~~The model complaints and inquiries notice reads~~]: "The (name of lender or note holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of lender or note holder) should contact the Office of Consumer Credit Commissioner through one of the means indicated below: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207; www.occc.state.tx.us; (800) 538-1579."

(27) Collateral. The model clause regarding the collateral reads: "The Property is subject to the Contract lien. I am responsible for all obligations in this Note."

(28) Preservation of claims and defenses. In accordance with the Federal Trade Commission's Holder in Due Course Rule (16 C.F.R. §433), it is an unfair or deceptive act or practice to take or receive a consumer credit contract in connection with the sale or lease of goods or services to consumers that does not include the following notice. The notice regarding the preservation of claims and defenses reads: "NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(29) Signature blocks. Documents for a home improvement loan on a homestead must be signed at the office of the lender, an attorney at law, or a title company. If this provision applies, the model clause, "This document must be signed at the office of the Lender, an

attorney at law, or a title company" should appear above the signature of the borrower. The licensee may also provide additional signature lines for witness signatures. The model signature block reads:
Figure: 7 TAC §90.603(c)(29) (No change.)

(d) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan contract for use in a transaction that allows for withdrawals or multiple advances.[:]

(1) Identification. The model identification clause listing the date and the account or contract number reads:
Figure: 7 TAC §90.603(d)(1) (No change.)

(2) Definitions. The model definitions section reads:

(A) "Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker. "I" or "me" means the Owner.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies. "You" or "your" means the Contractor.

(C) "Lender" means (name of Lender), whose address is (address of Lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(I) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest.

(J) "Loan Agreement" means the Note, Contract, and any other related document under which Lender has made a loan to me.

(K) "Applicable Law" means all controlling applicable federal, state, and local law.

(L) "Tenant at Sufferance" means a person who continues to possess the Property with no current right to possess it.

(M) "Forcible Detainer" means a lawsuit to remove a person from the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amount under this Contract.

(O) "Successor in Interest" means any party that has taken title to the Property.

(P) "Lien" means the Mechanic's and Materialman's Lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.["]

(3) Construction of improvements. The model clause regarding construction of improvements reads: "You agree to furnish and pay for all labor and material needed to complete the Work within _____ days from the date of this Contract. The Work will be performed on the Property in a good and workmanlike manner."

(4) Contract price. The model clause establishing the contract price reads: "I agree to pay, or cause to be paid, to you, or to your order, the sum of _____ dollars (U.S. $_____) when the Work is completed."

(5) Note payable to lender. The model clause specifying that the note is payable to the lender reads: "In exchange for money from the Lender to you, I have signed a Note to the Lender in the amount of _____ dollars (U.S. $_____)."

(6) Lien to secure note. The model clause regarding security for the note reads: "To secure the amounts Lender provides to you, and the interest payable to Lender, I give you, and you transfer to Lender, the Lien. The Note is secured by a deed of trust, which I will sign. The deed of trust will renew and extend the Lien created by this Contract."

(7) Transfer of lien. The model clause regarding the transfer of the lien reads: "You transfer to Lender all of your rights and interests in this Contract."

(8) Exceptions to conveyance and warranty. Any exceptions to conveyance and warranty should be specified in the contract. The model clause regarding the exceptions to conveyance and warranty reads: "The exceptions to conveyance and warranty are: (List any exceptions to conveyance and warranty.)"

(9) Completion by contractor, but not lender. The model clause specifying that the lender is not responsible for completing the construction reads: "You will complete the Work by the Completion Date. Lender is not responsible for completing the Work. Lender is not a guarantor of your performance. You will indemnify and hold Lender harmless against all claims related to the Work."

(10) Partial lien. The model clause regarding a partial lien reads: "If you do not complete the Work by the Completion Date in a good and workmanlike manner, then Lender will have a valid lien for the contract price, less the amount reasonably necessary to complete the Work. As an alternative, Lender may choose to complete the Work and the lien will be valid for the contract price."

(11) Changes and extras. The model clause regarding changes and extras reads: "All labor or material furnished outside of this Contract must be agreed upon in writing or it will be considered as performed under the original Contract and you will receive no extra money."

(12) Receipts and releases. The model clause regarding receipts and releases reads: "If I ask, you will give me valid receipts and releases for the Work from any subcontractor, worker, and supplier."

(13) No work commenced. The model clause specifying that no work has commenced prior to execution of the contract reads: "This Contract is executed, acknowledged, and delivered before any labor has been performed and any material has been furnished for the Work."

(14) Owner's promises and rights. The model clause regarding the owner's promises and rights reads:
Figure: 7 TAC §90.603(d)(14) (No change.)

(15) Owner's duties. The model clause regarding the owner's duties reads:
Figure: 7 TAC §90.603(d)(15) (No change.)

(16) Contractor's duties. The model clause regarding the contractor's duties reads:
Figure: 7 TAC §90.603(d)(16) (No change.)

(17) Contractor's rights. The model clause regarding the contractor's rights reads:
Figure: 7 TAC §90.603(d)(17) (No change.)

(18) Trustee's duties. The model clause regarding the trustee's duties reads:
Figure: 7 TAC §90.603(d)(18) (No change.)

(19) General provisions. The model clause regarding general contract provisions reads:
Figure: 7 TAC §90.603(d)(19) (No change.)

(20) Preservation of claims and defenses. In accordance with the Federal Trade Commission's Holder in Due Course Rule (16 C.F.R. §433), it is an unfair or deceptive act or practice to take or receive a consumer credit contract in connection with the sale or lease of goods or services to consumers that does not include the following notice. The notice regarding the preservation of claims and defenses reads: "NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(21) Owner and contractor responsible. Texas Property Code, §41.007 specifies that a home improvement contract must contain a notice specifying that the owner and the contractor are responsible for meeting the terms of the contract. The notice must appear in either this contract or the residential construction contract. The Property Code requires that the notice must be conspicuously printed, stamped, or typed in a font size equal to at least 10-point boldfaced type or computer equivalent and appear next to the owner's signature line on the contract. The wording of the notice is specified by the Property Code, which uses the pronouns "you" and "your" to refer to the owner. Licensees are encouraged to explain in the contract, prior to the notice, that "you" and "your" refer to the owner in this notice. The parties' signatures must be notarized. The licensee may use a different notary acknowledgment without having to submit the contract to the agency as a non-standard contract. The notice specifying that the owner and the contractor are responsible for meeting the terms of the contract, the model explanatory clause regarding the use of "you" and "your" in the notice, and the signature blanks read:
Figure: 7 TAC §90.603(d)(21) (No change.)

~~[(22) Texas Residential Construction Commission (TRCC) disclosures.]~~

~~[(A) TRCC home improvement contract notice. If a contract for the construction of a new home or an improvement to an existing home is required to be registered under the Texas Residential Construction Commission Act, Texas Property Code, §426.003, the contract must contain a TRCC home improvement contract notice. The disclosure or notice must contain:]~~

~~*[(i)* the builder's name and certificate of registration number; and]~~

~~*[(ii)* the notice required by the Texas Residential Construction Commission Act, Texas Property Code, §420.001, including the telephone number of the TRCC, in at least 10-point bold type or the computer equivalent.]~~

~~[(B) TRCC builder notice. If the contractor is required to register as a builder with the TRCC, the contract for improvements to an existing residence must incorporate a TRCC builder notice. The disclosure or notice must contain:]~~

~~*[(i)* the contractor's certificate of registration number; and]~~

~~*[(ii)* the address and telephone number at which the owner may file a complaint with the TRCC about the conduct of the contractor.]~~

~~[(C) Omission permitted if not applicable. The TRCC home improvement contract notice may be omitted if the contract is not required to be registered under Texas Property Code, §426.003. The TRCC builder notice may be omitted if the contractor is not required to register with the TRCC.]~~

(22) [~~(23)~~] Assignment. The parties may use a different assignment or a separate document for the assignment without having to submit the contract to the agency as a non-standard contract. The model assignment in which the contractor transfers and assigns the lien to the licensee [~~lender~~] reads:
Figure: 7 TAC §90.603(d)(22)
[~~Figure: 7 TAC §90.603(d)(23)~~]

(23) [~~(24)~~] Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

(e) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan promissory note for use in a transaction that allows for withdrawals or multiple advances.[~~:~~]

(1) Identification. The model identification clause lists the account or contract number, the name and address of the [~~creditor or~~] lender, the date of the note, the name and address of the borrower, the property address, the principal amount, and the terms of payment. The model clause identifying the pronouns used for the borrower and the lender reads:
Figure: 7 TAC §90.603(e)(1) (No change.)

(2) Truth in Lending Act [~~(TILA)~~] disclosure box. The model Truth in Lending Act [~~(TILA)~~] disclosure box reads:
Figure: 7 TAC §90.603(e)(2) (No change.)

(3) Itemization of amount financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth in Lending Act. An itemization of amount financed box

which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

(4) Security for payment. The model clause relating to the security for payment reads: "The Deed of Trust and the Lien created in the Contract secure this Note."

(5) Definitions. The model definitions section reads:

(A) "Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies.

(C) "Lender" means (name of Lender), whose address is (address of Lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(I) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest.

(J) "Loan Agreement" means the Note, Contract, and any other related document under which lender has made a loan to me.

(K) "Applicable Law" means all controlling applicable federal, state, and local law.

(L) "Tenant at Sufferance" means a person who continues to possess the Property with no current right to possess it.

(M) "Forcible Detainer" means a lawsuit to remove a person from the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amount under this Contract.

(O) "Successor in Interest" means any party that has taken title to the Property.

(P) "Lien" means the Mechanic's and Materialman's Lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.["]

(6) Promise to pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The model clause options for the borrower's promise to pay read:

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(7) Late charge. The model late charge provision for contracts using the scheduled installment earnings method or the true daily earnings method reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(8) After maturity interest. The model clause specifies the maximum interest rate allowed by law for after maturity interest. A licensee [~~creditor~~] may always choose a lower rate. The model provision for after maturity interest reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(9) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(10) Finance charge earnings and refund method. The model provision options specifying the finance charge earnings and refund method read:

(A) For contracts using the scheduled installment earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(e)(10)(A) (No change.)

(B) For contracts using the scheduled installment earnings method with prepayments option - Section 342.301 rate loans, the model language reads
Figure: 7 TAC §90.603(e)(10)(B) (No change.)

(C) For contracts using the true daily earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(e)(10)(C) (No change.)

(11) Deferment. The model provision regarding deferment reads: "If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules."

(12) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~creditor~~] may always choose a lesser amount. The model fee for dishonored check provision reads: "I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately."

(13) Default. The model provision specifying the conditions causing default reads:
Figure: 7 TAC §90.603(e)(13) (No change.)

(14) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.603(e)(14) (No change.)

(15) Credit insurance. If single premium credit insurance is offered, a permissible change to the disclosure can be to offer a single charge for the entire term of the loan. The term for the single premium charge should be shown for the original term of the loan, unless otherwise specified. The licensee has the option of including language that reads: "The insurance will cancel on the date when the total past due premiums equal or exceed (insert number) times the first month's premium." The industry standard regarding the relationship between total past due premiums and the first month's premium in this equation appears to be four times. However, if a different time frame is more appropriate, that time frame may be used. The model credit insurance disclosure box reads:
Figure: 7 TAC §90.603(e)(15) (No change.)

(16) Mailing of notices to borrower. The duty to give notice is satisfied when it is mailed by first class mail. The model provision regarding the mailing of notices to the borrower reads: "You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it."

(17) Statement of truthful information. The model provision specifying that the borrower gave truthful information reads: "I promise that all information I gave you is true."

(18) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration reads: "If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law. If you exercise this option, you will give me notice that you are demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement."

(19) No waiver of the lender's rights. The model provision expressing no waiver of the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(20) Collection expenses. The model collection expenses clause reads: "If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by Applicable Law. These expenses include, for example, reasonable attorneys' fees."

(21) Joint liability. The model provision providing for joint liability reads: "I understand that you may seek payment from only me without first looking to any other Borrower."

(22) Usury savings. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than Applicable Law allows."

(23) Savings clause. The model savings clause stating that if any part of the contract is invalid, the rest remains valid reads: "If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with any law, that law will control. The part of the Loan Agreement that conflicts with any law will be modified to comply with the law. The rest of the Loan Agreement remains valid."

(24) Prior agreements. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model clause stating that there are no prior agreements between the parties regarding the loan agreement reads: "This written Loan Agreement is the final agreement between you and me. It may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this Loan Agreement. Any change to this Loan Agreement must be in writing. Both you and I have to sign written agreements."

(25) Note secured by deed of trust. The model clause stating that the note is secured by a deed of trust reads: "In addition to this Note, the Deed of Trust protects the Note holder from losses that might result if I do not keep the promises that I make in this Note. The Deed of Trust describes how and under what conditions I may have to make immediate payment of all that I owe under this Note."

(26) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this Loan Agreement."

(27) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints [~~The model complaints and inquiries notice reads~~]: "The (name of lender or note holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of lender or note holder) should contact the Office of Consumer Credit Commissioner through one of the means indicated below: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207; www.occc.state.tx.us; (800) 538-1579."

(28) Collateral. The model clause regarding the collateral reads: "The Property is subject to the Contract lien. I am responsible for all obligations in this Note."

(29) Preservation of claims and defenses. The notice regarding the preservation of claims and defenses reads: "NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(30) Signature blocks. Documents for a home improvement loan on a homestead must be signed at the office of the lender, an attorney at law, or a title company. If this provision applies, the model clause, "This document must be signed at the office of the Lender, an attorney at law, or a title company" should appear above the signature

of the borrower. The licensee may also provide additional signature lines for witness signatures. The model signature block reads:
Figure: 7 TAC §90.603(e)(30) (No change.)

(f) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan deed of trust for use in a transaction that allows for withdrawals or multiple advances.[:]

(1) Definitions. The model definitions section reads:

(A) "Borrower" is _____. Borrower's address is _____.

(B) "Contractor" is _____. Contractor's address is _____.

(C) "Lender" is _____. Lender's address is _____.

(D) "Trustee" is _____. Trustee's address is _____.

(E) "I" or "me" means _____, the grantor under this Deed of Trust and the person who signed the Note ("Borrower").

(F) "Loan Agreement" means the Contract, Note, Security Document, Deed of Trust, any other related document, or any combination of those documents, under which Lender has made a loan to me.

(G) "Deed of Trust" means this document, which is dated _____, together with all riders to this document.

(H) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe Lender is _____ dollars (U.S. $_____) plus interest.

(I) "Property" means the property at (list address of the Property), whose legal description is (list legal description of the Property).

(J) "Applicable Law" means all controlling applicable federal, state, and local law.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or the Property by a condominium association, homeowners association, or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section ___ of this Deed of Trust.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: damage or destruction of the Property; condemnation or other taking of all or any part of the Property; conveyance instead of condemnation; or misrepresentations or omissions related to the value or condition of the Property.

(O) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amounts under this Deed of Trust.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Deed of Trust, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest" means any party that has taken title to the Property.

(R) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Deed of Trust. Such an arrangement usually takes the form of a long-term "ground lease."

(S) "Contract" means the Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(T) "Lien" means the Mechanic's and Materialman's Lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.["]

(2) Transfer of rights in [~~the~~] property. The model provision regarding a transfer of rights in the property reads:
Figure: 7 TAC §90.603(f)(2) (No change.)

(3) Payment of late charges and prepayment. The model provision regarding the payment of late charges and prepayment of principal and interest reads:
Figure: 7 TAC §90.603(f)(3) (No change.)

(4) Funds for escrow items. The model provision regarding the funds for escrow items reads:
Figure: 7 TAC §90.603(f)(4) (No change.)

(5) Charges and liens. The model provision regarding charges and liens reads:
Figure: 7 TAC §90.603(f)(5) (No change.)

(6) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.603(f)(6) (No change.)

(7) Preservation, maintenance, protection, and inspection of [~~the~~] property. The model provision regarding preservation, maintenance, protection, and inspection of the property reads: "I will not destroy, damage, or impair the Property, allow it to deteriorate, or commit waste. Whether or not I live in the Property, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to the Property to avoid further deterioration or damage unless Lender and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring the Property only if Lender releases the insurance or condemnation proceeds for the damage to or the taking of the Property. Lender may release proceeds for the repairs and restoration in a single payment or in a series of payments as the Work is completed. I still am obligated to complete repairs or restoration of the Property even if there are not enough proceeds to complete the Work. If this Deed of Trust secures a unit in a condominium or planned unit development, I will perform all of my obligations under the declaration or covenants creating or governing the condominium or planned unit development, and any other relevant document. Lender or Lender's agent may inspect the Property. Lender may inspect the interior of the Property with reason-

able cause. Lender will give me notice stating reasonable cause when or before the interior inspection occurs."

(8) Protection of lender's interest in the property and rights under the deed of trust. The model provision regarding protection of the lender's interest in the property and rights under the deed of trust reads:
Figure: 7 TAC §90.603(f)(8) (No change.)

(9) Assignment of miscellaneous proceeds and forfeiture. The model provision regarding the assignment of miscellaneous proceeds and forfeiture reads:
Figure: 7 TAC §90.603(f)(9) (No change.)

(10) Forbearance not a waiver. The model provision specifying that the borrower is not released from liability if the lender modifies the payment schedule reads: "If Lender doesn't enforce Lender's rights every time, Lender can still enforce them later."

(11) Joint and several liability, deed of trust execution, successors obligated. The model provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns reads:
Figure: 7 TAC §90.603(f)(11) (No change.)

(12) Usury savings clause. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than Applicable Law allows."

(13) Mailing of notices to borrower. The duty to give notice is satisfied when it is mailed by first class mail. The model provision regarding the mailing of notices to the borrower reads: "Lender or I may mail or deliver any notice to the address above. Lender or I may change the notice address by giving written notice. Lender's duty to give me notice will be satisfied when Lender mails it."

(14) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this Loan Agreement."

(15) Rules of construction. The model provision regarding rules of clause construction reads:
Figure: 7 TAC §90.603(f)(15) (No change.)

(16) Loan agreement copies. The model provision specifying that the lender will give the borrower a copy of all signed documents at the time the loan agreement is made reads: "At the time the Loan Agreement is made, Lender will give me copies of all documents I sign."

(17) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate and notice of acceleration reads: "If all or any interest in the Property is sold or transferred without Lender's prior written consent, Lender may require immediate payment in full of all that I owe under this Loan Agreement. Lender will not exercise this option if Applicable Law prohibits. If Lender exercises this option, Lender will give me notice that Lender is demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, Lender may use any remedy allowed by the Loan Agreement."

(18) Lender, contractor, and borrower's promises and agreements. The model provision regarding the lender, contractor, and borrower's promises and agreements reads: "LENDER, CONTRACTOR, AND I PROMISE AND AGREE:".

(19) Acceleration and remedies. The model provision regarding acceleration and remedies reads:
Figure: 7 TAC §90.603(f)(19) (No change.)

(20) Power of sale. The model provision regarding the power of sale reads:
Figure: 7 TAC §90.603(f)(20) (No change.)

(21) Borrower's right to reinstate after acceleration. The model provision regarding the borrower's right to reinstate after acceleration reads:
Figure: 7 TAC §90.603(f)(21) (No change.)

(22) Assignment of rents, appointment of receiver, and lender in possession. The model provision regarding the assignment of rents, appointment of receiver, and the lender in possession reads: "As additional security, I assign to you the rents of the Property, provided that you have the right, prior to acceleration or abandonment of the Property, to collect and retain the rents as they become due. Upon acceleration or abandonment, you, by agent or by court-appointed receiver, will be entitled to enter, take possession, manage the Property, and collect due and past due rents. All rents you or the court-appointed receiver collect will be applied first to payment of the cost of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorneys' fees, and then to the sums secured by this Deed of Trust. You and the receiver will be liable to account only for rents received."

(23) Release. The model provision regarding the release of the lien securing the loan agreement reads: "Lender will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the Lien to a Lender that is refinancing the Loan Agreement. I will pay only the cost of recording the release of lien."

(24) Trustees and trustee liability. The model provision regarding trustees and trustee liability reads:
Figure: 7 TAC §90.603(f)(24) (No change.)

(25) Assignment of contractor's lien, and commencement of work. The model provision regarding the assignment of the contractor's lien and specifying that no work was commenced before the contract was executed reads: "Contractor and I have entered into the Contract for improvements to be made to the Property. I will perform my duties under the Contract. Under the Contract, I gave Contractor a Lien on the Property. Contractor permanently transfers the Lien and any other interest Contractor has in the Property to Lender. As additional security, Contractor also agrees that the lien created by this Deed of Trust has priority over the Lien. The purpose of the Note is to pay in whole or in part the improvements to be made to the Property by the Contractor. Contractor and I agree that the Lien is for Lender's sole benefit. Any other interest Contractor has in the Property will be merged with the Lien, and may be enforced by Lender according to the terms of this Deed of Trust. Contractor and I further agree that no Work was performed or material delivered before the Contract was executed."

(26) Subrogation. The model provision regarding subrogation reads: "If I ask, Lender will use proceeds from the Loan Agreement to pay off all valid outstanding liens against the Property. Lender will then own all rights, superior titles, liens, and interests owned or claimed by any owner or holder of an outstanding lien or debt. Lender owns these things whether the lien or debt is transferred to Lender or whether it is released by the holder upon payment."

(27) Partial invalidity. The model provision regarding what happens if the sums secured and other charges violate applicable

law reads: "If any portion of the sums secured by this Deed of Trust cannot be lawfully secured, payments minus those sums will be applied first to the portions not secured. If any charge provided for in this Loan Agreement, separately or together with other charges that are considered part of this Loan Agreement, violates Applicable Law, the charge is reduced to the extent necessary to eliminate the violation. Lender will refund the amount of interest or other charges paid to Lender in excess of the amount permitted by Applicable Law. At Lender's option, the amount in excess will either be refunded directly to me or will be applied to reduce the principal of the debt."

(28) Renewal and extension. The model provision regarding the renewal and extension of the note secured by the deed of trust reads: "The Note secured by this Deed of Trust is renewed and extended, but not in extinguishment of the debt under the Contract identified in the paragraph entitled "Assignment of Contractor's Lien, Commencement of Work" and the Note."

(29) Sale of loan, change of loan servicer, notice of grievance, and lender's right to comply. The model provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply reads: "A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect my monthly payment and will comply with other servicing conditions required by the Loan Agreement or Applicable Law. In some cases, the company servicing or handling the Loan Agreement may change even if the Loan Agreement is not sold. If the company servicing or handling the Loan Agreement is changed, I will be given written notice of the change. The notice will state the name and address of the new company, the address to which my payments should be made, and any other information required by RESPA. Any notice of acceleration and opportunity to cure under the Loan Agreement will satisfy the notice and opportunity to address the alleged violation provisions of this Section. No agreement between Lender and me or any third party will limit Lender's ability to comply with Lender's duties under the Loan Agreement and Applicable Law. Lender and I are limiting all agreements so that all current or future interest or fees in connection with this Loan Agreement will not be greater than the highest amount allowed by Applicable Law. Lender and I intend to conform the Loan Agreement to the provisions of Applicable Law. If any part of the Loan Agreement is in conflict with the Applicable Law, then that part will be corrected or removed. This correction will be automatic and will not require any amendment or new document. Lender's right to cure any violation will survive my paying off the Loan Agreement. My right to cure will override any conflicting provision of the Loan Agreement. Lender's right to comply as provided in this Section will survive the payoff of the Loan Agreement. The provisions of this Section will supersede any inconsistent provision of the Loan Agreement."

(30) Hazardous substances. The model provision regarding hazardous substances reads:
Figure: 7 TAC §90.603(f)(30) (No change.)

(31) Lender's rights and Borrower's responsibilities. The model provision regarding the lender's rights and the borrower's responsibilities reads:
Figure: 7 TAC §90.603(f)(31) (No change.)

(32) Default. The model provision regarding the borrower's default reads: "Any default of my agreements with Lender will be a default of this Deed of Trust."

(33) Request for notice of default and foreclosure under superior mortgages or deeds of trust. The model provision regarding the lender and borrower's request for notice of default and foreclosure under superior mortgages or deeds of trust reads:
Figure: 7 TAC §90.603(f)(33) (No change.)

~~[(34) Texas Residential Construction Commission (TRCC) disclosures.]~~

~~[(A) TRCC home improvement contract notice. If a contract for the construction of a new home or an improvement to an existing home is required to be registered under the Texas Residential Construction Commission Act, Texas Property Code, §426.003, the contract must contain a TRCC home improvement contract notice. The disclosure or notice must contain:]~~

~~*[(i)* the builder's name and certificate of registration number; and]~~

~~*[(ii)* the notice required by the Texas Residential Construction Commission Act, Texas Property Code, §420.001, including the telephone number of the TRCC, in at least 10-point bold type or the computer equivalent.]~~

~~[(B) TRCC builder notice. If the contractor is required to register as a builder with the TRCC, the contract for improvements to an existing residence must incorporate a TRCC builder notice. The disclosure or notice must contain:]~~

~~*[(i)* the contractor's certificate of registration number; and]~~

~~*[(ii)* the address and telephone number at which the owner may file a complaint with the TRCC about the conduct of the contractor.]~~

~~[(C) Omission permitted if not applicable. The TRCC home improvement contract notice may be omitted if the contract is not required to be registered under Texas Property Code, §426.003. The TRCC builder notice may be omitted if the contractor is not required to register with the TRCC.]~~

(34) [~~(35)~~] Signature blocks. The parties' signatures must be notarized. The licensee may use a different notary acknowledgment without having to submit the deed of trust to the agency as non-standard. Documents for a home improvement loan on a homestead must be signed at the office of the lender, an attorney at law, or a title company. If this provision applies, the model clause, "This document must be signed at the office of the Lender, an attorney at law, or a title company" should appear above the signature of the borrower. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.603(f)(34)
[~~Figure: 7 TAC §90.603(f)(35)~~]

(35) [~~(36)~~] Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

§90.604. Permissible Changes.

(a) A licensee may consider making the following types of changes to the second lien home improvement contracts plain language model clauses:

(1) Regulation Z of the Truth in Lending Act provides a right of rescission form that must be provided to consumers in a transaction involving the consumer's principal dwelling. The Truth in Lending Act [~~TILA~~] right of rescission form for use in a transaction involving the consumer's principal dwelling reads:
Figure: 7 TAC §90.604(a)(1) (No change.)

(2) If the Texas constitutional homestead requirements apply to the transaction, the licensee must add a clause regarding notice of cancellation, place of singing the contract, and the five-day waiting period. The model clause regarding the notice of cancellation, place of signing the contract, and the five-day waiting period reads:
Figure: 7 TAC §90.604(a)(2) (No change.)

(3) Article 16, Section 50(a)(5) of the Texas Constitution provides that a contract for improvements on a homestead must expressly provide the owner with notice of the owner's right to cancel the contract. The model notice regarding the owner's right to cancel the contract reads: "NOTICE OF RIGHT TO CANCEL. THE OWNER MAY CANCEL THE CONTRACT WITHOUT PENALTY OR CHARGE WITHIN THREE DAYS AFTER THE EXECUTION OF THE CONTRACT BY ALL PARTIES, UNLESS THE WORK AND MATERIAL ARE NECESSARY TO COMPLETE IMMEDIATE REPAIRS TO CONDITIONS ON THE HOMESTEAD PROPERTY THAT MATERIALLY AFFECT THE HEALTH OR SAFETY OF THE OWNER OR PERSON RESIDING IN THE HOMESTEAD AND THE OWNER OF THE HOMESTEAD ACKNOWLEDGES SUCH IN WRITING."

(4) Texas Business and Commerce Code, Chapter 601 [~~39~~] requires that notice must be given to the consumer regarding the consumer's right to cancel certain types of transactions. If this chapter is applicable, the notice that must be given by the licensee must appear in immediate proximity to the consumer's signature, or on the front page of the receipt if a contract is not used. The notice must be in boldfaced type and must be the equivalent of at least 10 points in the Times typeface. The statement to which the notice must be substantially similar reads: "YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."

(5) Texas Business and Commerce Code, Chapter 601 [~~39~~] also requires, if applicable, that a completed notice of cancellation form in duplicate be attached to the loan documents or receipt of the consumer transaction. This notice must be easily detachable from the contract or receipt, be in the same language as the contract or receipt, be in boldfaced type, and be the equivalent of at least 10 points in the Times typeface. The required notice of cancellation reads:
Figure: 7 TAC §90.604(a)(5) (No change.)

(6) The licensee may add information related to information set forth in the model clauses that is not otherwise prohibited by law.

(7) The licensee may substitute another term for "Lender" or "Borrower" that has the same meaning, or use pronouns such as "you," "we," and "us."

(8) The model clauses may be presented in any order, and may be combined or further segregated at the licensee's option.

(9) The licensee may insert descriptive headings or number provisions.

(10) The licensee may change the case of a word if otherwise permitted by the Texas Finance Code.

(11) The licensee may make other changes that do not affect the substance of the disclosures.

(12) A sample model contract that does not allow for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(12)
[~~Figure: 7 TAC §90.604(a)(12)~~]

(13) A sample model promissory note that does not allow for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(13) (No change.)

(14) A sample model contract that allows for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(14)
[~~Figure: 7 TAC §90.604(a)(14)~~]

(15) A sample model promissory note that allows for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(15) (No change.)

(16) A sample model deed of trust that allows for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(16)
[~~Figure: 7 TAC §90.604(a)(16)~~]

(b) A licensee has considerable flexibility to arrange the format of the model form if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003466
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

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SUBCHAPTER G. SPANISH DISCLOSURES

7 TAC §§90.701 - 90.703, 90.706

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.701. Applicability.

(a) If a contract for loan under Chapter 342, Subchapters E, F, or G is negotiated in Spanish, then a licensee must deliver a disclosure to the debtor in Spanish no later than consummation of the contract.

(b) If a retail installment transaction under Chapter 348 is negotiated in Spanish, then a licensee [~~creditor~~], may but is not required

to, deliver a disclosure specified in §90.703 of this title (relating to Form of Disclosure) to the debtor in Spanish.

(c) The disclosure requirement does not apply to open-end transactions.

§90.702. Negotiation in Spanish.

(a) Negotiation terms. The disclosure specified in §90.703 of this title (relating to Form of Disclosure) must be given if a licensee [~~creditor~~] provides information in relation to a credit transaction with a debtor or the debtor's representative regarding any of the following credit terms in Spanish:

(1) amount financed;

(2) finance charge;

(3) annual percentage rate;

(4) the amount of any payment or schedule of payments;

(5) total of payments; or

(6) security interest.

(b) Advertising exception. A licensee [~~creditor~~] is not required to provide a disclosure specified in §90.703 of this title if a creditor advertises credit terms in Spanish that are specified in this section.

§90.703. Form of Disclosure.

(a) The licensee [~~creditor~~] may at its option provide a debtor one of the following:

(1) a Spanish translation of the contract form that includes a Spanish translation of the disclosure form under 12 C.F.R. §226.18;

(2) for transactions subject to Chapter 342, Subchapter E, a copy of the "Notificación de Crédito Al Consumidor (Préstamo a Plazos)" as prescribed in the following figure: [~~Figure: 7 TAC §90.703(a)(2)~~]
Figure: 7 TAC §90.703(a)(2) (No change.)

(3) for transactions subject to Chapter 342, Subchapter F:

(A) a copy of the "Notificación de Crédito Al Consumidor (Préstamo)," as prescribed in the following figure [~~Figure: 7 TAC §90.703(a)(3)(A)~~], selecting the appropriate late charge payment option; and
Figure: 7 TAC §90.703(a)(3)(A) (No change.)

(i) Late Charge Option 1: "Late Charge: If I don't pay an entire payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(ii) Late Charge Option 1 Spanish Translation: "Cargos por Retrasos: Si no doy un pago completo dentro de 10 días después de vencerse, me puedes cobrar un cargo por retraso. El cargo por retraso será el 5% de la cantidad del pago."

(iii) Late Charge Option 2: "Late Charge: For a loan that has an amount financed of less than $100, the late charge for a payment that is unpaid for 10 days after it is due is 5% of the amount of the installment. For a loan that has an amount financed of $100 or more, the late charge for a payment that is unpaid for 10 days after it is due is the greater of $10 or 5% of the amount of the installment."

(iv) Late Charge Option 2 Spanish Translation: "Cargos por Retrasos: Para un préstamo en el cual la cantidad financiada es menor de $100, el cargo por retraso en un pago que no se liquida por 10 días después de vencerse es 5% de la cantidad del pago. Para un préstamo en el cual la cantidad financiada es de $100 o más, el cargo por retraso en un pago que no se liquida por 10 días después de vencerse es de $10 o 5% de la cantidad del pago atrasado, lo que sea mayor."

(B) a copy of the "Conceptos Financieros," as prescribed in the following figure [~~Figure: 7 TAC §90.703(a)(3)(B)~~];
Figure: 7 TAC §90.703(a)(3)(B) (No change.)

(4) for transactions subject to Chapter 342, Subchapter G, a copy of the "Notificación de Crédito Al Consumidor (Préstamo de Segunda Hipoteca)" as prescribed in the following figure [~~Figure: 7 TAC §90.703(a)(4)~~]; or
Figure: 7 TAC §90.703(a)(4) (No change.)

(5) for transactions subject to Chapter 348, a copy of the "Notificación de Crédito Al Consumidor (Contrato de Menudeo a Plazos para Vehículo Automotor)" as prescribed in the following figure [~~Figure: 7 TAC §90.703(a)(5)~~], selecting the appropriate late charge payment option.
Figure: 7 TAC §90.703(a)(5) (No change.)

(b) Licensees [~~Creditors~~] may delete inapplicable provisions contained in the model disclosure. Licensees [~~Creditors~~] may also delete any of the English portions of Figure[~~:~~] 7 TAC §90.703(a)(4) or the lower portion of the disclosure below the payment schedule box of Figure 7 TAC §90.703(a)(3)(A).

§90.706. Legal Document.

(a) The agreement entered in the English language is the legal document and determines the rights and obligations of the parties. The disclosures required by federal law entered in the English language are the legal disclosures and determine the disclosure obligations of the licensee [~~creditor~~].

(b) The licensee [~~creditor~~] may at its option add the following disclaimer:

(1) "NOTICE REGARDING THE TRANSLATION INTO SPANISH: The English document is the legal document and reflects the parties' rights and obligations. The translation into Spanish of the document is provided for the convenience of the Borrower."

(2) Spanish Translation: "AVISO CON RESPECTO A LA TRADUCCIÓN AL ESPAÑOL: El documento en inglés es el documento legal y refleja los derechos y obligaciones de las partes. La traducción al español del documento se ofrece para la conveniencia del Prestatario."

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

Filed with the Office of the Secretary of State on June 18, 2010.

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER G. LENDING POWERS

7 TAC §91.701

The Credit Union Commission (the Commission) proposes amendments to §91.701, concerning lending powers. The amendments incorporate and expand on the loan documentation requirements of §91.702. The Commission proposes to repeal §91.702 concurrent with the amendments to this rule. The amendments also add required elements to the loan policies, update and refine the credit underwriting criteria, and provide that a line of credit have payments sufficient to amortize the outstanding balance over a reasonable period of time and not cause negative amortization. Finally, the amendments rewrite some provisions for clarity and correct a typographical error.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.701. Lending Powers.

(a) Authorization. A credit union may originate, invest in, sell, purchase, service, or participate in loans or otherwise extend credit in accordance with the Act, these Rules, and other applicable law.

(b) Written Policies. Before [~~Each credit union, before~~] engaging in any lending activity, each credit union shall establish written lending policies [~~approved by its board of directors~~] that set [~~establish~~] prudent credit underwriting and documentation standards for each specific type of lending activity. The lending policies shall contain a general outline of the manner in which loans are made, serviced, and collected. In addition the policies must:

(1) Be consistent with safe and sound credit union practices;

(2) Be appropriate to the size and financial condition of the credit union and the nature and scope of its operations;

(3) Be compatible with the size and expertise of the credit union's lending staff;

(4) Be compliant with all related laws and regulations;

(5) Be reviewed and approved by the credit union's board of directors at inception and [~~least~~] annually, thereafter;

(6) Address loan portfolio diversification standards to avoid undue concentrations of risk;

(7) Address loan documentation and underwriting standards that are clear and measurable;

(8) Address loan administration procedures for monitoring the loss exposure from the loan portfolio; [~~and~~]

(9) Address loan pricing guidelines to ensure that the rate of return is consistent with the risk from the lending activity; and

(10) [~~(9)~~] State the lending authority delegated to any individuals or committees by the board of directors.

(c) Loan Documentation. The lending policies shall include loan documentation practices that:

(1) Enable the credit union to make an informed lending decision and to assess risk, as necessary, on an ongoing basis;

(2) Identify the purpose of a loan and the source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner; and

(3) Ensure that any claim against a member is legally enforceable.

(d) Credit Underwriting. A credit union shall establish and maintain prudent credit underwriting practices that:

(1) Are commensurate with the types of loans the credit union will make and consider the terms and conditions under which they will be made;

(2) Consider the nature of the markets in which loans will be made;

(3) Provide for consideration of the member's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the member's character and willingness to repay as agreed;

(4) Take adequate account of concentration of credit risk; and

(5) Are appropriate to the size of the credit union and the nature and scope of its activities.

[~~(c) Underwriting Standards. To be considered prudent, a credit union's underwriting standards should reflect consideration of all credit evaluation factors relevant to the type of loan, including:~~]

[~~(1) The capacity of the member to adequately service the debt from the source(s) specified by the member;~~]

[~~(2) The value of the collateral;~~]

[~~(3) The overall creditworthiness of the member;~~]

[~~(4) The level of equity invested in the collateral (loan-to-value ratio);~~]

[~~(5) The type of information and documentation necessary to approve new credit, renew credit, increase credit to existing borrowers, and change terms in previously approved credits;~~]

[~~(6) A co-signer or other secondary source of repayment;~~]

[~~(7) Any additional collateral or credit enhancement (such as guarantees or mortgage insurance);~~]

[(8) Maximum loan maturities that relate to the anticipated source of repayment, the purpose of the loan, and the useful life of any collateral;]

[(9) Loan pricing that reflects the credit union's cost of funds, overhead, credit risk premium, and a reasonable return;]

[(10) The need for collateral protection insurance; and]

[(11) Filing/recordation standards to ensure a valid lien.]

(e) [(d)] Loan Maturity Limit. Except when a higher maturity date is provided for elsewhere in this chapter, the maturity of any [a] loan or extension of credit to a member may not exceed 15 years. Minimum payments, [Open-end credit is not subject to a regulatory maturity limit. However the amortization scheduling] on a line of credit balance must be sufficient to amortize the outstanding balance over a reasonable period of time and not cause negative amortization [shall not exceed 15 years].

(f) [(e)] Liquidity. In addition to establishing controls for credit risks, credit unions shall establish procedures and guidelines to monitor and limit the total volume of loans outstanding, to ensure adequate liquidity. In setting such guidelines, the credit union shall consider various factors such as credit demand, the volatility of shares and deposits, and availability of alternative funding sources.

(g) [(f)] Waivers. The commissioner in the exercise of discretion may grant a waiver in writing of any lending requirement described in this chapter. A decision to deny a waiver, however, is not subject to appeal. A waiver [wavier] request must contain the following:

(1) The requirement to be waived, the higher limit or the ratio sought;

(2) An explanation of the need for the waiver or to raise the limit or ratio; and

(3) Documentation supporting the credit union's ability to manage the additional risk from this activity.

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

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Harold E. Feeney
Commissioner
Credit Union Department
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7 TAC §91.702

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Credit Union Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Credit Union Commission (the Commission) proposes the repeal of §91.702, concerning records for lending transactions. The substance of the rule is proposed to be incorporated into §91.701 and this rule is no longer necessary.

The repeal is proposed as a result of the Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed repeal is in effect there will be no fiscal implications for state or local government.

Ms. Loar has also determined that for each year of the first five years the proposed repeal is in effect, the public benefits anticipated will be greater clarity and ease of use of the rules in the chapter. There will be no effect on small or micro businesses as a result of repealing the rule. There is no economic cost anticipated to credit unions or individuals if the rule is repealed.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The repeal is proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed repeal is Texas Finance Code, §124.001.

§91.702. Records for Lending Transactions.

This 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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7 TAC §91.703

The Credit Union Commission (the Commission) proposes amendments to §91.703, concerning interest. The amendments rename the rule "Interest Rates" and clarify that the board of directors sets the interest rates but can delegate this authority.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.703. Interest Rates.

(a) Loans made by each credit union shall bear interest at a rate or rates as may be determined by the credit union's board of directors. A [~~credit union's~~] board [~~of directors~~] may delegate all or part of its power to determine the interest rates on any [~~all~~] lending transactions. The board may also authorize a [~~any~~] refund of interest on loans under the conditions it may prescribe.

(b) A loan may provide for variable interest rates, so long as the factor or index governing the extent of the variation is not under the control of the credit union and can be readily ascertained from sources available to the public or any other index approved in writing by the commissioner which is not available to the public.

This 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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7 TAC §91.704

The Credit Union Commission (the Commission) proposes amendments to §91.704, concerning real estate lending. The amendments define improved real estate, further explain the lending policies a board of directors must establish, and clarify the conditions for excluded transactions. The amendments also incorporate the new federal requirement that residential mortgage loan originators register with the Nationwide Mortgage Licensing System and Registry, and make other editing changes for clarity.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.704. Real Estate Lending.

(a) Definitions. For the purposes of this section, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) First lien means any mortgage that takes priority over any other lien or encumbrance on the same property and that must be satisfied before other liens or encumbrances may share in proceeds from the property's sale.

(2) Home loan means a loan that is:

(A) made to one or more individuals for personal, family, or household purposes; and

(B) secured in whole or part by:

(i) a manufactured home, as defined by Finance Code §347.002, used or to be used as the borrower's principal residence; or

(ii) real property improved by a dwelling designed for occupancy by four or fewer families and used or to be used as the borrower's principal residence.

(3) Improved residential real estate means residential real estate containing offsite improvements, such as access to streets, curbs, and utility connections, sufficient to make the property ready for residential construction, and real estate in the process of being improved by a building.

(4) [~~(3)~~] Other acceptable collateral means any collateral in which the credit union has a perfected security interest, that has a quantifiable value, and is accepted by the credit union in accordance with safe and sound lending practices.

(5) [~~(4)~~] Owner-occupied means that the owner of the underlying real property occupies a dwelling unit of the real property as a principal residence.

(6) [~~(5)~~] Readily marketable collateral means insured deposits, financial instruments, and bullion in which the credit union has a perfected interest. Financial instruments and bullion must be saleable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions, on an auction or similarly available daily bid and ask price market.

(b) Written Policies. Before engaging in any real estate lending, a credit union shall adopt and maintain written policies that are appropriate for the size of the credit union and the nature and scope of its operation. When formulating the real estate lending policy, the credit union should consider both internal and external factors, such as its size and condition, expertise of its lending staff, avoidance of undue concentrations of risk, compliance with all real estate laws and rules, and general market conditions. Each policy must be consistent with safe and sound lending practices and establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate, or that are made for the purpose of financing

permanent improvements to real estate. The policies shall, in addition to the general requirements of §91.701(d) [~~§91.701(c)~~] of this title (relating to Lending Powers), address the following, as applicable:

(1) Title insurance;

(2) Escrow administration;

(3) Loan payoffs;

(4) Collection and foreclosure; and

(5) Servicing and participation agreements.

(c) Loan to Value Limitations.

(1) The board of directors shall establish its [~~their~~] own internal loan-to-value limits for real estate loans based on type of loan. These internal limits, however, shall not exceed the following regulatory limits:

(A) Unimproved land held for investment/speculation--Loan to value limit 60%

(B) Construction and Development: commercial, multifamily, and other nonresidential--Loan to value limit 75%

(C) Interim Construction: owner-occupied residential real estate--Loan to value limit 90%

(D) Owner occupied residential real estate (other than home equity)--Loan to value limit 95%

(E) Other residential real estate such as a second or vacation home--Loan to value limit 90%

(F) Home equity--Loan to value limit 80%

(G) All Other--Loan to value limit 80%

(2) The regulatory loan-to-value limits should be applied to the underlying property that collateralizes the loan. In determining the loan to-value ratio, a credit union shall include the aggregate amount of all sums borrowed, including the outstanding balances, plus any unfunded commitment or line of credit from all sources on an item of collateral, divided by the market value of the collateral used to secure the loan.

(d) Maximum Maturities. Notwithstanding the general 15-year maturity limit on lending transactions to members, the board of directors shall establish [~~in~~] written [~~policy~~] internal maximum maturities for real estate lending transactions. These maturities should not exceed the following regulatory limits:

(1) Improved residential real estate loans (owner-occupied, first lien)--40 years

(2) Improved residential real estate loans (not owner-occupied, first lien)--30 years

(3) Interim construction loans--18 months

(4) Manufactured home (first lien)--20 years

(5) Home equity loans--20 years (second lien)--30 years (first lien)

(6) Home improvement loans--20 years

(7) All other loans--15 years

(e) Mortgage Fraud Notice. A credit union must provide to each applicant for a home loan a written notice at closing. The notice must be provided on a separate document, be in at least 14-point type, and have the following or substantially similar language: "Warning: Intentionally or knowingly making a materially false or misleading written statement to obtain property or credit, including a mortgage loan, is a violation of §32.32, Texas Penal Code, and, depending on the amount of the loan or value of the property, is punishable by imprisonment for a term of 2 years to 99 years and a fine not to exceed $10,000. "I/we, the undersigned home loan applicant(s), represent that I/we have received, read, and understand this notice of penalties for making a materially false or misleading written statement to obtain a home loan. "I/we represent that all statements and representations contained in my/our written home loan application, including statements or representations regarding my/our identity, employment, annual income, and intent to occupy the residential real property secured by the home loan, are true and correct as of the date of loan closing." On receipt of the notice, the applicant shall verify the information and execute the notice. A credit union must keep the signed notice on file with the records required under §91.701 of this title [~~§91.702~~].

(f) Excluded Transactions. It is recognized that there are a number of lending situations in which other factors significantly outweigh the need to apply the regulatory loan-to-value limits. As a result, an exception to the loan-to-value limits is permissible for the following loan categories [~~These include~~]:

(1) Loans that are covered through appropriate credit enhancements in the form of readily marketable collateral or other acceptable collateral.

(2) Loans guaranteed or insured by the U.S. government or its agencies, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the regulatory loan-to-value limit.

(3) Loans guaranteed, insured, or otherwise backed by the full faith and credit of the state, a municipality, a county government, or an agency thereof, provided that the amount of the guaranty, insurance, or assurance is at least equal to the portion of the loan that exceeds the regulatory loan-to-value limit.

(4) Loans that are to be sold promptly after origination, without recourse, to a financially responsible third party.

(5) Loans that are renewed, refinanced, or restructured without the advancement of new funds or an increase in the line of credit (except for reasonable closing costs) where consistent with safe and sound credit union practices and part of a clearly defined and well-documented program to achieve orderly liquidation of the debt, reduce risk of loss, or maximize recovery on the loan.

(6) Loans that facilitate the sale of real estate acquired by the credit union in the ordinary course of collecting a debt previously contracted in good faith.

(g) Loans to 100% of Value. A credit union may make a loan in an amount up to 100% of the value of real property security if that part of the loan that exceeds the regulatory loan-to-value limit is guaranteed or insured by a private corporation, organization, or other entity. The board of directors must ensure that the credit union exercises appropriate due diligence to ensure that any such guarantor or insurer has the financial capacity and willingness to perform under the terms of the guaranty or insurance agreement.

(h) Registration of residential mortgage loan originators. Title V of the Housing and Economic Recovery Act of 2008 (Public Law 110-289) requires employees of a credit union who engage in the business of a mortgage loan originator to register with the Nationwide Mortgage Licensing System and Registry and to obtain a unique identifier. A credit union must comply with the requirements imposed by Part 761 of the NCUA Rules and Regulations.

This 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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7 TAC §91.708

The Credit Union Commission (the Commission) proposes amendments to §91.708, concerning real estate appraisals or evaluations. The amendments substitute the phrase "amount of the loan or extension of credit" for the phrase "transaction value" for better accuracy, clarify when the commissioner may require an appraisal, allow a credit union to substitute a certification of value in certain renewal instances, and make other editing changes for clarity.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.708. Real Estate Appraisals or Evaluations.

(a) Policies and Procedures. A credit union's board of directors is responsible for reviewing and adopting policies and procedures that establish and maintain an effective, independent real estate appraisal and evaluation program. A credit union's selection criteria for individuals who may perform appraisals or evaluations must provide for the independence of the individual performing the evaluation. That is, the individual has neither a direct nor indirect interest, financial or otherwise, in the property or transaction. The individual selected must also be competent to perform the assignment based upon the individual's qualifications, experience, and educational background. An individual may be an employee of a credit union if the individual qualifies under the conditions and requirements contained in Part 722 of the National Credit Union Administration Rules and Regulations.

(b) Loans Over $250,000. For real estate loans in which the amount of the loan or extension of credit [~~transaction value~~] exceeds $250,000, the credit union shall obtain a professional appraisal report by a state certified or licensed appraiser. The appraisal report shall be in writing and conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation, in Washington, D.C.

(c) Loans $250,000 or Less. For a real estate loans with an amount of the loan or extension of credit [~~a transaction value~~] of $250,000 or less, the services of a state certified or licensed appraiser is not necessary; however, the credit union must obtain an appropriate evaluation of real property collateral that is [~~shall be~~] supported by a written estimate of market value either performed by a qualified individual who has demonstrated competency in performing evaluations or from tax appraisal data of a governmental entity.

(d) Right to Require an Appraisal. The commissioner may require an appraisal under this section [~~Reappraisals may be required by the commissioner on real estate or other property or interests therein securing loans~~], at the expense of the credit union, when the commissioner has reasonable cause to believe the value of the collateral [~~security~~] is overstated.

(e) Existing Loans. In the case of renewal of a loan where there has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the credit union's real estate collateral protection after the transaction, even with the advancement of additional funds [~~are advanced by the credit union~~], a written certification of current value by the original appraiser or an acceptable substitute shall satisfy this section.

(f) Other Appraisal Requirements. A [~~As applicable, a~~] credit union shall also comply with applicable [~~the~~] real estate appraisal requirements contained within Part 722 of the National Credit Union Administration Rules and Regulations.

This 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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7 TAC §91.710

The Credit Union Commission (the Commission) proposes amendments to §91.710, concerning overdraft protection. The amendments provide that the credit union comply with the overdraft service requirements of the Federal Reserve System and make non-substantive editing changes for clarity.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there

will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.710. Overdraft Protection.

(a) Written Policy [~~policy~~]. A credit union may advance money to a member to cover an account deficit without having a credit application from the borrower on file if the credit union has written policies and procedures adequate to address the credit, operational, and other risks associated with this type of program. The policy must:

(1) Set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union's ability to absorb losses;

(2) Establish a time limit no later than 60 calendar days from the date first overdrawn to charge off the overdraft balance if the [~~for a~~] member does not [~~to~~] repay the overdraft balance, or does not obtain an approved loan from the credit union[~~, otherwise the overdraft balance should be charged off~~];

(3) Limit the dollar amount of overdrafts the credit union will honor per account;

(4) Institute prudent practices related to suspension of overdraft protection services; and

(5) Establish the fee, if any, the credit union will charge members for honoring overdrafts.

(b) Safety and Soundness Requirements. A credit union must manage the risks associated with an overdraft protection program in accordance with safe and sound credit union principles. Accordingly, a credit union must establish and maintain effective risk management and control processes over its program. Such processes include appropriate recognition, treatment, and financial reporting, in accordance with generally accepted accounting principles, of income, expenses, assets, liabilities, and all expected and unexpected losses associated with the program. A credit union also shall assess the adequacy of its internal control and risk mitigation activities in view of the nature and scope of its overdraft protection program.

(c) Communications with Member. A credit union shall carefully review its overdraft protection program to ensure that marketing and other communications concerning the program do not mislead members to believe that the program is a traditional line of credit or that payment of overdrafts is guaranteed. In addition, a credit union shall take reasonable precautions to make sure members are not misled about the correct amount of their account balance, or the costs or scope of the overdraft protection offered, and that it does not encourage irresponsible member financial behavior that potentially may increase risk to the credit union.

(d) Other Requirements. A credit union shall also comply with the overdraft service requirements contained within Part 205 of the Federal Reserve System Rules and Regulations (Regulation E).

This 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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7 TAC §91.711

The Credit Union Commission (the Commission) proposes amendments to §91.711, concerning loan participations. The amendments rename the rule "Purchase and Sale of Member Loans" and rework subsection (b) of the rule to clarify terminology and requirements for written policies. The amendments also specify that purchase and sale agreements be in writing with minimum terms and define the term "member loan." Finally, the amendments also formalize the requirement that the credit union exercise independent judgment before purchasing a participation interest, incorporate the requirements of Part 741 of National Credit Union Administration's rules for some participation interests, and define sales with recourse.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.711. Purchase and Sale of Member Loans [~~Loan Participations~~].

(a) Policies. A credit union may sell or purchase all or part of a participation interest in a member loan or pool of member loans in accordance with [~~participations in any type of loan it is authorized to make from other credit unions, credit union organizations, corporations or other financial organizations pursuant to~~] written policies adopted [~~established~~] by the board of directors that address the following matters [~~. Such policies shall~~]:

(1) The type of entities to which the credit union is authorized to sell participation interests in member loans;

(2) The types of member loans in which the credit union may purchase or sell a participation interest and the types of participation interests which may be purchased or sold;

(3) The underwriting standards to be applied in the purchase of participation interests in member loans;

(4) Limitations on the aggregate principal amount of participation interest in member loans that the credit union may purchase from a single entity as necessary to diversify risk, and limitations on the aggregate amount the credit union may purchase from all entities;

(5) Provision for the identification and reporting of member loans in which participation interests are sold or purchased; and

(6) Requirements for providing and securing in a timely manner adequate credit and other information needed to make an independent judgment.

[~~(1) Establish the standards for review;~~]

[~~(2) Set up the aggregate limits on the amount of loans participations purchased from any single outside source; and~~]

[~~(3) Require that all participations meet the underwriting, documentation, and compliance standards applied to loans of that type originated by the credit union. The credit union may also rely on the stated written underwriting standards of the originating lender, provided it performs a due diligence review of the loan(s) that, at a minimum, confirms compliance with this subsection.~~]

(b) Purchase and Sale Agreements. The sale or purchase of a member loan or participation interest must be based on a written agreement between the parties. Agreements to purchase or sell a member loan or a participation interest shall, at a minimum:

(1) Identify the particular member loan(s) to be covered by the agreement;

(2) Provide for the transfer of credit and other borrower information on a timely and continuing basis;

(3) Provide for sharing, dividing, or assigning collateral;

(4) Identify the nature of the participation interest(s) sold or purchased;

(5) Set forth the rights and obligations of the parties and the terms and conditions of the sale; and

(6) Contain any terms necessary for the appropriate administration of the member loan and the protection of the participation interests of the credit union.

[~~(b) For regulatory purposes, a credit union shall segregate and treat the purchase of a loan participation as an investment in accordance with Section 91.805 of this title (relating to Loan Participation Investments), unless the participation is in a loan of a type that the credit union is authorized to make and the borrower is a member of the credit union or a member of another participating credit union.~~]

(c) Member Loan Servicing. A credit union may sell to or purchase from any participant the servicing of any member loan in which it owns a participation interest. If a party other than the credit union will be servicing the member loan(s), the credit union shall ensure that all contracts require the servicer to administer the member loan(s) in accordance with prudent industry standards, and provide for a possible change of the servicer if performance is inadequate.

(d) Definition. For purposes of this section, a member loan means a loan or extension of credit where the borrower(s) is a member of the credit union or a member of another participating credit union.

(e) Independent Credit Judgment. A credit union that purchases a participation interest in a member loan has the responsibility of conducting member loan underwriting procedures on the member loan to determine that it complies with the policies of the credit union and meets the credit union's credit standards. The credit union shall make a judgment on the creditworthiness of the borrower that is independent of the originating lender and any intermediary seller prior to the purchase of the participation interest and prior to any servicing action that alters the terms of the original agreement. This credit judgment may not be delegated to any person that is not an employee or independent agent of the credit union. A credit union that purchases a participation interest in a member loan may use information, such as appraisals or collateral inspections, furnished by the originating lender, or any intermediary seller; however, the purchasing credit union shall independently evaluate such information when exercising its independent credit judgment. The independent credit judgment shall be documented by a credit analysis that considers the underwriting, documentation, and compliance standards that would be required by a prudent lender and shall include an evaluation of the capacity and reliability of the servicer.

(f) Other Requirements. A credit union purchasing a participation interest in a member loan from a lender that is not a credit union insured by the National Credit Union Share Insurance Fund, must also comply with applicable requirements contained within Part 741 of the National Credit Union Administration Rules and Regulations.

(g) Sales with Recourse. When a member loan or participation interest is sold with recourse, it shall be considered, to the extent of the recourse, an extension of credit by the purchaser to the seller, as well as an extension of credit from the seller to the borrower(s).

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

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Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 837-9236

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7 TAC §91.713

The Credit Union Commission (the Commission) proposes amendments to §91.713, concerning indirect financing of motor vehicles or other chattels. The amendments rename the rule "Indirect Lending," add a requirement that the credit union periodically review statistics for compliance and concentration risk, and edit the rule for clarity.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.713. Indirect Lending [~~Financing of Motor Vehicles or Other Chattels~~].

(a) Indirect Lending [~~Financing~~] Program. Credit unions may implement a program of indirect financing of motor vehicles and other tangible personal property. As used in this chapter, an indirect financing is the credit union's purchase [~~by a credit union~~] of a member's retail installment contract [~~of a member~~] that is originated by a seller to finance the purchase of the motor vehicle or other property.

(b) Contracts Treated as a Loan. For the purposes of this chapter, a retail installment contract purchased under this authority may be treated as a loan on the books and records of the credit union and is subject to the same limitations and restrictions imposed upon loan transactions. As with other lending, the credit union is responsible for making the final underwriting decision. The seller may initially determine whether the prospective buyer is a member or eligible for membership in the credit union, but the final determination of membership eligibility is the credit union's responsibility [~~of the credit union~~].

(c) Authorization. Credit unions may purchase or [~~otherwise~~] hold retail installment contracts when authorized by applicable law. The retail installment contract must provide for a rate or amount of time price differential that does not exceed a rate or amount authorized by applicable law.

(d) Written Policies. The board of directors shall establish, implement, and maintain prudent and reasonable written policies that are appropriate for the size and complexity of the credit union's indirect lending program. The board must also ensure that the credit union has sufficient staff with the expertise to purchase, service, and monitor the program and the contract portfolio consistent with safe and sound credit union practices. The policies must be specific and detailed enough to foster prudent and compliant credit practices.

(e) Third Party Providers. A credit union may rely on services provided by third parties to support its indirect lending activities. The board of directors must ensure that the credit union exercises appropriate due diligence before entering into third party arrangements, and maintains effective oversight and control throughout the arrangement. This oversight and control should include a periodic review of each material seller's retail installment contract statistics to ensure compliance with credit union credit criteria and to avoid undue concentrations of risk.

(f) Subprime Indirect Lending. If a credit union conducts a program that includes subprime indirect lending, it must perform comprehensive due diligence before engaging in and during that type of activity. At a minimum, due diligence shall focus on understanding the higher levels of credit, compliance, reputation, and other risks involved, plus the likelihood that origination, servicing, collections, operating, and capital costs will increase. The strategic decision to engage in subprime indirect lending must also be supported by a sound business plan that establishes measurable financial objectives as well as limitations on growth, volume, and concentrations. For the purposes of this section, "subprime indirect lending" refers to programs that target borrowers with weakened credit histories typically characterized by payment delinquencies, previous charge-offs, judgments, or bankruptcies. Such programs may also target borrowers with questionable repayment capacity evidenced by low credit scores or high debt-burden ratios.

This 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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Harold E. Feeney
Commissioner
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For further information, please call: (512) 837-9236

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7 TAC §91.719

The Credit Union Commission (the Commission) proposes amendments to §91.719, concerning loans to officials and senior management employees. The amendments add titles to subsections for clarity, reduce the frequency of reports to the board, and add a requirement that the board of directors' review of these loans be made a part of the minutes.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance

Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.719. Loans to Officials and Senior Management Employees.

(a) Prohibition on Preferential Rates, Terms, and Conditions. The rates, terms, conditions, and availability of any loan or other extension of credit made to, or endorsed or guaranteed by, a director, senior management employee, member of the credit committee, or an immediate family member of any such individual shall not be more favorable than the rates, terms, conditions, and availability of comparable loans or credit to other credit union members.

(b) Approval of Governing Board. Before making a loan, extending credit, or becoming contractually liable to make a loan or extend credit to a director, senior management employee, member of the credit committee, or an immediate family member of such individual, the board of directors must approve the transaction if the loan or the extension of credit or aggregate of outstanding loans and extensions of credit to any one person, the person's business interests, and the members of the person's immediate family is greater than 15% of the credit union's net worth. A loan fully secured by shares in the credit union or deposits in other financial institutions shall not be subject to, or included in, the aggregate amounts included in this section.

(c) Definition. For purposes of this section, senior management employees shall include the chief executive officer, any assistant chief executive officers (e.g. vice presidents and above), and the chief financial officer; and immediate family members shall include a person's spouse or any other person living in the same household.

(d) Aggregate Limit on Insider Loans. The aggregate of all outstanding loans or extensions of credit made to, or endorsed or guaranteed by, all directors, credit committee members, senior management employees, and immediate family members of all such individuals, shall not exceed 20% of the credit union's total assets. The requirements described in this subsection shall apply unless waived in writing by the commissioner for good cause shown.

(e) Reports to Governing Board. At least annually [~~semiannually~~], the president shall make a report to the board of directors on the outstanding indebtedness of all directors, credit committee members, senior management employees, and immediate family members of such individuals. The Board's review shall be included as part of the minutes of the meeting at which the report was presented. [~~Each report must ordinarily be retained at the credit union for a period of three years and shall not be filed with the Department unless specifically requested.~~] The report required by this section shall include the following information:

(1) The amount of each indebtedness; and

(2) A description of the terms and conditions (including the interest rate, the original amount and date, maturity date, payment terms, security, if any, and any other unusual term or condition) of each extension of credit.

(f) Governing Board Option. At the discretion of the Board, the reporting requirement of subsection (e) of this section may be waived for any individual if the aggregate amount of all outstanding loans and extensions of credit to that person, the person's business interests, and the members of the person's immediate family do not exceed the greater of $25,000 or one-quarter of one percent (.25%) of the credit union's net worth.

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

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CHAPTER 97. COMMISSION POLICIES AND ADMINISTRATIVE RULES
SUBCHAPTER B. FEES

7 TAC §97.115

The Credit Union Commission (Commission) proposes new §97.115, concerning reimbursement of expenses for legal services. The proposed new rule permits the commissioner to recover the Credit Union Department's (the Department) legal costs that result from the actions or inactions of a specific credit union. The rule excludes costs from proceedings where the credit union's legal rights, duties, or privileges are being determined by the Department. The rule also excludes costs from proceedings where the individual credit union's legal rights, duties, or privileges are being determined as against the Department.

The new rule is proposed to more fairly allocate the cost of operating the Department among credit unions.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed new 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. Loar has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the rule. There is no economic cost anticipated to the credit union system or individuals for complying with the rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The new rule is proposed under Texas Finance Code, §15.402, which authorizes the Commission to establish reasonable and necessary fees for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §16.003, which permits the Department to set the amount of fees, penalties, charges and revenues required to carry out its functions.

The specific sections affected by the proposed new rule are Texas Finance Code, §15.402 and §16.003.

§97.115. Reimbursement of Expenses for Legal Services.

(a) The commissioner may seek direct reimbursement of expenses, from an individual credit union for legal assistance incurred

solely and necessarily as a consequence of the actions or inactions of that credit union. To ensure that the rights and interest of all parties are protected, this section shall not apply to any adjudicative proceedings in which the legal rights, duties, or privileges of the credit union are being determined by the Department after an opportunity for hearing. This section also does not apply to court proceedings wherein the individual credit union's legal rights, duties, or privileges are being determined as against the Department.

(b) Unless the credit union appeals the charges, the full amount is due when the credit union receives the assessment from the Department.

(c) If a credit union files a written notice of appeal, the Commission shall hear the appeal at its next regularly scheduled meeting. The Commission may take any action it considers to be fair and reasonable.

(d) When possible, the Department will notify a credit union before the Department requests legal assistance which may be charged to a credit union under this section.

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

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7 TAC §97.116

The Credit Union Commission (Commission) proposes new §97.116, concerning recovery of cost for extraordinary services. The proposed new rule requires a credit union to reimburse the Credit Union Department (the Department) for expenses incurred if the credit union requires more than its proportionate share of Department resources.

The new rule is proposed to more fairly allocate the cost of operating the Department among credit unions.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed new 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. Loar has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the rule. There is no economic cost anticipated to the credit union system or individuals for complying with the rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The new rule is proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §16.003, which permits the Department to set the amount of fees, penalties, charges and revenues required to carry out its functions.

The specific sections affected by the proposed new rule are Texas Finance Code, §15.402 and §16.003.

§97.116. Recovery of Cost for Extraordinary Services.

(a) In order to mitigate the financial stress placed on credit unions to fund the Department's operations, the commissioner may seek direct reimbursement for the time and actual expenses incurred by the Department, which are unique and directly attributable to an individual credit union. Expenses include personnel costs, transportation costs, meals, lodging, and other incidental expenses.

(b) In the event the commissioner determines that the nature of a service is unusual and recovery of costs associated with the extraordinary service is appropriate, the Department shall provide advance notice to the credit union of its intention to recover expenses. Unless the credit union appeals the determination, the full amount is due when the credit union receives the bill from the Department.

(c) In seeking reimbursement, the commissioner shall consider the amount of the costs involved, the nature of the service, the impact of the activity on other Department services, and other factors deemed appropriate. The commissioner may reduce the charges and bill the credit union less than the full amount of expenses associated with the service.

(d) If a credit union files a notice of appeal, the Commission shall hear the appeal at its next regularly scheduled meeting. The Commission may take any action it considers to be fair and reasonable.

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

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 61. COMBATIVE SPORTS

16 TAC §§61.1, 61.10, 61.20 - 61.23, 61.30, 61.40 - 61.42, 61.44, 61.47, 61.80, 61.105, 61.106

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at 16 Texas Administrative Code ("TAC") §§61.1, 61.10, 61.20 - 61.23, 61.30, 61.40 - 61.42, 61.44, 61.47, 61.80, 61.105 and 61.106 regarding the combative sports program.

These proposed rule changes are necessary to make appropriate clarifications in the rules for combative sports and to ensure the safety of combative sports contestants. The proposed rule changes were recommended by the Medical Advisory Commit-

tee at its meeting on October 30, 2009, and at its meeting on April 30, 2010.

The Department proposes to amend §61.1 to change the reference from the rules to the chapter as well as remove the phrase "Combative Sports" and "Texas Department of Licensing and Regulation" to maintain consistency and uniformity of the text of the Authority section of all Department rule chapters.

The Department proposes to amend §61.10 to include a new definition of "Badge" which is a department-issued credential provided to ringside officials who officiate at a combative sports event. Also included is a new definition of "Federal Identification Card" which is a nationally recognized identification card required to compete in a combative sports event. The remaining definitions are renumbered appropriately.

The Department proposes to amend §61.20(a) to clarify the current rules which require referees and ringside physicians who officiate at regulated amateur events to be licensed or registered by the executive director.

The Department proposes to amend §61.21(a)(2) to conform with the Department's criminal conviction licensing standards which prohibit an applicant from having convictions for an offense directly relating to the duties and responsibilities of a referee.

Proposed amendments to §61.21(a)(3)(B)(ii) would allow a referee to qualify for a Texas license when currently licensed and in good standing in another state whose licensing requirements are equivalent to those of Texas.

Proposed new §61.21(b) would allow the executive director to waive licensing requirements for any applicant who is licensed and in good standing with any department-approved sanctioning body such as the World Boxing Council or the World Boxing Association.

There are currently three classes of endorsements that show the class of bouts at which a referee may officiate. The proposed amendments to §61.21(c)(2) combine mixed martial arts and kickboxing into the same category of endorsement in order to simplify the endorsement process.

The Department proposes to amend §61.22(a)(2) to conform with the Department's criminal conviction licensing standards which prohibit an applicant from having convictions for an offense that directly relates to the duties and responsibilities of a judge.

Proposed amendment §61.22(a)(3)(B)(ii) would allow a judge to qualify for a Texas license when currently licensed and in good standing in another state whose licensing requirements are equivalent to those of Texas.

Proposed new §61.22(b) would allow the executive director to waive licensing requirements for any applicant who is licensed and in good standing with any department-approved sanctioning body such as the World Boxing Council or the World Boxing Association.

The Department proposes to amend §61.22(c) to allow judges applying for a license or license renewal to provide the Department with the results of a visual acuity test that has been performed within three years instead of one year, as is currently required. Because few states require ophthalmologic exams for judges, at times, judges who reside out-of-state and who are contracted to work events in Texas, are not able to do so because they have not had an eye exam within the last year. This amendment is proposed to make it less burdensome for judges from out-of-state to officiate at events in Texas.

The Department proposes to amend §61.23(c) to specify that a medical examination submitted by a fighter 36 years or older must have been performed within the previous twelve months to ensure that medical evaluations are made based upon the fighter's current medical condition.

The Department proposes new §61.23(f) to prohibit a promoter from lending his or her license to another person to promote an event. Proposed new §61.23(g) provides clarification that a promoter may work with another promoter as long as both persons are licensed.

Section 61.30 is amended at its title to change "Department" to "Executive Director" to more accurately reflect the content of the section. The Department also proposes to amend §61.30(b), (c), (f), (g)(1), (h) - (l), and (o) - (q) to add the phrase "or his designee" after the term "executive director". The proposed amendments are added to provide clarification that the executive director may designate an individual to act on his behalf in regulating combative sports events and to conform with §61.30(a) which provides that the executive director, or his designee, has complete authority over all phases of an event.

The number of knockouts, suspensions and whether or not a fighter has the physical or mental ability to defend him or herself are critical health and safety concerns to look at when determining an athlete's suitability for licensure. For this reason, the Department proposes new §61.30(d)(1) - (10) to include specific indicators that the executive director may use to evaluate a fighter's overall physical condition.

The Department proposes new §61.30(g)(2)(A) - (C) to include procedures for issuing badges to ring officials working an assigned event. Because the technical zone must be kept clear so that injured fighters get unimpeded medical care and so that ringside officials are not hindered in the performance of their duties, the proposed rule will ensure that only ringside officials authorized to work the specific event will be in the technical zone.

Proposed new §61.30(g)(6) provides that a ring official who uses his or her badge to gain entrance to an unassigned event may be removed from the rotation list.

Existing regulation permits changing a rendered decision only when the compilation of a score card shows an error that would mean the decision was given to the wrong contestant. The Department proposes new §61.30(n)(1)(A) - (C) and (n)(2) to allow the executive director to also change a rendered decision when there was a violation of the rules and regulations which affected the results of a bout or when the winner of a bout tests positive for prohibited substances.

The Department proposes to amend §61.40(a)(1)(A) to increase the surety bond requirement for promoters from $10,000 to $15,000 for guaranteeing payment of all obligations. This rule amendment is proposed to ensure that participants in a combative sports event will be compensated for their services when the promoter fails to bear financial all responsibility for the event. The Department has determined that of the claims made on surety bonds in the last several years, the $10,000 amount was not sufficient for payment of all claims. Increasing the bond amount will provide greater coverage for future claims.

The Department proposes to amend §61.40(b)(3) to add the term "boxing" before registry and to include the national registry for Mixed Martial Arts ("MMA") contestants. These amendments

are proposed to distinguish the national boxing registry from the national mixed martial arts registry and to require promoters to provide current results for MMA contestants from the MMA national registry.

The Department proposes new §61.40(b)(8) to require that the promoter designate a seating area near the technical zone for ring officials and other individuals assigned to work the event to ensure that all personnel have seating during bouts at which they are not officiating.

The Department proposes to add §61.40(b)(15) to require that a promoter schedule a minimum of six bouts for each MMA event and a maximum of 15 bouts. The remaining paragraphs are renumbered appropriately.

The Department proposes to amend §61.40(b)(16)(A) to change the term cameramen to camera operators and to add the phrase "or his designee" after the term "Executive Director".

The Department proposes to amend §61.40(b)(16)(B) to add the phrase "or his designee" after the term "Executive Director".

The Department proposes to amend §61.40(b)(16)(C) to include the terms neck brace, defibrillator, backboard, and portable suction to the portable medical equipment required to be on site for all contests. These items are currently being provided on site for all contests and this amendment reflects current emergency medical technical practices. The Department also proposes to add the phrase "or his designee" after the term "Executive Director".

The Department proposes new §61.40(b)(17) to require the promoter to pay by check or money order the licensing fees of seconds, managers or ringside physicians who are not licensed at the time of the weigh-in. This expands the current requirement the promoter has to pay the licensing fees of contestants.

The Department proposes to amend §61.40(d)(4) to change the term "sworn inventory" to "verified report" to conform to the statutory language of Texas Occupations Code §2052.152. The Department proposes an additional requirement that the report be on a department-approved form to conform to agency reporting standards.

The Department proposes to amend §61.40(d)(7) to change boxing event to combative sport event to include mixed martial arts. The proposed amendment to §61.40(d)(11) includes the phrase "or his designee" after the term "Executive Director".

The Department proposes to amend §61.40(d)(8) to include the term "deadwood" to the type of tickets the promoter is required to hold in order to conform with current industry practices.

The Department proposes new §61.40(d)(9) to specify that complimentary tickets issued in excess of twenty-five percent will be subject to the gross receipts tax.

Proposed new §61.40(d)(10) amends the method of calculating gross receipts.

Proposed new §61.40(f) clarifies the time frame in which a departmental audit will be conducted.

The Department proposes to amend §61.41(d) to clarify that the safety of the contestants "shall" be the primary concern of the referee rather than "should" be the concern of the referee to more accurately reflect the referee's responsibilities.

The Department proposes to amend §61.42(g) to clarify that judges "shall" maintain focus during the bout rather than "will" in order to more accurately reflect the judges responsibilities.

The Department proposes to amend §61.44(c) to require that the manager "or his designee" attend the referee's rules meeting prior to the first contest of an event. This amendment is proposed to address circumstances when a manager with contestants in different locations is unable to be present at both rule meetings.

The proposed amendment to §61.47(a) and new paragraphs (1) - (4) extends the age of medical examinations that a contestant must submit from thirty days to one year and ophthalmologic examinations from thirty days to six months in order to reduce the financial costs associated with medical testing.

The Department proposed amendment to §61.47(o) and new subsections (p) - (q) prohibits the use of any drugs, alcohol, stimulants or injections before or during a bout, to require an applicant or licensee to provide a urine sample at the executive director's direction and to codify a list of prohibited substances that would be conclusive evidence of a violation. The drugs proposed for inclusion in §61.47(q) are those covered by the World Anti-Doping Agency 2010 Prohibited List.

The Department, after conducting an annual fee review pursuant to Texas Occupations Code §51.202 and determining that there is sufficient revenue to cover costs of the combative sports program, proposes to amend §61.80 to reduce the licensing fees for managers, seconds, matchmakers, referees, judges and timekeepers.

The Department proposes to amend §61.105(b) to change "physicians scales" to "a department-approved scale" to also allow for the use of digital scales.

The Department proposes new §61.106(f) to include guidelines for proper hand bandaging which is regarded as an important factor in maintaining fighters' hands from being damaged. The proposed change conforms to the hand bandage requirements established by the Association of Boxing Commissions and is the current national standard.

In addition to the changes identified above, the Department has made a few grammatical and technical corrections to the rules as proposed which include changing the terms "Commission", "Department," and "Executive Director" to lower case to match the use of the terms in the statute and changing the term "contest" to "bout" to more accurately reflect the terminology of the industry.

William H. Kuntz, Jr., Executive Director has determined that, for the first five-year period the proposed amendments are in effect there will be a fiscal impact to state or local government as a result of changing the calculation of gross receipts to exempt twenty-five percent of complimentary tickets issued. Many states that host large combative sports events exempt a percentage of complimentary tickets from the calculation of gross receipts. In addition, local governments will benefit from the increased revenue generated by local hotel and motel taxes. The proposed amendment will allow the state of Texas to effectively compete with other states for televised major combative sports events that will provide significant revenue to the state's general revenue fund and offset reductions in gross receipts revenues.

Mr. Kuntz also has determined that, for each year of the first five-year period the amendments are in effect, the public will benefit from the proposed amendments to the rules as local communities hosting major combative sports events will benefit from the

increased revenue generated by hotel and motel taxes. In addition, the proposed rules will provide greater clarity and, therefore, certainty in the administration of the combative sports program.

There will be an economic effect on small or micro-businesses or to persons who are required to comply with the rules as proposed. There are approximately 55 combative sports promoters who are currently licensed with the Department all of whom would be considered micro-businesses under Texas Government Code, Chapter 2006. The anticipated economic effect on the promoters, who are required to comply with §61.40(a)(1)(A) would be the cost of underwriting a surety bond for an additional $5,000. On average, a $10,000 surety bond costs between $250 and $300 for a promoter with a good credit rating and it is anticipated that the cost of the additional coverage would increase the cost of the bond by approximately fifty percent. This would increase a promoter's cost to purchase a bond by approximately $125 to $150. Costs to promoters with substandard credit would also increase by approximately fifty percent however the amount of the increase could vary widely because of the many subjective factors bond underwriters use in setting bond costs.

While the increase in surety bonds will have an economic impact on promoters, the Executive Director is authorized to establish the amount of the surety bond under Texas Occupations Code, Chapters 51 and 2052 and the increase is necessary to ensure that contestants and other combative sports participants are compensated for their services when a promoter fails to pay.

Under Texas Government Code, Chapter 2006, the Department is required to consider alternative regulatory methods if they would be consistent with the health, safety, and environmental and economic welfare of the state. The Department has determined that there is not an alternative method to achieving the purpose of the proposed rule. Surety bonds are required to ensure that combative sports participants are compensated for their labor when a promoter fails to be responsible for the costs associated with a combative sport event. While the surety bond is necessary to protect participants, the Department has taken steps to minimize the adverse economic impact on promoters. The proposed surety bond increase has been set to be commensurate with, and not in excess of, the surety bond amount required for gross receipts taxes.

Comments on the proposal may be submitted to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, Chapters 51 and 2052, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 2052. No other statutes, articles, or codes are affected by the proposal.

§61.1. Authority.

This chapter is [~~These rules are~~] promulgated under the authority of [~~the~~] Texas Occupations Code, Chapter 2052[~~, "Combative Sports"~~] and [~~the~~] Texas Occupations Code, Chapter 51[~~, "Texas Department of Licensing and Regulation"~~].

§61.10. Definitions.

The following words and terms have the following meanings:

(1) Badge--A department-issued credential provided to timekeepers, judges, referees and ringside physicians who officiate at combative sports events.

(2) [~~(1)~~] Chief second--The second designated by the contestant as the primary advisor or assistant to the contestant.

(3) [~~(2)~~] Code--The Texas Occupations Code, Chapter 2052, "Combative Sports".

(4) [~~(3)~~] Contestant--Any participant, including a professional combative sports contestant, who competes in a combative sport event regulated by the Code.

(5) [~~(4)~~] Deadwood--The numerical difference between tickets printed and tickets used.

(6) Federal Identification Card--A nationally recognized identification card issued by the National Boxing Registry or the National Mixed Martial Arts Registry required for competition in a combative sport event.

(7) Full Contact--Contact made while intentionally striking a blow with any part of the body to an opponent when the contact has the potential to temporarily disable or to injure an opponent.

(8) [~~(5)~~] Knock-down--A knock-down occurs when any part of a contestant's body, other than his feet, contacts the floor of the ring or fighting area as a result of a blow struck to the contestant by an opponent.

(9) [~~(6)~~] License or Registration--A document issued by the executive director [~~Executive Director~~] permitting a person to participate at an event or perform a function regulated by the Code.

(10) [~~(7)~~] Manager--A person who, under contract, agreement, or other arrangement with a contestant undertakes to directly or indirectly, control, or administer a professional combative sports contestant's affairs.

(11) [~~(8)~~] Matchmaker--One who arranges matches for professional combative sports contestants.

(12) [~~(9)~~] Person--Any natural person, corporation, partnership, association or other similar entity.

(13) [~~(10)~~] Purse--The financial guarantee or any other remuneration promised to contestants for participating in an event and includes guarantees for cable pay per view, radio, television or motion picture rights.

(14) [~~(11)~~] Ring Officials--Referees, judges, ringside physicians and timekeepers.

(15) [~~(12)~~] Ringside Physician--An individual licensed to practice medicine by the Texas Medical Board [~~Texas State Board of Medical Examiners~~], and registered with the department [~~Department~~].

(16) [~~(13)~~] Second--A person who provides assistance or advice to a contestant during a contest.

(17) [~~(14)~~] Technical Zone--A restricted access alcoholic beverage free area located between the ringside and a department-approved [~~department approved~~] barrier.

(18) [~~(15)~~] Timekeeper--A person who is the official timer of the length of rounds/heats and the intervals between rounds/heats and counts when a contestant is down.

[(16) Full Contact--Contact made while intentionally striking a blow with any part of the body to an opponent when the contact has the potential to temporarily disable or to injure an opponent.]

§61.20. General Licensing Requirements.

(a) Professional combative sports contestants, promoters, referees, judges, seconds, matchmakers, managers, timekeepers, ringside physicians, and event coordinators who officiate or participate in a regulated professional event[, other than a regulated amateur event,] authorized by the Code must be licensed or registered by the executive director. Referees and ringside physicians who officiate at regulated amateur events must also be licensed or registered by the executive director [Executive Director].

(b) Amateur combative sports associations must be registered by the executive director [Executive Director].

(c) If a licensee or registrant, other than a contestant or a second, changes his address of record, the licensee or registrant shall inform the executive director [Executive Director] in writing of the change within 30 days of the change.

(d) Each applicant must submit a completed application or renewal form and the appropriate fees.

(e) All licensing requirements for contestants should be completed at least 72 hours before an event [a contest].

§61.21. Licensing Requirements--Referees.

(a) To qualify for a new license as a referee, an applicant must:

(1) be at least 21 years of age;

(2) provide information sufficient for the department to verify that the applicant has not been convicted of an offense that directly relates to the duties and responsibilities of a referee [not have been convicted of a felony];

(3) demonstrate the ability to perform the functions of a referee by:

(A) having completed a training program provided by, or approved by the executive director [Executive Director], that consists of classroom training and an internship program; or,

(B) meeting one or more of the following:[:]

(i) having at least three years active experience as a referee in the combative sport in which he seeks endorsement by having officiated in at least ten combative sporting events per year;

(ii) being currently licensed and in good standing as a referee in a state that the executive director [Executive Director] has determined has licensing requirements that are equivalent to Texas' requirements; or

(iii) having formerly held a Texas referee's license that lapsed in good standing.

(b) These requirements may be waived by the executive director for any applicant who is licensed and in good standing as a referee with any department-approved sanctioning body such as the World Boxing Council, World Boxing Association, International Boxing Federation, or World Boxing Organization.

(c) [(b)] Referee licenses will be endorsed showing each class of bouts in which they may officiate with one or more of the following legends:

(1) B (Boxing); and

(2) M (Mixed martial arts and Kickboxing). [K (Kick-boxing); and]

[(3) M (Mixed martial arts).]

(d) [(c)] An endorsement may be obtained by completion of classroom training and an internship program provided or approved by the executive director [Executive Director] for that class of endorsement.

(e) [(d)] Persons renewing licenses, or obtaining new licenses on the basis of holding a license from another state or formerly having held a Texas license, may obtain one or more endorsements by providing proof acceptable to the executive director [Executive Director] of previous experience refereeing contests in the class of endorsement(s) sought.

(f) [(e)] Referees must have an endorsement for a class in order to referee events in that class.

§61.22. Licensing Requirements--Judges.

(a) To qualify for a new license as a judge, an applicant must:

(1) be at least 21 years of age;

(2) provide information sufficient for the department to verify that the applicant has not been convicted of an offense that directly relates to the duties and responsibilities of a judge; [not have been convicted of a felony; and,]

(3) demonstrate the ability to perform the functions of a judge by:

(A) having observed and completed score cards for all contests in at least five events while under the supervision of the department [Department] and scoring the contests in keeping with standards established by the executive director [Executive Director]; or,

(B) meeting one or more of the following:

(i) having at least three years active experience as a judge and/or referee by having officiated in at least ten combative sporting events per year;

(ii) being currently licensed and in good standing as a judge in a state that the executive director [Executive Director] has determined has licensing requirements that are equivalent to Texas' requirements; or

(iii) having formerly held a Texas judge's license that lapsed in good standing.

(b) These requirements may be waived by the executive director for any applicant who is licensed and in good standing as a judge with any department-approved sanctioning body such as the World Boxing Council, World Boxing Association, International Boxing Federation, or World Boxing Organization.

(c) [(b)] To obtain or renew a license, a judge must provide test results showing visual acuity in each eye of at least 20/40 corrected. The test must have been performed by a licensed Optometrist or licensed Ophthalmologist no more than three years [one year] before the application for licensure or license renewal is filed.

§61.23. General Prohibitions.

(a) Judges, Timekeepers, Matchmakers, Referees and Ringside Physicians may not have a direct or indirect financial interest in any contestant.

(b) Contestants and ring officials licensed under the Code may not participate in an illegal event.

(c) Persons under the age of 17 will not be issued a license. Minors age 17 but not yet 18 may be issued a contestant's license with a notarized written consent from a parent or guardian. A person age

36 or older applying for a contestant's license shall also submit a report of favorable physical testing conducted within the previous twelve months including but not limited to an EEG (electroencephalography), and an EKG (electrocardiogram). The applicant may request an administrative hearing if the executive director [~~Executive Director~~] determines the physical testing results are not favorable in any way and fails to issue a license for that reason.

(d) A matchmaker may not act as, and may not be licensed as; a contestant, ring official or second.

(e) A promoter may not act as, and may not be licensed as; a referee, timekeeper, or judge. A promoter may be licensed as a manager and as a second. A promoter may be licensed as a contestant unless prohibited by Federal law.

(f) A promoter shall not permit his promoter's license to be used by another person.

(g) Licensed promoters may engage in promotions with other licensed promoters so long as each promoter holds a valid unexpired license.

(h) [~~(f)~~] No person shall be allowed to participate in an event [~~a contest~~] performing a function for which a license is required, unless the person has proof of identification and a current license. Acceptable proof of identification includes driver's licenses, passport, state issued identification cards, federal identification [~~boxing~~] cards, or any other identification required by the executive director [~~Executive Director~~].

(i) [~~(g)~~] A contestant [~~Contestant~~] may not act as, and may not be licensed as a judge [~~Judge~~].

(j) [~~(h)~~] A person [~~Person~~] who is an officer or director of a Ranking Organization may not act as, and may not be licensed as a judge [~~Judge~~].

§61.30. Responsibilities and Authority of the Executive Director [~~Department~~].

(a) The executive director [~~Executive Director~~], or his designee, has complete authority over all phases of an event, including, but not limited to the weigh-in, matching of contestants, entrance to the forum, access [~~passes~~] to the technical zone, audit of ticket sales, [~~and~~] payment of purses and changing of a rendered decision in accordance with subsection (n).

(b) For all professional events [~~contests~~] the executive director, or his designee, [~~Executive Director~~] will assign the timekeepers, referees, ringside physicians and judges.

(c) In title and championship bouts [~~contests,~~] the executive director, or his designee, [~~Executive Director~~] will consult with the sponsoring or sanctioning bodies on the assignment of judges and referees. The executive director, or his designee, [~~Executive Director~~] will make assignments for such bouts [~~contests~~].

(d) The executive director, or his designee, will evaluate an applicant's or licensee's fitness for licensure as a contestant based on the totality of his or her physical condition, taking into account the following indicators:

(1) under the age of 18;

(2) actual age;

(3) number of bouts;

(4) number of rounds fought;

(5) number of identified injuries;

(6) number of knockouts and technical knockouts suffered within the last 12 months, specifically those where the contestant lost consciousness;

(7) periods of inactivity in excess of 12 calendar months;

(8) ring record for the past twenty-four months;

(9) weight, including fluctuations in weight; and

(10) any health or mental condition that may contribute to the lack of ability to perform.

(e) [~~(d)~~] The executive director [~~Executive Director~~] may request medical tests to prove gender of a contestant.

(f) [~~(e)~~] The executive director, or his designee, [~~Executive Director~~] may recognize and enforce disciplinary sanctions, disqualification, or medical suspensions imposed by other combative sport authorities. If the executive director, or his designee, [~~Executive Director~~] proposes to deny licensure based on action of another jurisdiction, the applicant has a right to an opportunity for a hearing.

(g) [~~(f)~~] Selection and Assignment of Ring Officials

(1) The executive director, or his designee, [~~Executive Director~~] will assign ring officials on a rotational basis from lists of licensees and registrants. Assignments will be made to ensure the highest degree of safety for contestants. The department [~~Department~~] will assist license holders and registrants in developing expertise in the combative sports of their choice, to include training and shadow officiating.

(2) To officiate at an assigned event, a ring official will be issued a department badge after executing a signed acknowledgement agreeing to the following terms.

(A) The badge is the property of the department and may only be used at an event to which the ring official has been assigned.

(B) A ring official shall surrender the badge at any time at the direction of the executive director, or his designee, if used to gain access to a regulated event the ring official has not been assigned to work or for any other reason that violates department rules or the code.

(C) Failure to surrender the badge upon direction of the executive director, or his designee, may result in disciplinary action and removal from the rotation list.

(3) [~~(2)~~] The key determining factors for assigning ring officials are:

(A) the ring official's level of expertise in connection with the level of expertise required for a particular bout [~~contests~~] and a particular combative sport;

(B) the location of the event;

(C) the location of the licensee's residence; and

(D) any other factors as determined by the executive director [~~Executive Director~~].

(4) [~~(3)~~] A ring official who declines to work an event, will miss his rotation.

(5) [~~(4)~~] The name of a ring official who declines to work an event five times in succession will be taken off of the rotation [~~rotational~~] list.

(6) A ring official who uses his badge to gain access to a regulated event to which he has not been assigned or who violates department rules or the code may be removed from the rotation list.

(7) [~~(5)~~] In order to be reinstated on the rotation list, an official may be required to complete additional training as determined by the executive director [~~Executive Director~~].

(8) [~~(6)~~] If a ring official under this subsection substitutes for another who declined to work an event, the substituting official does not lose his place on the rotation [~~rotational~~] list.

(h) [~~(g)~~] The executive director, or his designee, [~~Executive Director~~] shall assign two timekeepers for each event, one to keep time and one to count for knock-downs.

(i) [~~(h)~~] The executive director, or his designee, [~~Executive Director~~] may eject any person from an event who violates department [~~Department~~] rules or the Code.

(j) [~~(i)~~] The executive director, or his designee, [~~Executive Director~~] will not approve matches between contestants in different weight categories, except by weight tolerances as stated in §61.105.

(k) [~~(j)~~] The executive director, or his designee, [~~Executive Director~~] will not approve matches between genders.

(l) [~~(k)~~] The executive director, or his designee, [~~Executive Director~~] may waive the application of a rule to an event if he determines that such waiver will not negatively affect the safety of any contestant and that the spirit of the Code and this chapter [~~these rules~~] is served by such waiver. The waiver must be in writing or later confirmed in writing.

(m) [~~(l)~~] Licensure or registration does not automatically authorize an individual to participate in an event.

(n) [~~(m)~~] A decision rendered after a contest is final and shall not be changed unless :

(1) following the rendition of a decision the executive director determines that any one of the following occurred: [~~Executive Director, after a review of the judges' scorecards, finds that a clerical or mathematical error resulted in an incorrect decision.~~]

(A) the compilation of the score card of the judges shows an error which would mean that the decision was given to the wrong contestant;

(B) there was a violation of the laws or rules and regulations governing combative sports which affected the result of any bout; or

(C) the winner of a bout tested positive immediately after the bout for a substance listed in §61.47(q).

(2) If the executive director determines that any of paragraph (1)(A) - (C) occurred with regards to any bout then the decision rendered shall be changed as the executive director may direct.

(o) [~~(n)~~] The executive director, or his designee, [~~Executive Director~~] may approve championship or title bouts [~~contests~~] if the department [~~Department~~] has recognized the sponsoring sanctioning organization as a legitimate combative sport organization.

(p) [~~(o)~~] The executive director, or his designee, [~~Executive Director~~] may require of a contestant, neurological or other medical testing.

~~[(p) The Executive Director may order a drug screen at any time for good cause. If a drug screen is performed the contestant is responsible for paying the costs of the drug screen.]~~

(q) The executive director, or his designee, [~~Executive Director~~] shall have sole control over the technical zone [~~Technical Zone~~] including but not limited to who may be admitted to the zone.

§61.40. Responsibilities of the Promoter.

(a) Bond and Insurance Requirements for Promoters

(1) At the time of licensure and upon each renewal, a promoter applicant must submit to the department [~~Department~~] proof of financial responsibility by:

(A) submitting a $15,000 [~~$10,000~~] surety bond written by a bonding company authorized to do business in the State [~~state~~] of Texas guaranteeing payment of all obligations, except gross receipts taxes, arising out of events promoted by the applicant which shall remain in effect for four years after the effective cancellation date; and

(B) submitting a $15,000 surety bond, written by a bonding company authorized to do business in the State of Texas, guaranteeing payment of gross receipts taxes owed for promoted events, which shall remain in effect for four years after the effective cancellation date.

(2) The promoter shall provide insurance and pay all deductibles for contestants, to cover medical, surgical and hospital care with a minimum limit of $50,000 for injuries sustained while participating in a contest and $100,000 to a contestant's estate if he dies of injuries received while participating in a contest. The insurance premium and deductibles shall not be deducted from the contestant's purse. At least ten calendar days before an event, the promoter shall provide to the department [~~Department~~] for each event sponsored, a certificate of insurance showing proper coverage. The promoter shall supply to those participating in the event the proper information for filing a medical claim.

(b) A promoter [~~Promoter~~] shall:

(1) Bear all financial responsibility for the event.

(2) Provide the department [~~Department~~] written notice of all proposed event dates, ticket prices, and participants of the main event, at least 21 days before the proposed event date and obtain written approval from the department [~~Department~~] to promote the event prior to advertising or selling tickets. Promoters who have cancelled or postponed two events in sequence after having obtained departmental [~~Departmental~~] approval for the events will be required to pay the permit fee set out in §61.80(c) [~~(b)~~] at the time the 21 day notice is filed. The fee will not be refunded.

(3) Obtain written departmental approval for the fight card at least 10 working days before the event date. The request shall contain the full legal name, address, date-of-birth, Texas contestant license number, Federal Identification number, weight, previous fight record (by supplying current results from the contestant's boxing registry recognized by the Professional Boxing Safety Act of 1996, 15 USC §§6301-6313 or from Mixed Martial Arts, LLC the national registry for MMA contestants), and number of rounds to be fought for each contestant. In addition, the department [~~Department~~] may require submission of certified birth certificates or other official evidence of identification.

(4) Provide written notice to the department [~~Department~~] of any change in the card before the scheduled weigh-in. Notices announcing changes or substitutions in the card must also be conspicuously posted at the box office and announced from the ring before the opening bout [~~contest~~].

(5) Provide to the department [~~Department~~], written notice of any change in the announced or advertised location, time or card cancellations before the scheduled weigh-in.

(6) Provide two ringside physicians, registered by the department [~~Department~~], for each event.

(7) Provide at least one registered physician to conduct pre-fight physicals. The department [~~Department~~] may require additional physicians depending on the event size. Provide a private area for the ringside physician to perform pre-fight examinations.

(8) Provide a sufficient number of seats in a department-designated area located in close proximity to the technical zone for use by ring officials and other individuals authorized and/or assigned by the department to work the event.

(9) [~~(8)~~] Assure that beverages are only allowed in paper or plastic cups at the event.

(10) [~~(9)~~] Immediately after the event, compensate the ringside physicians, timekeepers, judges, referees and contestants. Payment of percentage contracts shall be made when the amount can be determined. Payments that do not require additional accounting or auditing, shall be made in the presence of an authorized department [~~Department~~] representative.

(11) [~~(10)~~] Provide no less than two private dressing rooms of adequate size for the contestants and their licensed managers, and seconds, and separate dressing rooms for male and female contestants. Only working department [~~Commission~~] employees, contract inspectors, media, physicians, licensed working ring officials, promoter, matchmaker, manager and seconds will be allowed in the dressing rooms.

(12) [~~(11)~~] Ensure that no alcoholic beverages or illegal drugs are in the dressing room.

(13) [~~(12)~~] Ensure the safety of the contestants, officials, and spectators.

(A) There shall be a pre-fight plan and route to remove an injured contestant from the ring and arena. The [~~Upon request, the~~] promoter shall inform the department [~~Department~~] of the plan which [~~these plans. The plan~~] shall include the name and location of a local hospital emergency room.

(B) A sufficient number of security personnel shall be retained to maintain order.

(14) [~~(13)~~] Schedule no less than 24 or more than 60 rounds for each boxing event. No bout [~~event~~] shall exceed 10 rounds, except a championship or title bout [~~contest,~~] which shall not exceed 12 rounds. A sparring or exhibition bout [~~event~~] shall not exceed three rounds.

(15) Schedule no less than 6 or more than 15 bouts for each mixed martial arts event.

(16) [~~(14)~~] Ensure that the rules in §61.106 [~~set forth herein below~~] regarding equipment and gloves that apply to a particular type of event are followed and that each event is conducted in compliance with the following:

(A) The ring apron shall be kept clear at all times of objects including, but not limited to: cameras, microphones, and advertisements. A separate camera platform at a neutral corner of the ring for use by camera operators [~~cameramen~~] may be provided. Camera operators [~~Cameramen~~] may be allowed on the ring apron during rest periods, between bouts, or at the discretion of the executive director, or his designee [~~Executive Director~~]. No seats may be sold at the ring apron.

(B) The technical zone [~~Technical Zone~~] shall be set up for the department [~~Department~~], according to the instructions of the executive director or his designee [~~Executive Director's instructions~~].

(C) All emergency medical personnel and portable medical equipment shall be located within the technical zone [~~Technical Zone~~] during the event. There must be a resuscitator, oxygen, stretcher, a certified ambulance, neck brace, defibrillator, backboard, portable suction, and an emergency medical technician on site for all contests. The executive director, or his designee, [~~Executive Director~~] may require additional medical personnel and equipment depending on the number of matches scheduled.

(D) The judges' chairs shall be high enough that their shoulders shall be no lower than the ring floor. Physician ringside seats shall be in the neutral corner(s).

(E) There shall be at least one, but no more than three, authorized promoter representative(s) at ringside at all times. Only the promoter's representative(s), department [~~Department~~] officials, the press, physicians, representatives of sanctioning bodies, and judges shall sit at the ringside tables. For purposes of this subparagraph [~~rule~~], an event coordinator is a representative of the promoter.

(17) Pay by check or money order the licensing fee of any contestant, second, manager, or ringside physician who intends to participate in a scheduled combative sports event and who is not licensed at the time of the event weigh-in.

[~~(15) In the event that a person who is intended to be a Contestant is not licensed at the time of the weigh-in it is the promoter's responsibility to pay the licensing fee by check or money order. No cash will be accepted.~~]

(18) [~~(16)~~] Supervise the activities of employees and event coordinators to assure that promoted events are conducted in compliance with this chapter [~~these rules~~] and applicable statutes.

(19) [~~(17)~~] Ensure that all advertising concerning an event he promotes accurately describes the event and does not include the names of any person or entity, other than the promoter, as a presenter of the event.

(c) Contract requirements between Promoter and Contestant.

(1) The promoter for an event shall have contracts with contestants executed in triplicate on department [~~Department~~] forms showing the amount of guarantee or percentage promised the number and time limit of rounds, when and where the contestants are scheduled to appear, weight category, and other pertinent details governing the event. If applicable, the compensation section must include the specifics of television, radio and cable rights. The contract must define and provide for agreement on compensation if the opponent fails to appear at the weigh-in or bout. All contracts must state the dollar amount or percentage withheld for expenses, taxes, advances, sanctions or any other items the promoter seeks to subtract from a contestant's purse.

(2) The promoter shall furnish one executed copy of the contract to the contestants or their managers, retain one, and submit one to the department [~~Department~~].

(3) All required information must be typed or legibly printed, and the contestant and promoter shall initial any changes or addenda.

(d) Tickets

(1) All tickets shall have printed on each half, the price including any service surcharge or handling fee, and event date.

(2) Roll tickets with consecutive numbers shall be sold only at the box office on the day of the event [~~show~~].

(3) If there is no ticket manifest, tickets of different prices shall be printed on different colored ticket stock.

(4) The promoter shall submit a verified report [~~sworn inventory~~] to the department [~~Department~~] of tickets delivered to any outlet or event sponsor. The report [~~inventory~~] shall account for any known overprints, changes, or extras and must be on a department-approved form.

(5) Tickets shall not be sold for more than the actual capacity of the location where the event is held.

(6) All tickets shall be torn in half and one half returned to the ticket holder at the entrance gate. The other half shall be immediately deposited in a sealed container, where it is to remain until the department's [~~Department's~~] representative witnesses the opening of the container. No one shall pass through the gate without having their ticket torn or shall occupy a seat unless holding a ticket half or have a working pass or credential with a specific seat assignment indicated on them. Passes and or credentials may not be sold or bartered.

(7) If a main event or special added attraction is postponed or cancelled for any reason, the promoter shall promptly refund ticket sales. A special added attraction is the appearance of any person or persons at any combative sports [~~boxing~~] event whose reputation or ability is calculated to increase attendance. Tickets in the hands of ticket services shall be returned to the promoter not later than when the box office at the combative sports [~~boxing~~] event site has closed.

(8) Promoters shall hold tickets of every description used for any event, including deadwood, for at least 30 days after the event. The tickets shall be kept in separate packages for each event for audit purposes.

(9) The promoter shall be responsible to pay the gross receipts tax for complimentary tickets issued in excess of 25%.

(10) Gross receipts shall be calculated as 3% of the face value of all tickets sold plus 3% of the face value of all complimentary tickets issued in excess of 25%.

~~[(9) When computing gross receipts, the face value of tickets, except deadwood, shall be included whether the tickets were sold for cash, given away, or bartered for services provided.]~~

(11) [~~(10)~~] Tickets shall be accounted for after the event and the executive director, or his designee, [~~Executive Director~~] may review the process, and may check the number of gate ticket containers and their seals or padlocks.

(e) A promoter shall submit to the department [~~Department~~] a tax report and a 3% gross receipts tax payment within three business days of an event.

(f) In the event of a departmental audit of a tax report authorized by §2052.152, of the Texas Occupations Code, a person subject to the financial audit shall make available used tickets, deadwood and additional exhibits to the department in the form and at a time established by the executive director, or his designee.

§61.41. Responsibilities of the Referee.

(a) Referees are responsible for enforcing the rules of the bouts [~~contest~~] and shall exercise immediate authority, direction and control over bouts [~~contests~~]. The referee shall conduct a rules meeting before the first bout of the event.

(b) The referee may eject from an event any person who violates the Code or department [~~Department~~] rules. If a second violates this chapter [~~these rules~~] or the Code, the referee may disqualify the seconds' contestant.

(c) If an assigned referee is unable to officiate, he shall notify the department [~~Department~~] at least five hours before the event [~~contest~~].

(d) The safety of contestants shall [~~should~~] be the primary concern of the referee at all times. The referee may stop any bout [~~contest~~]:

(1) where there is reason to believe that continuing may result in serious injury to either contestant;

(2) if a contestant cannot defend himself;

(3) because of an injury or a contestant's poor physical condition; or

(4) if the referee feels that a contestant is not fighting in earnest.

(e) If a contestant is accidentally fouled, including a head butt but can continue, the referee may stop the bout [~~contest,~~] for a reasonable time, and inform the judges and the contestant's second of the accidental injury.

(f) If a mouthpiece is knocked out, the referee shall call time during a break in the action, the contestant's second will clean and reinsert the mouthpiece. If the mouthpiece is spit out the same procedure will be followed and the referee may [~~can~~] charge the contestant with a foul.

(g) The referee or executive director [~~Executive Director~~] may disqualify a contestant and declare the opponent the winner after one warning by the referee or a department [~~Department~~] representative for the use of profanity, obscene or threatening gestures by a contestant, his manager, or his second.

(h) When a foul occurs, the referee shall call time and advise the judges of the foul and the number of points they should deduct.

(i) Before each bout, the referee shall call the contestants and their chief seconds together for final instructions. The referee shall hold the chief second responsible for his contestant's conduct during the bout [~~contest~~].

(j) When a low blow incapacitates a contestant, the referee shall give him reasonable time to recover. The referee may confer with the ringside physician. If a contestant shows an unwillingness to continue because of a low-blow claim, and the referee has resumed the fight, that contestant shall be declared the loser by a technical knockout.

(k) Knock-downs.

(1) When a blow to a contestant causes a knock-down, the referee shall order the opponent to go to the ring's farthest neutral corner, pointing to the corner, and immediately pick up the timekeeper's count.

(2) The referee shall audibly announce the passing of the seconds, accompanying the count with upward motions of his arm for each second and indicating the count with visual finger counts after each second.

(3) The referee shall stop counting if the opponent does not remain in the neutral corner until the count is complete.

(4) A contestant who is knocked down shall not be allowed to resume until the referee has finished counting to eight.

(5) If a contestant who is knocked down rises before the count of ten and goes down again without being struck, the referee shall resume the count where he stopped.

(6) When a round ends before a contestant who was knocked down rises, the bell shall not ring, and the count shall continue. If the contestant rises before the count of ten, the bell shall ring ending the round.

(7) If the contestant who is knocked down does not rise before the count of ten, the referee shall declare the opponent the winner by a knockout.

(8) If the contestant appears to be seriously injured, without beginning a count, the referee may summon the ringside physician into the ring, and declare the bout terminated by knockout.

(9) The referee's count is the official count.

(l) If a contestant does not answer the bell signifying the start of a round, the referee shall give a ten count and declare him the loser by a technical knockout.

(m) If a contestant who has been knocked out of the ring or has fallen out of the ring during the bout [~~contest~~] fails to return immediately, the referee shall give the contestant 20 seconds to return to the ring. After a 20 second count, if the contestant has not returned to the ring, the referee shall count the contestant out as if he were down. No one may help contestants back into the ring.

(n) If during the first four rounds a contestant is accidentally injured, and is unable to continue, or is pushed, knocked or falls out of the ring, and is injured by the fall and unable to return, the referee shall declare the bout a no decision. If such injury occurs during later rounds, all completed rounds and the partial round in which the bout is terminated shall be scored and the contestant ahead on points shall be declared the winner by technical decision.

(o) A licensed referee may act as a judge or a timekeeper.

(p) All referees must attend the rules meeting prior to the first bout [~~contest~~] of an event.

§61.42. Responsibilities of Judges.

(a) A majority vote of the judging officials decides the outcome of the bout [~~contest~~].

(b) If an assigned judge is unable to officiate, he shall notify the department [~~Department~~] at least five hours before the event [~~contest~~].

(c) If a contest is stopped before the end of the fourth round because of an accidental foul, the bout [~~contest~~] shall be declared a no decision. If after the fourth round an accidental foul injury occurs or worsens and the bout [~~contest~~] is stopped, all completed and partial rounds shall be scored. The contestant ahead on points shall be declared the winner by technical decision.

(d) Scoring shall be recorded only on a department [~~Department-approved~~] form. Once the form is completed, checked and signed by the official it must be given directly to the department [~~Department~~] supervisor for the event. Scoring forms are the property of the department [~~Department~~] and will be maintained in the official records of the event.

(e) In all bouts [~~contests~~], the total points the judges give each contestant may be announced.

(f) A licensed judge may act as a timekeeper.

(g) A judge shall [~~will~~] at all times during a bout [~~contest~~] maintain focus on the bout [~~contest~~] even during rest periods. In order to maintain focus, judges shall [~~will~~] not engage in distractions including but not limited to: eating, talking, taking photographs, or carrying materials not related to the bout [~~contest~~].

§61.44. Responsibilities of Managers.

(a) Managers shall deal fairly with contestants.

(b) It is the contestant and manager's joint responsibility to comply with all requirements, including rest periods and medical suspensions.

(c) Managers or their designees, must attend the referee's rules meeting conducted prior to the first bout [~~contest~~] of an event.

§61.47. Responsibilities of Contestants.

(a) Medical Examinations. Each contestant applying for a license, or license renewal, shall submit on a department-approved [~~department approved~~] form signed by an examining physician and an examining ophthalmologist or optometrist:

(1) Proof [~~proof~~] of having passed a comprehensive medical examination within the previous twelve months; and

(2) Proof of having passed an ophthalmologic medical examination within the previous six months.

(3) The comprehensive medical examination must also include proof [~~thirty days of the date the application is signed by the applicant. Examining physicians, optometrists, and ophthalmologists must be licensed by a state, district or territory of the United States of America. The exam must include an ophthalmologic medical examination completed by an Ophthalmologist or Optometrist and must indicate~~] that within the last six months, the applicant has been tested for and is free of the Hepatitis C virus and the human immunodeficiency virus (HIV), and that the applicant is not acutely or chronically infected with the Hepatitis B virus by testing the Hepatitis B surface antigen for a non-reactive result, or by other medically acceptable testing procedure that establishes the absence of Hepatitis B infectivity.

(4) Examining physicians, optometrists, and ophthalmologists must be licensed by a state, district or territory of the United States of America.

(b) A contestant applicant must submit to the department [~~Department~~] all information required by the department's [~~Department's~~] application.

(c) A contestant may not perform under any name that does not appear in departmental records.

(d) Contestants shall report to the weigh in at the scheduled time.

(e) Contestants shall in good faith perform to the best of their abilities.

(f) A contestant who commits a foul under this chapter [~~these rules~~] is subject to administrative sanctions and or penalties in addition to losing points during a contest.

(g) Arguing with an official or refusing to obey the orders of an official is prohibited.

(h) Contestants shall compete in proper ring attire. The trunks' waistband shall not extend above the waistline and the hem may not extend more than two inches below the knee. Ring attire may not have sequins, buttons, tassels or any other decorative items that may become detached during a bout [~~contest~~]. A fitted mouthpiece shall be worn while competing. Shoes shall be of soft material and shall not be fitted with spikes, cleats, or hard heels. Contestants may not participate in any bout [~~contest~~] while wearing jewelry, including but not limited to, watches, rings, necklaces, bracelets, earrings, any type of stud used to penetrate body piercings.

(i) All contestants shall be in the dressing room at least 45 minutes before the event is scheduled to begin. The contestants shall be ready to enter the ring immediately after the preceding bout [~~contest~~] is finished.

(j) After receiving final instructions from the referee, contestants may touch gloves or shake hands and then shall retire to their corners.

(k) After the referee or judge's decision has been announced, both contestants and their seconds shall leave the ring when requested to do so by the referee.

(l) Every contestant shall undergo a pre-fight physical examination. If a contestant's physical exam shows him unfit for competition, the contestant shall not participate in the contest. The manager, chief second, or contestant shall make an immediate report of the facts to the promoter and the department [~~Department~~].

(m) If a contestant becomes ill or injured and cannot take part in a bout [~~contest~~] for which he is under contract, he, his chief second, or his manager shall immediately report the facts to the promoter and the department [~~Department~~]. The contestant must submit to the department [~~Department~~] medical proof of the injury or illness.

(n) A positive Hepatitis C, or human immunodeficiency virus (HIV) test, or a positive Hepatitis B surface antigen test or other indication of Hepatitis B infectivity will result in disqualification.

(o) The administration or use of any drugs, [~~or~~] alcohol, stimulants, or injections in any part of the body, either before or during[~~, or up to 24 hours before~~] a bout to or by a contestant [~~contest~~] is prohibited unless a drug is prescribed, administered or authorized by a licensed physician and the executive director [~~Executive Director~~] authorizes the contestant to use the drug. If a contestant is taking prescribed or over the counter medication, he/she must inform the executive director [~~Executive Director~~] of such usage at least 24 hours prior to the bout [~~contest~~].

(p) A person who applies for or holds a license as a contestant shall provide a urine specimen for drug testing either before or after the bout, if directed by the executive director or his designee. The applicant or licensee is responsible for paying the costs of the drug screen.

(q) A positive test (which has been confirmed by a laboratory authorized by the executive director or his designee) for any of the following substances shall be conclusive evidence of a violation of subsection (o).

(1) Stimulants

(2) Narcotics

(3) Cannabinoids (marijuana)

(4) Anabolic agents (exogenous and endogenous)

(5) Peptide hormones

(6) Masking agents

(7) Diuretics

(8) Glucocorticosteroids

(9) Beta--2 agonists (asthma medications)

(10) Anti-estrogenic agents

(11) Alcohol

(r) [~~(p)~~] As a condition of licensure, contestants waive right of confidentiality of medical records relating to treatment or diagnosis of any condition that relates to the contestant's ability to participate in a bout [~~contest~~]. All medical records submitted to the department [~~Department~~] are confidential, and shall be used only by the executive director [~~Executive Director~~] or his [~~his/her~~] representative for the purpose of ascertaining the contestant's ability to be licensed or participate in a bout [~~contest~~].

(s) [~~(q)~~] Medical disqualification of a contestant is for his own safety and may be made at the recommendation of the examining physician or the department [~~Department~~]. If a contestant disagrees with a medical disqualification, medical suspension or rest period set at the discretion of a ringside physician or a disqualification set by the department [~~Department~~], he may request a hearing to show proof of fitness. The hearing shall be provided at the earliest opportunity after the department [~~Department~~] receives a written request from the contestant or his manager.

(t) [~~(r)~~] The following are gender specific provisions.

(1) Male contestants must wear a protection cup, which shall be firmly adjusted before entering the ring.

(2) Female contestants:

(A) Must wear garments that cover their breasts;

(B) Shall submit to a pregnancy test at weigh-in;

(C) Will be disqualified by a positive pregnancy test; and,

(D) May wear breast protection plates.

(u) [~~(s)~~] Contestants must attend the referee's rules meeting conducted prior to the first bout [~~contest~~] of an event.

§61.80. Fees.

(a) The annual fee shall accompany each license or registration application or renewal as follows.

(1) Promoter--$900

(2) Contestant--$20

(3) Manager--$100 [~~$200~~]

(4) Second--$20 [~~$30~~]

(5) Matchmaker--$100 [~~$175~~]

(6) Referee--$125 [~~$250~~]

(7) Judge--$100 [~~$200~~]

(8) Timekeeper--$30 [~~$40~~]

(9) Ringside Physician--$25

(10) Amateur Combative Sports Association--$50[~~.~~]

(11) Event Coordinator--$200

(b) Four year Federal Identification card--$20

(c) Permit Fee--$100 per live professional event and the simultaneous telecast of a live contest on a closed circuit telecast in which fees are charged for admission.

(d) A fee submitted to obtain a license, permit or registration is nonrefundable.

§61.105. Weight Categories and Weigh-in--Boxing and Kickboxing.

(a) A promoter [~~Promoter~~] shall assure that the weigh-in takes place at a specific time set by the promoter and approved by the department [~~Department~~], generally between the hours of 2 p.m. of the day before the contest and 12 noon the day of the contest. The department [~~Department~~] must be notified ten days before the event.

(b) A department-approved scale [~~Physician's scales~~] must be used for weighing-in contestants. The department [~~Department~~] may require that the scales be certified.

(c) Contestants failing to meet contract weight shall have two hours to meet the allowances and be reweighed.

(d) No contestant may engage in a contest where the weigh-in weight difference between contestants exceeds the allowance shown in the following "WEIGHT ALLOWANCE" schedule:

(1) 112 lbs. or under--3 lbs.

(2) 113-118 lbs.--4 lbs.

(3) 119-126 lbs.--5 lbs.

(4) 127-135 lbs.--6 lbs.

(5) 136-147 lbs.--8 lbs.

(6) 148-160 lbs.--10 lbs.

(7) 161-175 lbs.--12 lbs.

(8) 176-200 lbs.--15 lbs.

(9) 201 lbs. or over--No limit

(e) If a contestant's body weight at the time of weigh-in is 5% or more over his contracted weight, he shall be disqualified for the contest.

(f) If in an attempt to make weight, a contestant shows evidence of dehydration, having taken diuretics, or other drugs, or having used any other harsh modality, the department [~~Department~~] shall disqualify the contestant on the advice of the examining physician.

(g) Weight Divisions. The weight classes for boxing and kickboxing contests or exhibitions are shown in paragraphs (1) - (15) [~~the schedule below~~]. A contestant in a weight class may participate in a bout with a contestant in an adjacent weight class so long as their weight difference falls within the weight allowance shown in subsection (d) [~~of this section above~~] for the weight of the contestant weighing the least.

(1) Flyweight--up to 112 lbs.

(2) Super Flyweight--over 112 to 115 lbs.

(3) Bantamweight--over 115 to 118 lbs.

(4) Super Bantamweight--over 118 to 122 lbs.

(5) Featherweight--over 122 to 126 lbs.

(6) Super Featherweight--over 126 to 130 lbs.

(7) Lightweight--over 130 to 135 lbs.

(8) Super Lightweight--over 135 to 140 lbs.

(9) Welterweight--over 140 to 147 lbs.

(10) Super Welterweight--over 147 to 154 lbs.

(11) Middleweight--over 154 to 160 lbs.

(12) Super Middleweight--over 160 to 168 lbs.

(13) Light Heavyweight--over 168 to 175 lbs.

(14) Cruiserweight--over 175 to 200 lbs.

(15) Heavyweight--over 200 lbs.

§61.106. Ring and Glove Requirements--Boxing and Kickboxing Contests.

(a) The ring shall be set up at least two hours before the contest is scheduled to begin.

(b) Except as specifically otherwise authorized by the executive director [~~Executive Director~~], rings shall meet the following:

(1) Rings shall be square with sides not less than 16 feet or more than 24 feet inside the ropes, and the floor shall extend at least 24 inches beyond the ropes on all sides, and shall be of at least 3/4-inch material, adequately supported, and padded with ensolite or similar closed-cell foam that is at least 1-inch thick;

(2) The padding shall extend over the edge of the ring platform and have a top covering of canvas, duck, or similar material approved by the department [~~Department~~];

(3) The covering shall be clean and be tightly stretched and laced to the ring platform and may not have tears, holes or overlapping seams;

(4) The ring platform shall have at least three sets of steps into the ring during a contest: one set for each contestant's corner and one set in the neutral corner to be used for the ringside physician and the department [~~Department~~];

(5) The ring corners shall be protected inside the ring with a urethane pad at least six inches wide, and shall be covered with material similar to the ring floor covering, and the covering must be long enough to cover all the rope joints;

(6) Ring posts shall be made of a strong material, preferably steel, and shall be at least three inches in diameter, and shall be secured under the ring to prevent spreading;

(7) There shall be four ring ropes at least one inch in diameter evenly spaced, one foot apart with the lower rope being 18 inches above the ring floor;

(8) The ropes shall be attached to the ring posts with turnbuckles and shall be stretched taut during all contests, and the bottom rope shall be padded with at least 2 inches of soft material;

(9) Be equipped with a bell that makes a sound loud enough to be heard by the contestants, referee, and other officials; and,

(10) Include in each contestant's corner an appropriate receptacle for spitting, a clean water bucket for the contestant's use, and at least three chairs or stools labeled "seconds" to be used by the contestant's official seconds.

(c) New gloves must be used for all professional main events. If gloves used in preliminary contests have been used before, they shall be whole, clean, in sanitary condition, and subject to inspection by the referee and department [~~Department~~] representatives. Any gloves found unfit shall not be used and must be replaced with acceptable gloves. There shall be extra sets of gloves on hand to be used in case gloves are broken or in any way damaged during a contest.

(d) Contestants in all weight categories up to, and including 147 lbs, shall use eight-ounce gloves. In heavier classes, they may wear ten-ounce gloves. Female contestants may wear 10-ounce gloves.

(e) Promoters of professional events shall keep gloves used in an event in their possession for a minimum of seven days after the event and shall make them available for inspection by the department [~~Department~~] upon request.

(f) Hand wraps shall be restricted to no more than twenty yards of soft gauze, not more than two inches wide. The gauze shall be held in place by no more than eight feet of adhesive tape, no more than one and one-half inches wide. The adhesive tape shall not cover any part of the knuckles when the hand is clenched to make a fist. The use of water, or any other liquid or material, on the tape is strictly prohibited. Hand wraps shall be applied in the dressing room in the presence of a department representative.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003555

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-7348

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 133. HOSPITAL LICENSING

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§133.2, 133.41, and 133.163 and proposes adding new §133.49, concerning the regulation of general hospitals.

BACKGROUND AND PURPOSE

The amendments and new section are necessary to comply with legislation passed during the 81st Legislature, 2009, Regular Session.

House Bill (HB) 643 added Health and Safety Code, Chapter 259, which requires hospitals to comply with qualification standards for employment of surgical technologists.

HB 2626 amended Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims.

Senate Bill (SB) 1932 amended Health and Safety Code, Chapter 251, which allows hospitals to provide outpatient dialysis during declared disasters.

SB 476 added Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited.

SB 203 amended Health and Safety Code, Chapter 98, involving the reporting of health care-associated infections and preventable adverse events in certain health care facilities to the department.

The department regulates general hospitals as required by Health and Safety Code, Chapter 241.

SECTION-BY-SECTION SUMMARY

Amendments to §133.2 add definitions for nurse and surgical technologist.

An amendment to §133.41(e) requires hospitals to provide, with documented consent, care to a sexual assault victim age 18 years or older who has not reported the assault to a law enforcement agency, if the victim has arrived at the hospital not later than 96 hours after the time the assault occurred.

An amendment to §133.41(g) requires hospitals to require a written, implemented, and enforced policy for reporting to the department certain healthcare-associated infections and preventable adverse events.

Amendments to §133.41(f) and (o) require the governing body of a hospital to adopt, implement, and enforce a written nurse staffing policy; require hospitals to create a nurse staffing committee as a standing committee, establish committee membership, require the committee to meet at least quarterly, and define responsibilities of the committee; require a nurse services staffing plan and policies; require annual reporting to the department on the nurse staffing policy, nurse staffing plan, nurse staffing committee, and nurse sensitive outcome measures used in the nurse staffing plan; require the adoption, implementation and enforcement of policies on use of mandatory overtime; prohibit hospitals from requiring a nurse to work mandatory overtime or using on-call time as a substitute for mandatory overtime; prohibit scheduling nurses for procedures expected to last beyond their scheduled shift; provide exceptions to the mandatory overtime prohibition in certain situations, including disasters or emergencies, and require the hospital to make and document a good faith effort to meet staffing needs through other measures; and require that a hospital may not suspend, terminate, discipline, or discriminate against a nurse who refuses to work mandatory overtime.

An amendment to §133.41(t) allows hospitals to provide outpatient dialysis services when the Governor or the President of the United States declares a disaster in this state or another state.

An amendment to §133.41(w) requires hospitals to adopt, implement, and enforce policies related to the employment of surgical technologists.

The new §133.49 requires hospitals to comply with reporting certain healthcare-associated infections and preventable adverse events to the department in accordance with Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events). The department will promulgate rules to set forth the detailed requirements for reporting. This information will allow the department to make available patient safety information in Texas, including information related to healthcare-associated infections and preventable adverse events in a format that is available on an Internet website.

An amendment to §133.163 establishes that outpatient renal dialysis shall not be performed in a hospital's inpatient renal dialysis suite unless authorized during a disaster declaration, as referenced in §133.41.

FISCAL NOTE

Renee Clack, Section Director, Health Care Quality Section, has determined that for each year of the first five-year period that the sections will be in effect, there will not be fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Clack has also determined that there may be an adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses may be required to alter their business practices in order to comply with the sections. Section 133.41(f) and (o) (SB 476), related to nurse staffing and mandatory overtime, may have an economic impact on hospitals.

Hospitals of any size, which have relied on the use of mandatory overtime, may incur costs in providing nursing coverage for nurse members of the nurse staffing committee to attend meetings. There is a potential cost to hospitals that choose to hire additional nurses or use staffing agencies if nursing services are currently provided by the use of mandatory overtime; this is a business decision of the facility. There is no historical data to

determine costs or how many hospitals have used mandatory overtime of nurses to provide staffing.

Hospitals that have relied on mandatory overtime have several options for providing nursing coverage, such as requesting currently employed nurses to voluntarily work overtime, hiring additional nurses, using a float pool of nurses, working with nurse staffing agencies, or implementing potential solutions developed by the mandated nursing staffing committee. Hospitals may also consider these options to provide coverage during nurse staffing committee meetings.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There may be economic costs to persons who are required to comply with §133.41(f) and (o) (SB 476) as described in the small and micro-business impact analysis. There are no costs to persons who are required to comply with the proposed §§133.41(e) (HB 2626), 133.41(g) and 133.49 (SB 203), 133.41(f) and 133.63 (SB 1932), or 133.41(w) (HB 643). There is no anticipated impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Clack has also determined that, for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The rules protect the health, safety, and welfare of patients receiving services in hospitals, hospital personnel, and the public. Alternative methods of compliance have been provided in these rules to allow facilities the flexibility to make business decisions based on their needs.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by 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 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

The department has determined that the 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 Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Beth Pickens, Health Care Quality Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 149347, Mail Code 2822, Austin, Texas 78714-9347, (512) 834-6752 or by email to beth.pickens@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §133.2

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §241.026; concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of health care-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects the Health and Safety Code, Chapters 98, 241, 257, 258, 259, 323, and 1001; and Government Code, Chapter 531.

§133.2. Definitions.

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

(1) - (30) (No change.)

(31) Nurse--A registered nurse or vocational nurse licensed under Occupations Code, Chapter 301.

(32) [~~(31)~~] Outpatient--An individual who presents for diagnostic or treatment services for an intended length of stay of less than 24 hours; provided, however, that an individual who requires continued observation may be considered as an outpatient for a period of time not to exceed a total of 48 hours.

(33) [~~(32)~~] Outpatient services--Services provided to patients whose medical needs can be met in less than 24 hours and are provided within the hospital; provided, however, that services that require continued observation may be considered as outpatient services for a period of time not to exceed a total of 48 hours.

(34) [~~(33)~~] Owner--One of the following persons or governmental unit which will hold or does hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a governmental unit;

(C) a limited liability company;

(D) an individual;

(E) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(F) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(G) all co-owners under any other business arrangement.

(35) [~~(34)~~] Patient--An individual who presents for diagnosis or treatment.

(36) [~~(35)~~] Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, including surgery and related ancillary services.

(37) [~~(36)~~] Person--An individual, firm, partnership, corporation, association, or joint stock company, and includes a receiver, trustee, assignee, or other similar representative of those entities.

(38) [~~(37)~~] Physician--A physician licensed by the Texas Medical Board.

(39) [~~(38)~~] Physician assistant--A person licensed as a physician assistant by the Texas State Board of Physician Assistant Examiners.

(40) [~~(39)~~] Podiatrist--A podiatrist licensed by the Texas State Board of Podiatric Medical Examiners.

(41) [~~(40)~~] Practitioner--A health care professional licensed in the State of Texas, other than a physician, podiatrist, or dentist. A practitioner shall practice in a manner consistent with their underlying practice act.

(42) [~~(41)~~] Premises--A premises may be any of the following:

(A) a single building where inpatients receive hospital services; or

(B) multiple buildings where inpatients receive hospital services provided that the following criteria are met:

(i) all buildings in which inpatients receive hospital services are subject to the control and direction of the same governing body;

(ii) all buildings in which inpatients receive hospital services are within a 30-mile radius of the primary hospital location;

(iii) there is integration of the organized medical staff of each of the hospital locations to be included under the single license;

(iv) there is a single chief executive officer for all of the hospital locations included under the license who reports directly to the governing body and through whom all administrative authority flows and who exercises control and surveillance over all administrative activities of the hospital;

(v) there is a single chief medical officer for all of the hospital locations under the license who reports directly to the governing body and who is responsible for all medical staff activities of the hospital;

(vi) each hospital location to be included under the license that is geographically separate from the other hospital locations contains at least one nursing unit for inpatients which is staffed and maintains an active inpatient census, unless providing only diagnostic or laboratory services, or a combination of diagnostic or laboratory services, in the building for hospital inpatients; and

(vii) each hospital that is to be included in the license complies with the emergency services standards:

(I) for a general hospital, if the hospital provides surgery or obstetrical care or both; or

(II) for a special hospital, if the hospital does not provide surgery or obstetrical care.

(43) [~~(42)~~] Presurvey conference--A conference held with department staff and the applicant or the applicant's representative to review licensure rules and survey documents and provide consultation prior to the on-site licensure inspection.

(44) [~~(43)~~] Psychiatric disorder--A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful syndrome (distress) or impairment in one or more important areas of behavioral, psychological, or biological function and is more than a disturbance in the relationship between the individual and society.

(45) [~~(44)~~] Quality improvement--A method of evaluating and improving processes of patient care which emphasizes a multidisciplinary approach to problem solving, and focuses not on individuals, but systems of patient care which might be the cause of variations.

(46) [~~(45)~~] Registered nurse (RN)--A person who is currently licensed by the Board of Nurse Examiners for the State of Texas as a registered nurse or who holds a valid registered nursing license with multi-state licensure privilege from another compact state.

(47) [~~(46)~~] Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;

(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities, or other definitive medical treatment;

(C) has a medical staff in regular attendance; and

(D) maintains records of the clinical work performed for each patient.

(48) [~~(47)~~] Stabilize--With respect to an emergency medical condition, to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or that the woman has delivered the child and the placenta.

(49) Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(50) [~~(48)~~] Transfer--The movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who has been declared dead, or leaves the facility without the permission of any such person.

(51) [~~(49)~~] Universal precautions--Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in hospitals.

(52) [~~(50)~~] Violation--Failure to comply with the licensing statute, a rule or standard, special license provision, or an order issued by the commissioner of state health services (commissioner) or the commissioner's designee, adopted or enforced under the licensing statute. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003558
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.41, §133.49

STATUTORY AUTHORITY

The amendment and new section are authorized by Health and Safety Code, §241.026; concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of health care-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment and new section affect the Health and Safety Code, Chapters 98, 241, 257, 258, 259, 323, and 1001; and Government Code, Chapter 531.

§133.41. Hospital Functions and Services.

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

(e) Emergency services. All licensed hospital locations, including multiple-location sites, shall have an emergency suite that complies with §133.161(a)(1)(A) of this title (relating to Requirements for Buildings in Which Existing Licensed Hospitals are Located) or §133.163(f) of this title, and the following.

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

(6) Emergency services for survivors of sexual assault.

(A) The hospital shall [~~must~~] develop, implement and enforce policies and procedures to ensure that a sexual assault survivor who presents to the hospital following a sexual assault receives one of the following [~~is~~]:

(i) [~~provided~~] the care specified under subparagraph (B) of this paragraph; or

(ii) stabilization and transfer [~~stabilized and transferred~~] to a health care facility designated in a community-wide plan as the health care facility for treating sexual assault survivors, where the survivor will receive the care specified under subparagraph (B) of this paragraph.

(B) A hospital providing [~~which provides~~] care to a sexual assault survivor shall provide the survivor with the following:

(i) a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B;

(I) if the examination has been requested by a law enforcement agency under Code of Criminal Procedure, Article 56.06, or is conducted under Code of Criminal Procedure, Article 56.065; or

(II) for a victim age 18 or older who has not reported the assault to a law enforcement agency, if the victim has arrived at the facility not later than 96 hours after the time the assault occurred, and consents to the examination;

(ii) a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;

(iii) access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;

(iv) the information form required by Health and Safety Code, §323.005;

(v) a private treatment room, if available;

(vi) if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and

(vii) the name and telephone number of the nearest sexual assault crisis center.

~~*[(i)* a private area, if available, to wait and to speak with the appropriate medical, legal and sexual assault crisis center staff or volunteers until a physician, nurse, or other qualified medical personnel is able to treat the survivor;]~~

~~*[(ii)* a private treatment room, if available;]~~

~~*[(iii)* a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B, if the examination has been approved by a law enforcement agency;]~~

~~*[(iv)* access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;]~~

~~*[(v)* the department's standard Information Form for Sexual Assault Survivors, which may be obtained through the department's website or by contacting the hospital licensing program at (512) 834-6648;]~~

~~*[(vi)* the name and telephone number of the nearest sexual assault crisis center; and]~~

~~*[(vii)* if indicated, access to appropriate prophylaxis for exposure to sexually transmitted infections.]~~

(C) The hospital must obtain documented consent before providing the forensic medical examination and treatment.

(D) [~~(C)~~] Upon request, the hospital shall submit to the department their plan for the provision of service to sexual assault survivors. The plan must describe how the hospital will ensure that the services required under subparagraph (B) of this paragraph will be provided.

(i) The hospital shall submit the plan by the 60th day after the department makes the request.

(ii) The department will approve or reject the plan not later than 120th day following the submission of the plan.

(iii) If the department is not able to approve the plan, the department will return the plan to the hospital and will identify the specific provisions with which the hospital's plan failed to comply.

(iv) The hospital shall correct and resubmit the plan to the department for approval not later than the 90th day after the plan is returned to the hospital.

(f) Governing body.

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

(8) Nurse Staffing. The governing body shall adopt, implement and enforce a written nurse staffing policy to ensure that an adequate number and skill mix of nurses are available to meet the level of patient care needed. The governing body policy shall require that hospital administration adopt, implement and enforce a nurse staffing plan and policies that:

(A) require significant consideration be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(B) are based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(C) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(D) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(E) protect from retaliation nurses who provide input to the nurse staffing committee; and

(F) comply with subsection (o) of this section.

(g) Infection control. The hospital shall provide a sanitary environment to avoid sources and transmission of infections and communicable diseases. There shall be an active program for the prevention, control, and surveillance of infections and communicable diseases.

(1) Organization and policies. A person shall be designated as infection control professional. The hospital shall ensure that policies governing prevention, control and surveillance of infections and communicable diseases are developed, implemented and enforced.

(A) - (B) (No change.)

(C) A written policy shall be adopted, implemented and enforced for reporting all reportable diseases to the local health authority and the Infectious Disease Surveillance and Epidemiology Branch, Department of State Health Services, MC 2822, P. O. Box 149347, Austin, Texas 78714-9347 [~~1100 West 49th Street, Austin, Texas 78756-3199~~], in accordance with Chapter 97 of this title (relating to Communicable Diseases) , and Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events).

(D) (No change.)

(2) - (3) (No change.)

(h) - (n) (No change.)

(o) Nursing services. The hospital shall have an organized nursing service that provides 24-hour nursing services as needed.

(1) Organization. The hospital shall have a [~~an organized nursing service that provides 24-hour nursing care. The nursing service shall be~~] well-organized service with a plan of administrative authority and delineation of responsibilities for patient care.

(A) - (E) (No change.)

(2) Staffing and delivery of care.

(A) - (E) (No change.)

[~~(F) At a minimum, the following critical factors shall be considered in the determination of staffing levels:~~]

[~~*(i)* patient characteristics and number of patients for whom care is being provided, including number of admissions, discharges and transfers on a unit;~~]

[~~*(ii)* intensity of patient care being provided and variability of patient care across a nursing unit;~~]

[~~*(iii)* scope of services provided;~~]

[~~*(iv)* context within which care is provided, including architecture and geography of the environment, and the availability of technology; and~~]

[~~*(v)* nursing staff characteristics, including staff consistency and tenure, preparation and experience, and the number and competencies of clinical and nonclinical support staff the nurse must collaborate with or supervise.~~]

[~~(G) The hospital shall adopt, implement and enforce a written process for setting staffing levels that takes into account the critical factors specified in subparagraph (F) of this paragraph. The process shall include:~~]

[~~*(i)* establishing presumptive or initial staffing levels that are recalculated at least annually or as necessary;~~]

[~~*(ii)* setting staffing levels on a unit by unit basis or other bases appropriate to the hospital;~~]

[~~*(iii)]* adjusting of staffing levels from shift to shift based on factors, such as, the intensity of patient care; and~~]

[~~*(iv)* reporting to the advisory committee, as referenced in subparagraph (H) of this paragraph, showing variance between desired and actual staffing levels, and an explanation for the variance. The reports shall be confidential and not subject to disclosure under Government Code, Chapter 552, and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release.~~]

(F) [~~(H)~~] The hospital shall establish a nurse staffing [~~designate an advisory~~] committee as a standing committee of the hospital. The committee shall be established in accordance with Health and Safety Code (HSC), §§161.031 - 161.033, to be responsible for soliciting and receiving input from nurses on the development, ongoing monitoring, and evaluation of the staffing plan. As provided by HSC, §161.032, the hospital's records and review relating to evaluation of these outcomes and indicators are confidential and not subject to disclosure under Government Code, Chapter 552 and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release. As used in this subsection, "committee" or "staffing committee" means a nurse staffing committee established under this subparagraph.

(i) The committee shall be composed of:

(I) [~~(i)~~] at least 60% [~~have, as one-half of its members,~~] registered nurses who are involved in direct patient care at least 50% of their work time and selected by their peers who provide direct care during at least 50% of their work time;

(II) [~~(ii)~~] [~~include~~] at least one representative from either infection control, quality assessment and performance [~~program~~] improvement or risk management; [~~and~~]

(III) [~~(iii)~~] members who are representative of the types of nursing services provided at the hospital; and [~~to the extent feasible, represent multiple areas of nursing practice.~~]

(IV) the chief nursing officer of the hospital who is a voting member.

(ii) Participation on the committee by a hospital employee as a committee member shall be part of the employee's work time and the hospital shall compensate that member for that time accordingly. The hospital shall relieve the committee member of other work duties during committee meetings.

(iii) The committee shall meet at least quarterly.

(iv) The responsibilities of the committee shall be to:

(I) develop and recommend to the hospital's governing body a nurse staffing plan that meets the requirements of subparagraph (G) of this paragraph;

(II) review, assess and respond to staffing concerns expressed to the committee;

(III) identify the nurse-sensitive outcome measures the committee will use to evaluate the effectiveness of the official nurse services staffing plan;

(IV) evaluate, at least semiannually, the effectiveness of the official nurse services staffing plan and variations between the plan and the actual staffing; and

(V) submit to the hospital's governing body, at least semiannually, a report on nurse staffing and patient care outcomes, including the committee's evaluation of the effectiveness of the official nurse services staffing plan and aggregate variations between the staffing plan and actual staffing.

(G) [~~(I)~~] The hospital shall adopt, implement and enforce a written official nurse services staffing plan. As used in this subsection, "patient care unit" means a unit or area of a hospital in which registered nurses provide patient care.

(i) The official nurse services staffing plan and policies shall:

(I) require significant consideration to be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(II) be based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(III) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(IV) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(V) protect from retaliation nurses who provide input to the nurse staffing committee; and

(VI) comply with subsection (o) of this section.

(ii) The plan shall:

(I) set minimum staffing levels for patient care units that are:

(-a-) based on multiple nurse and patient considerations including:

(-1-) patient characteristics and number of patients for whom care is being provided, including number of admissions, discharges and transfers on a unit;

(-2-) intensity of patient care being provided and variability of patient care across a nursing unit;

(-3-) scope of services provided;

(-4-) context within which care is provided, including architecture and geography of the environment, and the availability of technology; and

(-5-) nursing staff characteristics, including staff consistency and tenure, preparation and experience, and the number and competencies of clinical and non-clinical support staff the nurse must collaborate with or supervise.

(-b-) determined by the nursing assessment and in accordance with evidence-based safe nursing standards; and

(-c-) recalculated at least annually, or as necessary;

(II) include a method for adjusting the staffing plan shift to shift for each patient care unit based on factors, such as, the intensity of patient care to provide staffing flexibility to meet patient needs;

(III) include a contingency plan when patient care needs unexpectedly exceed direct patient care staff resources;

(IV) [~~(I)~~] reflect current standards established by private accreditation organizations, governmental entities, national nursing professional associations, and other health professional organizations [~~be consistent with standards established by the Texas nurse licensing board~~] and should be developed based upon a review of the codes of ethics developed by the nursing profession through national nursing organizations;

(V) [~~(II)~~] include a mechanism for evaluating the effectiveness of the official nurse services staffing plan based on patient needs, nursing sensitive quality indicators, nurse satisfaction measures collected by the hospital and evidence based nurse staffing standards. [~~utilize outcomes and nursing-sensitive indicators as an integral role in setting and evaluating the adequacy of the staffing plan.~~] At least one from each of the following three types of outcomes shall be correlated to the adequacy of staffing:

(-a-) nurse-sensitive patient outcomes selected by the nurse staffing committee [~~that are nursing-sensitive~~], such as, patient falls, adverse drug events, injuries to patients, skin breakdown, pneumonia, infection rates, upper gastrointestinal bleeding, shock, cardiac arrest, length of stay, or patient readmissions;

(-b-) operational outcomes, such as, work-related injury or illness, vacancy and turnover rates, nursing care hours per patient day, on-call use, or overtime rates; and

(-c-) substantiated patient complaints related to staffing levels;

(VI) [~~(III)~~] incorporate a process that facilitates the timely and effective identification of concerns about the adequacy of the staffing plan by the nurse staffing [~~advisory~~] committee established pursuant to subparagraph (F) [~~(H)~~] of this paragraph. This process shall include:

(-a-) a prohibition on retaliation for reporting concerns;

(-b-) a requirement that nurses report concerns timely through appropriate channels within the hospital;

(-c-) orientation of nurses on how to report concerns and to whom;

(-d-) encouraging nurses to provide input to the committee relating to nurse staffing concerns;

(-e-) review, assessment, and response by the committee to staffing concerns expressed to the committee;

(-f-) [~~(-d-)~~] a process for providing feedback during the [~~advisory~~] committee meeting on how concerns are addressed by the [~~advisory~~] committee established under subparagraph (F) [~~(H)~~] of this paragraph; and

(-g-) [~~(-e-)~~] use of the nurse safe harbor peer review process pursuant to Occupations Code, §303.005;

(VII) [~~(IV)~~] include policies and procedures that require:

(-a-) orientation of nurses and other personnel who provide nursing care to all patient care units to which they are assigned on either a temporary or permanent basis;

(-b-) that the orientation of nurses and other personnel and the competency to perform nursing services is documented in accordance with hospital policy;

(-c-) that nursing assignments be congruent with documented competency; and

(VIII) be used by the hospital as a component in setting the nurse staffing budget and guiding the hospital in assigning nurses hospital wide.

~~*(V)* when utilized as a means for meeting staffing needs, include policy and procedures for mandatory overtime. The policy and procedures shall include:~~

~~[(-a-) documentation of the basis and justification for mandatory overtime;]~~

~~[(-b-) an action plan for the reduction or elimination of the use of mandatory overtime to meet staffing needs;]~~

~~[(-c-) a process for monitoring and evaluating the use of mandatory overtime; and]~~

~~[(-d-) procedures for notifying nurses and other personnel who provide nursing care of the mandatory overtime policy. As used in this subsection, "mandatory overtime" means being required to work, other than on-call time, when not scheduled including beyond hours or days scheduled. Neither the length of the shift (whether 4, 8, 12, or 16 hours) nor the number of shifts scheduled to work (whether 4, 5, or 6 a week) is the determinative factor in defining mandatory overtime.]~~

(iii) The hospital shall make readily available to nurses on each patient care unit at the beginning of each shift the official nurse services staffing plan levels and current staffing levels for that unit and that shift.

(iv) [~~(ii)~~] There shall be a semiannual [~~an annual~~] evaluation by the staffing committee of the effectiveness of the official nurse services staffing plan and variations between the staffing plan and actual staffing. The[~~, including an~~] evaluation shall consider [~~of~~] the outcomes and nursing-sensitive indicators as set out in clause (ii)(V) [~~(i)(II)~~] of this subparagraph, patient needs, nurse satisfaction measures collected by the hospital, and evidence based nurse staffing standards. This evaluation shall be documented in the minutes of the [~~advisory~~] committee established under subparagraph (F) [~~(H)~~] of this paragraph and presented to the hospital's governing body. Hospitals may determine whether this evaluation is done on a unit or facility level basis. To assist the committee with the semiannual evaluation, the hospital shall report to the committee the variations between the staffing plan and actual staffing. This report of variations shall be confidential and not subject to disclosure under Government Code, Chapter 552 and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release.

(v) [~~(iii)~~] The staffing plan shall be retained for a period of two years.

(H) [~~(J)~~] Nonemployee licensed nurses who are working in the hospital shall adhere to the policies and procedures of the hospital. The CNO shall provide for the adequate orientation, supervision, and evaluation of the clinical activities of nonemployee nursing personnel which occur within the responsibility of the nursing services.

(I) The hospital shall annually report to the department on:

(i) whether the hospital's governing body has adopted a nurse staffing policy;

(ii) whether the hospital has established a nurse staffing committee that meets the membership requirements of subparagraph (F) of this paragraph;

(iii) whether the nurse staffing committee has evaluated the hospital's official nurse services staffing plan and has reported the results of the evaluation to the hospital's governing body; and

(iv) the nurse-sensitive outcome measures the committee adopted for use in evaluating the hospital's official nurse services staffing plan.

(3) Mandatory overtime. The hospital shall adopt, implement and enforce policies on use of mandatory overtime.

(A) As used in this subsection:

(i) "on-call time" means time spent by a nurse who is not working but who is compensated for availability; and

(ii) "mandatory overtime" means a requirement that a nurse work hours or days that are in addition to the hours or days scheduled, regardless of the length of a scheduled shift or the number of scheduled shifts each week. In determining whether work is mandatory overtime, prescheduled on-call time or time immediately before or after a scheduled shift necessary to document or communicate patient status to ensure patient safety is not included.

(B) A hospital may not require a nurse to work mandatory overtime, and a nurse may refuse to work mandatory overtime.

(C) This section does not prohibit a nurse from volunteering to work overtime.

(D) A hospital may not use on-call time as a substitute for mandatory overtime.

(E) The prohibitions on mandatory overtime do not apply if:

(i) a health care disaster, such as a natural or other type of disaster that increases the need for health care personnel, unexpectedly affects the county in which the nurse is employed or affects a contiguous county;

(ii) a federal, state, or county declaration of emergency is in effect in the county in which the nurse is employed or is in effect in a contiguous county;

(iii) there is an emergency or unforeseen event of a kind that:

(I) does not regularly occur;

(II) increases the need for health care personnel at the hospital to provide safe patient care; and

(III) could not prudently be anticipated by the hospital; or

(iv) the nurse is actively engaged in an ongoing medical or surgical procedure and the continued presence of the nurse through the completion of the procedure is necessary to ensure the health and safety of the patient. Scheduling nurses for procedures that could be anticipated to require the nurse to stay beyond the end of their scheduled shift constitutes mandatory overtime and shall be prohibited.

(F) If a hospital determines that an exception exists under subparagraph (E) of this paragraph, the hospital shall, to the extent possible, make and document a good faith effort to meet the staffing need through voluntary overtime, including calling per diems and agency nurses, assigning floats, or requesting an additional day of work from off-duty employees.

(G) A hospital may not suspend, terminate, or otherwise discipline or discriminate against a nurse who refuses to work mandatory overtime.

(4) [~~(3)~~] Drugs and biologicals. Drugs and biologicals shall be prepared and administered in accordance with federal and state laws, the orders of the individuals granted privileges by the medical staff, and accepted standards of practice.

(A) All drugs and biologicals shall be administered by, or under supervision of, nursing or other personnel in accordance with federal and state laws and regulations, including applicable licensing rules, and in accordance with the approved medical staff policies and procedures.

(B) All orders for drugs and biologicals shall be in writing, dated, timed, and signed by the individual responsible for the care of the patient as specified under subsection (f)(6)(A) of this section. When telephone or verbal orders must be used, they shall be:

(i) accepted only by personnel who are authorized to do so by the medical staff policies and procedures, consistent with federal and state laws;

(ii) dated, timed, and authenticated within 48 hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders; and

(iii) used infrequently.

(C) There shall be a hospital procedure for immediately reporting transfusion reactions, adverse drug reactions, and errors in administration of drugs to the attending physician and, if appropriate, to the hospital-wide quality assessment and performance improvement program.

(5) [~~(4)~~] Blood transfusions.

(A) Transfusions shall be prescribed in accordance with hospital policy and administered in accordance with a written protocol for the administration of blood and blood components and the use of infusion devices and ancillary equipment.

(B) Personnel administering blood transfusions and intravenous medications shall have special training for this duty according to written, adopted, implemented and enforced hospital policy.

(C) Blood and blood components shall be transfused through a sterile, pyrogen-free transfusion set that has a filter designed to retain particles potentially harmful to the recipient.

(D) The patient must be observed during the transfusion and for an appropriate time thereafter for suspected adverse reactions.

(E) Pretransfusion and posttransfusion vital signs shall be recorded.

(F) When warming of blood is indicated, this shall be accomplished during its passage through the transfusion set. The warming system shall be equipped with a visible thermometer and may have an audible warning system. Blood shall not be warmed above 42 degrees Celsius.

(G) Drugs or medications, including those intended for intravenous use, shall not be added to blood or blood components. A 0.9% sodium chloride injection, United States Pharmacopeia, may be added to blood or blood components. Other solutions intended for intravenous use may be used in an administration set or added to blood or blood components under either of the following conditions:

(i) they have been approved for this use by the Federal Drug Administration; or

(ii) there is documentation available to show that addition to the component involved is safe and efficacious.

(H) There shall be a system for detection, reporting and evaluation of suspected complications of transfusion. Any adverse event experienced by a patient in association with a transfusion is to be regarded as a suspected transfusion complication. In the event of a suspected transfusion complication, the personnel attending the patient shall notify immediately a responsible physician and the transfusion service and document the complication in the patient's medical record. All suspected transfusion complications shall be evaluated promptly according to an established procedure.

(I) Following the transfusion, the blood transfusion record or a copy shall be made a part of the patient's medical record.

(6) [~~(5)~~] Reporting and peer review of a vocational or registered nurse. A hospital shall adopt, implement, and enforce a policy to ensure that the hospital complies with the Occupations Code §§301.401-301.403, 301.405 and Chapter 303 (relating to Grounds for Reporting Nurse, Duty of Nurse to Report, Duty of Peer Review Committee to Report, Duty of Person Employing Nurse to Report, and Nursing Peer Review respectively), and with the rules adopted by the Board of Nurse Examiners in 22 TAC §217.16 (relating to Minor Incidents), §217.19 (relating to Incident-Based Nursing Peer Review and Whistleblower Protections), and §217.20 (relating to Safe Harbor Peer Review for Nurses and Whistleblower Protections).

(7) [~~(6)~~] Policies and procedures related to workplace safety.

(A) The hospital shall adopt, implement and enforce policies and procedures related to the work environment for nurses which:

(i) improve workplace safety and reduce the risk of injury, occupational illness, and violence; and

(ii) increase the use of ergonomic principles and ergonomically designed devices to reduce injury and fatigue.

(B) The policies and procedures adopted under subparagraph (A) of this paragraph, at a minimum, must include:

(i) evaluating new products and technology that incorporate ergonomic principles;

(ii) educating nurses in the application of ergonomic practices;

(iii) conducting workplace audits to identify areas of risk of injury, occupational illness, or violence and recommending ways to reduce those risks;

(iv) controlling access to those areas identified as having a high risk of violence; and

(v) promptly reporting crimes committed against nurses to appropriate law enforcement agencies.

(8) [~~(7)~~] Safe patient handling and movement practices.

(A) The hospital shall adopt, implement and enforce policies and procedures to identify, assess, and develop strategies to control risk of injury to patients and nurses associated with the lifting, transferring, repositioning, or movement of a patient.

(B) The policies and procedures shall establish a process that, at a minimum, includes the following:

(i) analysis of the risk of injury to both patients and nurses posed by the patient handling needs of the patient populations served by the hospital and the physical environment in which patient handling and movement occurs;

(ii) education of nurses in the identification, assessment, and control of risks of injury to patients and nurses during patient handling;

(iii) evaluation of alternative ways to reduce risks associated with patient handling, including evaluation of equipment and the environment;

(iv) restriction, to the extent feasible with existing equipment and aids, of manual patient handling or movement of all or most of a patient's weight to emergency, life- threatening, or otherwise exceptional circumstances;

(v) collaboration with and annual report to the nurse staffing committee;

(vi) procedures for nurses to refuse to perform or be involved in patient handling or movement that the nurse believes in good faith will expose a patient or a nurse to an unacceptable risk of injury;

(vii) submission of an annual report to the governing body on activities related to the identification, assessment, and development of strategies to control risk of injury to patients and nurses associated with the lifting, transferring, repositioning, or movement of a patient; and

(viii) development of architectural plans for constructing or remodeling a hospital or a unit of a hospital in which patient handling and movement occurs, with consideration of the feasibility of incorporating patient handling equipment or the physical space and construction design needed to incorporate that equipment at a later date.

(p) - (s) (No change.)

(t) Renal dialysis services.

(1) Hospitals may provide inpatient dialysis services without an additional license under HSC Chapter 251. Hospitals providing outpatient dialysis services shall be licensed under HSC Chapter 251.

(2) Hospitals may provide outpatient dialysis services when the governor or the president of the United States declares a disaster in this state or another state. The hospital may provide outpatient dialysis only during the term of the disaster declaration.

(3) [~~(1)~~] Equipment.

(A) Maintenance and repair. All equipment used by a facility, including backup equipment, shall be operated within manufacturer's specifications, and maintained free of defects which could be a potential hazard to patients, staff, or visitors. Maintenance and repair of all equipment shall be performed by qualified staff or contract personnel.

(i) Staff shall be able to identify malfunctioning equipment and report such equipment to the appropriate staff for immediate repair.

(ii) Medical equipment that malfunctions must be clearly labeled and immediately removed from service until the malfunction is identified and corrected.

(iii) Written evidence of all maintenance and repairs shall be maintained.

(iv) After repairs or alterations are made to any equipment or system, the equipment or system shall be thoroughly tested for proper operation before returning to service. This testing must be documented.

(v) A facility shall comply with the federal Food, Drug, and Cosmetic Act, 21 United States Code (USC), §360i(b), concerning reporting when a medical device as defined in 21 USC §321(h) has or may have caused or contributed to the injury or death of a patient of the facility.

(B) Preventive maintenance. A facility shall develop, implement and enforce a written preventive maintenance program to ensure patient care related equipment used in a facility receives electrical safety inspections, if appropriate, and maintenance at least annually or more frequently as recommended by the manufacturer. The preventive maintenance may be provided by facility staff or by contract.

(C) Backup machine. At least one complete dialysis machine shall be available on site as backup for every ten dialysis machines in use. At least one of these backup machines must be completely operational during hours of treatment. Machines not in use during a patient shift may be counted as backup except at the time of an initial or an expansion survey.

(D) Pediatric patients. If pediatric patients are treated, a facility shall use equipment and supplies, to include blood pressure cuffs, dialyzers, and blood tubing, appropriate for this special population.

(E) Emergency equipment and supplies. A facility shall have emergency equipment and supplies immediately accessible in the treatment area.

(i) At a minimum, the emergency equipment and supplies shall include the following:

(I) oxygen;

(II) mechanical ventilatory assistance equipment, to include airways, manual breathing bag, and mask;

(III) suction equipment;

(IV) supplies specified by the medical director;

(V) electrocardiograph; and

(VI) automated external defibrillator or defibrillator.

(ii) If pediatric patients are treated, the facility shall have the appropriate type and size emergency equipment and supplies listed in clause (i) of this subparagraph for this special population.

(iii) A facility shall establish, implement, and enforce a policy for the periodic testing and maintenance of the emergency equipment. Staff shall properly maintain and test the emergency equipment and supplies and document the testing and maintenance.

(F) Transducer protector. A transducer protector shall be replaced when wetted during a dialysis treatment and shall be used for one treatment only.

(4) [~~(2)~~] Water treatment and dialysate concentrates.

(A) Compliance required. A facility shall meet the requirements of this section. A facility may follow more stringent requirements than the minimum standards required by this section.

(i) The facility administrator and medical director shall each demonstrate responsibility for the water treatment and dialysate supply systems to protect hemodialysis patients from adverse effects arising from known chemical and microbial contaminates that may be found in improperly prepared dialysate, to ensure that the dialysate is correctly formulated and meets the requirements of all applicable quality standards.

(ii) The facility administrator and medical director must assure that policies and procedures related to water treatment and dialysate are understandable and accessible to the operator(s) and that the training program includes quality testing, risks and hazards of improperly prepared concentrate and bacterial issues.

(iii) The facility administrator and medical director must be informed prior to any alteration of, or any device being added to, the water system.

(B) Water treatment. These requirements apply to water intended for use in the delivery of hemodialysis, including the preparation of concentrates from powder at a dialysis facility and dialysate.

(i) The design for the water treatment system in a facility shall be based on considerations of the source water for the facility and designed by a water quality professional with education, training, or experience in dialysis system design.

(ii) When a public water system supply is not used by a facility, the source water shall be tested by the facility at monthly intervals in the same manner as a public water system as described in 30 TAC, §290.104 (relating to Summary of Maximum Contaminant Levels, Maximum Residual Disinfectant Levels, Treatment Techniques, and Action Levels), and §290.109 (relating to Microbial Contaminants) as adopted by the Texas Commission on Environmental Quality (TCEQ).

(iii) The physical space in which the water treatment system is located must be adequate to allow for maintenance, testing, and repair of equipment. If mixing of dialysate is performed in the same area, the physical space must also be adequate to house and allow for the maintenance, testing, and repair of the mixing equipment and for performing the mixing procedure.

(iv) The water treatment system components shall be arranged and maintained so that bacterial and chemical contaminant levels in the product water do not exceed the standards for hemodialysis water quality described in §4.2.1 (concerning Water Bacteriology) and §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the Association for the Advancement of Medical Instrumentation (AAMI). All documents published by the AAMI as referenced in this section may be obtained by writing the following address: 1110 North Glebe Road, Suite 220, Arlington, Virginia 22201.

(v) Written policies and procedures for the operation of the water treatment system must be developed and implemented. Parameters for the operation of each component of the water treatment system must be developed in writing and known to the operator. Each major water system component shall be labeled in a manner that identifies the device; describes its function, how performance is verified and actions to take in the event performance is not within an acceptable range.

(vi) The materials of any components of water treatment systems (including piping, storage, filters and distribution systems) that contact the purified water shall not interact chemically or physically so as to affect the purity or quality of the product water adversely. Such components shall be fabricated from unreactive materials (e.g. plastics) or appropriate stainless steel. The use of materials that are known to cause toxicity in hemodialysis, such as copper, brass, galvanized material, or aluminum, is prohibited.

(vii) Chemicals infused into the water such as iodine, acid, flocculants, and complexing agents shall be shown to be nondialyzable or shall be adequately removed from product water. Monitors or specific test procedures to verify removal of additives shall be provided and documented.

(viii) Each water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of two carbon tanks in series. If the source water is from a private supply which does not use chlorine/chloramine, the water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of one carbon tank.

(I) Reverse osmosis membranes. Reverse osmosis membranes, if used, shall meet the standards in §4.3.7 (concerning Reverse Osmosis) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(II) Deionization systems.

(-a-) Deionization systems, if used, shall be monitored continuously to produce water of one megohm-centimeter (cm) or greater specific resistivity (or conductivity of one microsiemen/cm or less) at 25 degrees Celsius. An audible and visual alarm shall be activated when the product water resistivity falls below this level and the product water stream shall be prevented from reaching any point of use.

(-b-) Patients shall not be dialyzed on deionized water with a resistivity less than 1.0 megohm-cm measured at the output of the deionizer.

(-c-) A minimum of two deionization (DI) tanks in series shall be used with resistivity monitors including audible and visual alarms placed pre and post the final DI tank in the system. The alarms must be audible in the patient care area.

(-d-) Feed water for deionization systems shall be pretreated with activated carbon adsorption, or a comparable alternative, to prevent nitrosamine formation.

(-e-) If a deionization system is the last process in a water treatment system, it shall be followed by an ultrafilter or other bacteria and endotoxin reducing device.

(III) Carbon tanks.

(-a-) The carbon tanks must contain acid washed carbon, 30-mesh or smaller with a minimum iodine number of 900.

(-b-) A minimum of two carbon adsorption beds shall be installed in a series configuration.

(-c-) The total empty bed contact time (EBCT) shall be at least ten minutes, with the final tank providing at least five minutes EBCT. Carbon adsorption systems used to prepare water for portable dialysis systems are exempt from the requirement for the second carbon and a ten minute EBCT if removal of chloramines to below 0.1 milligram (mg)/1 is verified before each treatment.

(-d-) A means shall be provided to sample the product water immediately prior to the final bed(s). Water from this port(s) must be tested for chlorine/chloramine levels immediately prior to each patient shift.

(-e-) All samples for chlorine/chloramine testing must be drawn when the water treatment system has been operating for at least 15 minutes.

(-f-) Tests for total chlorine, which include both free and combined forms of chlorine, may be used as a single analysis with the maximum allowable concentration of 0.1 mg/liter (L). Test results of greater than 0.5 parts per million (ppm) for chlorine or 0.1 ppm for chloramine from the port between the initial tank(s) and final tank(s) shall require testing to be performed at the final exit and replacement of the initial tank(s).

(-g-) In a system without a holding tank, if test results at the exit of the final tank(s) are greater than the parameters for chlorine or chloramine described in this subclause, dialysis treatment shall be immediately terminated to protect patients from exposure to chlorine/chloramine and the medical director shall be notified. In systems with holding tanks, if the holding tank tests <1mg/L for total chlorine, the reverse osmosis (RO) may be turned off and the product water in the holding tank may be used to finish treatments in process. The medical director shall be notified.

(-h-) If means other than granulated carbon are used to remove chlorine/chloramine, the facility's governing body must approve such use in writing after review of the safety of the intended method for use in hemodialysis applications. If such methods include the use of additives, there must be evidence the product water does not contain unsafe levels of these additives.

(ix) Water softeners, if used, shall be tested at the end of the treatment day to verify their capacity to treat a sufficient volume of water to supply the facility for the entire treatment day and shall be fitted with a mechanism to prevent water containing the high concentrations of sodium chloride used during regeneration from entering the product water line during regeneration.

(x) If used, the face(s) of timer(s) used to control any component of the water treatment or dialysate delivery system shall be visible to the operator at all times. Written evidence that timers are checked for operation and accuracy each day of operation must be maintained.

(xi) Filter housings, if used during disinfectant procedures, shall include a means to clear the lower portion of the housing of the disinfecting agents. Filter housings shall be opaque.

(xii) Ultrafilters, or other bacterial reducing filters, if used, shall be fitted with pressure gauges on the inlet and outlet water lines to monitor the pressure drop across the membrane. Ultrafilters shall be included in routine disinfection procedures.

(xiii) If used, storage tanks shall have a conical or bowl shaped base and shall drain from the lowest point of the base. Storage tanks shall have a tight-fitting lid and be vented through a hydrophobic 0.2 micron air filter. Means shall be provided to effectively disinfect any storage tank installed in a water distribution system.

(xiv) Ultraviolet (UV) lights, if used, shall be monitored at the frequency recommended by the manufacturer. A log sheet shall be used to record monitoring.

(xv) Water treatment system piping shall be labeled to indicate the contents of the pipe and direction of flow.

(xvi) The water treatment system must be continuously monitored during patient treatment and be guarded by audible and visual alarms which can be seen and heard in the dialysis treatment area should water quality drop below specific parameters. Quality monitor sensing cells shall be located as the last component of the water treatment system and at the beginning of the distribution system. No water treatment components that could affect the quality of the product water as measured by this device shall be located after the sensing cell.

(xvii) When deionization tanks do not follow a reverse osmosis system, parameters for the rejection rate of the membranes must assure that the lowest rate accepted would provide product water in compliance with §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition published by the AAMI.

(xviii) A facility shall maintain written logs of the operation of the water treatment system for each treatment day. The log book shall include each component's operating parameter and the action taken when a component is not within the facility's set parameters.

(xix) Microbiological testing of product water shall be conducted.

(I) Frequency. Microbiological testing shall be conducted monthly and following any repair or change to the water treatment system. For a newly installed water distribution system, or when a change has been made to an existing system, weekly testing shall be conducted for one month to verify that bacteria and endotoxin levels are consistently within the allowed limits.

(II) Sample sites. At a minimum, sample sites chosen for the testing shall include the beginning of the distribution piping, at any site of dialysate mixing, and the end of the distribution piping.

(III) Technique. Samples shall be collected immediately before sanitization/disinfection of the water treatment system and dialysis machines. Water testing results shall be routinely trended and reviewed by the medical director in order to determine if results seem questionable or if there is an opportunity for improvement. The medical director shall determine if there is a need for retesting. Repeated results of "no growth" shall be validated via an outside laboratory. A calibrated loop may not be used in microbiological testing of water samples. Colonies shall be counted using a magnifying device.

(IV) Expected results. Product water used to prepare dialysate, concentrates from powder, or to reprocess dialyzers for multiple use, shall contain a total viable microbial count less than 200 colony forming units (CFU)/millimeter (ml) and an endotoxin concentration less than 2 endotoxin units (EU)/ml. The action level for the total viable microbial count in the product water shall be 50 CFU/ml and the action level for the endotoxin concentration shall be 1 EU/ml.

(V) Required action for unacceptable results. If the action levels described at subclause (IV) of this clause are observed in the product water, corrective measures shall be taken promptly to reduce the levels into an acceptable range.

(VI) Records. All bacteria and endotoxin results shall be recorded on a log sheet in order to identify trends that may indicate the need for corrective action.

(xx) If ozone generators are used to disinfect any portion of the water or dialysate delivery system, testing based on the manufacturer's direction shall be used to measure the ozone concentration each time disinfection is performed, to include testing for safe levels of residual ozone at the end of the disinfection cycle. Testing for ozone in the ambient air shall be conducted on a periodic basis as rec-

ommended by the manufacturer. Records of all testing must be maintained in a log.

(xxi) If used, hot water disinfection systems shall be monitored for temperature and time of exposure to hot water as specified by the manufacturer. Temperature of the water shall be recorded at a point furthest from the water heater, where the lowest water temperature is likely to occur. The water temperature shall be measured each time a disinfection cycle is performed. A record that verifies successful completion of the heat disinfection shall be maintained.

(xxii) After chemical disinfection, means shall be provided to restore the equipment and the system in which it is installed to a safe condition relative to residual disinfectant prior to the product water being used for dialysis applications.

(xxiii) Samples of product water must be submitted for chemical analysis every six months and must demonstrate that the quality of the product water used to prepare dialysate or concentrates from powder, meets §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(I) Samples for chemical analysis shall be collected at the end of the water treatment components and at the most distal point in each water distribution loop, if applicable. All other outlets from the distribution loops shall be inspected to ensure that the outlets are fabricated from compatible materials. Appropriate containers and pH adjustments shall be used to ensure accurate determinations. New facilities or facilities that add or change the configuration of the water distribution system must draw samples at the most distal point for each water distribution loop, if applicable, on a one time basis.

(II) Additional chemical analysis shall be submitted if substantial changes are made to the water treatment system or if the percent rejection of a reverse osmosis system decreased 5.0% or more from the percent rejection measured at the time the water sample for the preceding chemical analysis was taken.

(xxiv) Facility records must include all test results and evidence that the medical director has reviewed the results of the water quality testing and directed corrective action when indicated.

(xxv) Only persons qualified by the education or experience may operate, repair, or replace components of the water treatment system.

(C) Dialysate.

(i) Quality control procedures shall be established to ensure ongoing conformance to policies and procedures regarding dialysate quality.

(ii) Each facility shall set all hemodialysis machines to use only one family of concentrates. When new machines are put into service or the concentrate family or concentrate manufacturer is changed, samples shall be sent to a laboratory for verification.

(iii) Prior to each patient treatment, staff shall verify the dialysate conductivity and pH of each machine with an independent device.

(iv) Bacteriological testing shall be conducted.

(I) Frequency. Responsible facility staff shall develop a schedule to ensure each hemodialysis machine is tested quarterly for bacterial growth and the presence of endotoxins. Hemodialysis machines of home patients shall be cultured monthly until results not exceeding 200 CFU/ml are obtained for three consecutive months, then quarterly samples shall be cultured.

(II) Acceptable limits. Dialysate shall contain less than 200 CFU/ml and an endotoxin concentration of less than 2 EU/ml. The action level for total viable microbial count shall be 50 CFU/ml and the action level for endotoxin concentration shall be 1 EU/ml.

(III) Action to be taken. Disinfection and retesting shall be done when bacterial or endotoxin counts exceed the action levels. Additional samples shall be collected when there is a clinical indication of a pyrogenic reaction and/or septicemia.

(v) Only a licensed nurse may use an additive to increase concentrations of specific electrolytes in the acid concentrate. Mixing procedures shall be followed as specified by the additive manufacturer. When additives are prescribed for a specific patient, the container holding the prescribed acid concentrate shall be labeled with the name of the patient, the final concentration of the added electrolyte, the date the prescribed concentrate was made, and the name of the person who mixed the additive.

(vi) All components used in concentrate preparation systems (including mixing and storage tanks, pumps, valves and piping) shall be fabricated from materials (e.g., plastics or appropriate stainless steel) that do not interact chemically or physically with the concentrate so as to affect its purity, or with the germicides used to disinfect the equipment. The use of materials that are known to cause toxicity in hemodialysis such as copper, brass, galvanized material and aluminum is prohibited.

(vii) Facility policies shall address means to protect stored acid concentrates from tampering or from degeneration due to exposure to extreme heat or cold.

(viii) Procedures to control the transfer of acid concentrates from the delivery container to the storage tank and prevent the inadvertent mixing of different concentrate formulations shall be developed, implemented and enforced. The storage tanks shall be clearly labeled.

(ix) Concentrate mixing systems shall include a purified water source, a suitable drain, and a ground fault protected electrical outlet.

(I) Operators of mixing systems shall use personal protective equipment as specified by the manufacturer during all mixing processes.

(II) The manufacturer's instructions for use of a concentrate mixing system shall be followed, including instructions for mixing the powder with the correct amount of water. The number of bags or weight of powder added shall be determined and recorded.

(III) The mixing tank shall be clearly labeled to indicate the fill and final volumes required to correctly dilute the powder.

(IV) Systems for preparing either bicarbonate or acid concentrate from powder shall be monitored according to the manufacturer's instructions.

(V) Concentrates shall not be used, or transferred to holding tanks or distribution systems, until all tests are completed.

(VI) If a facility designs its own system for mixing concentrates, procedures shall be developed and validated using an independent laboratory to ensure proper mixing.

(x) Acid concentrate mixing tanks shall be designed to allow the inside of the tank to be rinsed when changing concentrate formulas.

(I) Acid mixing systems shall be designed and maintained to prevent rust and corrosion.

(II) Acid concentrate mixing tanks shall be emptied completely and rinsed with product water before mixing another batch of concentrate to prevent cross contamination between different batches.

(III) Acid concentrate mixing equipment shall be disinfected as specified by the equipment manufacturer or in the case where no specifications are given, as defined by facility policy.

(IV) Records of disinfection and rinsing of disinfectants to safe residual levels shall be maintained.

(xi) Bicarbonate concentrate mixing tanks shall have conical or bowl shaped bottoms and shall drain from the lowest point of the base. The tank design shall allow all internal surfaces to be disinfected and rinsed.

(I) Bicarbonate concentrate mixing tanks shall not be prefilled the night before use.

(II) If disinfectant remains in the mixing tank overnight, this solution must be completely drained, the tank rinsed and tested for residual disinfectant prior to preparing the first batch of that day of bicarbonate concentrate.

(III) Unused portions of bicarbonate concentrate shall not be mixed with fresh concentrate.

(IV) At a minimum, bicarbonate distribution systems shall be disinfected weekly. More frequent disinfection shall be done if required by the manufacturer, or if dialysate culture results are above the action level.

(V) If jugs are reused to deliver bicarbonate concentrate to individual hemodialysis machines:

(-a-) jugs shall be emptied of concentrate, rinsed and inverted to drain at the end of each treatment day;

(-b-) at a minimum, jugs shall be disinfected weekly, more frequent disinfection shall be considered by the medical director if dialysate culture results are above the action level; and

(-c-) following disinfection, jugs shall be drained, rinsed free of residual disinfectant, and inverted to dry. Testing for residual disinfectant shall be done and documented.

(xii) All mixing tanks, bulk storage tanks, dispensing tanks and containers for single hemodialysis treatments shall be labeled as to the contents.

(I) Mixing tanks. Prior to batch preparation, a label shall be affixed to the mixing tank that includes the date of preparation and the chemical composition or formulation of the concentrate being prepared. This labeling shall remain on the mixing tank until the tank has been emptied.

(II) Bulk storage/dispensing tanks. These tanks shall be permanently labeled to identify the chemical composition or formulation of their contents.

(III) Single machine containers. At a minimum, single machine containers shall be labeled with sufficient information to differentiate the contents from other concentrate formulations used in the facility and permit positive identification by users of container contents.

(xiii) Permanent records of batches produced shall be maintained to include the concentrate formula produced, the volume of the batch, lot number(s) of powdered concentrate packages, the manufacturer of the powdered concentrate, date and time of mixing, test results, person performing mixing, and expiration date (if applicable).

(xiv) If dialysate concentrates are prepared in the facility, the manufacturers' recommendations shall be followed regarding any preventive maintenance. Records shall be maintained indicating the date, time, person performing the procedure, and the results (if applicable).

(5) [~~(3)~~] Prevention requirements concerning patients.

(A) Hepatitis B vaccination.

(i) With the advice and consent of a patient's attending nephrologist, facility staff shall make the hepatitis B vaccine available to a patient who is susceptible to hepatitis B, provided that the patient has coverage or is willing to pay for vaccination.

(ii) The facility shall make available to patients literature describing the risks and benefits of the hepatitis B vaccination.

(B) Serologic screening of patients.

(i) A patient new to dialysis shall have been screened for hepatitis B surface antigen (HBsAg) within one month before or at the time of admission to the facility or have a known hepatitis B surface antibody (anti-HBs) status of at least 10 milli-international units per milliliter no more than 12 months prior to admission. The facility shall document how this screening requirement is met.

(ii) Repeated serologic screening shall be based on the antigen or antibody status of the patient.

(I) Monthly screening for HBsAg is required for patients whose previous test results are negative for HBsAg.

(II) Screening of HBsAg-positive or anti-HBs-positive patients may be performed on a less frequent basis, provided that the facility's policy on this subject remains congruent with Appendices i and ii of the National Surveillance of Dialysis Associated Disease in the United States, 2000, published by the United States Department of Health and Human Services.

(C) Isolation procedures for the HBsAg-positive patient.

(i) The facility shall treat patients positive for HBsAg in a segregated treatment area which includes a hand washing sink, a work area, patient care supplies and equipment, and sufficient space to prevent cross-contamination to other patients.

(ii) A patient who tests positive for HBsAg shall be dialyzed on equipment reserved and maintained for the HBsAg-positive patient's use only.

(iii) When a caregiver is assigned to both HBsAg-negative and HBsAg-positive patients, the HBsAg-negative patients assigned to this grouping must be Hepatitis B antibody positive. Hepatitis B antibody positive patients are to be seated at the treatment stations nearest the isolation station and be assigned to the same staff member who is caring for the HBsAg-positive patient.

(iv) If an HBsAg-positive patient is discharged, the equipment which had been reserved for that patient shall be given intermediate level disinfection prior to use for a patient testing negative for HBsAg.

(v) In the case of patients new to dialysis, if these patients are admitted for treatment before results of HBsAg or anti-HBs testing are known, these patients shall undergo treatment as if the HBsAg test results were potentially positive, except that they shall not be treated in the HBsAg isolation room, area, or machine.

(I) The facility shall treat potentially HBsAg-positive patients in a location in the treatment area which is outside of traffic patterns until the HBsAg test results are known.

(II) The dialysis machine used by this patient shall be given intermediate level disinfection prior to its use by another patient.

(III) The facility shall obtain HBsAg status results of the patient no later than three days from admission.

(u) - (v) (No change.)

(w) Surgical services. If a hospital provides surgical services, the services shall be well- organized and provided in accordance with acceptable standards of practice. If outpatient surgical services are offered, the services shall be consistent in quality with inpatient care in accordance with the complexity of services offered. A special hospital may not offer surgical services.

(1) Organization and staffing. The organization of the surgical services shall be appropriate for the scope of the services offered.

(A) - (D) (No change.)

(E) The facility shall adopt, implement, and enforce policies and procedures to comply with Health and Safety Code, Chapter 259 (relating to Surgical Technologists at Health Care Facilities).

(2) (No change.)

(x) - (y) (No change.)

§133.49. Reporting Requirements.

A hospital shall submit reports to the department in accordance with the reporting requirements in Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events).

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

Filed with the Office of the Secretary of State on June 21, 2010.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER I. PHYSICAL PLANT AND CONSTRUCTION REQUIREMENTS

25 TAC §133.163

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §241.026; concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of health care-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects the Health and Safety Code, Chapters 98, 241, 257, 258, 259, 323, and 1001; and Government Code, Chapter 531.

§133.163. Spatial Requirements for New Construction.

(a) - (aa) (No change.)

(bb) Renal dialysis suite. Outpatient renal dialysis shall not be performed in the hospital's inpatient renal dialysis suite unless authorized under §133.41(t) of this title. When outpatient renal dialysis is provided within a hospital building, the service and facilities shall be separated from the hospital with a two-hour fire rated partition. The owner of the outpatient renal dialysis facility must obtain a separate license under Texas Health and Safety Code, Chapter 251, End Stage Renal Disease Facilities. Mechanical, electrical and plumbing services may be contracted from the hospital and the hospital shall maintain all rights and controls of all systems. When inpatient renal dialysis services are provided, the following rooms or areas shall be included.

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

(cc) - (ff) (No change.)

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

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CHAPTER 135. AMBULATORY SURGICAL CENTERS

SUBCHAPTER A. OPERATING REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS

25 TAC §§135.2, 135.15, 135.26

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§135.2, 135.15, and 135.26, concerning the regulation of ambulatory surgical centers.

BACKGROUND AND PURPOSE

The amendments to §135.2 and §135.15 are necessary to comply with House Bill 643, 81st Legislature, Regular Session, 2009, which added Health and Safety Code, Chapter 259, relating to surgical technologists. House Bill 643 requires ambulatory sur-

gical centers to comply with qualification standards for employment of surgical technologists.

The amendment to §135.26 is necessary to comply with Senate Bill (SB) 203, 81st Legislature, Regular Session, 2009, which amended Health and Safety Code, Chapter 98, involving the reporting of health care-associated infections and preventable adverse events in certain health care facilities to the department.

The department regulates ambulatory surgical centers as required by Health and Safety Code, Chapter 243.

SECTION-BY-SECTION SUMMARY

An amendment to §135.2(21) adds the definition of "Surgical technologist" as defined in Health and Safety Code, Chapter 259.

An amendment to §135.15 requires ambulatory surgical centers to adopt, implement, and enforce policies related to the employment of surgical technologists.

An amendment to §135.26 requires ambulatory surgical centers to report to the department incidents of certain healthcare-associated infections and preventable adverse events, in accordance with Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events). The department will promulgate rules to set forth the detailed requirements for reporting. This information will allow the department to make available patient safety information in Texas, including information related to healthcare-associated infections and preventable adverse events in a format that is available on an Internet website.

FISCAL NOTE

Renee Clack, Section Director, Health Care Quality Section, has determined that for each year of the first five-year period that the sections will be in effect, there will not be fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Clack has also determined that there will not be an adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Clack has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The rules protect the health, safety, and welfare of patients receiving services in ambulatory surgical centers, personnel, and the public.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by 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 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

The department has determined that the 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 Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Beth Pickens, Health Care Quality Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 148347, Mail Code 2822, Austin, Texas 78714-9347, (512) 834-6752 or by email to beth.pickens@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards for the licensing and regulation of ambulatory surgical centers; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 98, concerning the reporting the of health care-associated infections; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendments affect the Health and Safety Code, Chapters 98, 243, 259, and 1001; and Government Code, Chapter 531.

§135.2. Definitions.

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

(1) - (20) (No change.)

(21) Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(22) [~~(21)~~] Title XVIII--Title XVIII of the United States Social Security Act, 42 United States Code (USC), §§1395 et seq.

§135.15. Facility Staffing and Training.

(a) Nursing services.

(1) (No change.)

(2) There shall be a written plan of administrative authority for all nursing services with responsibilities and duties of each category

of nursing personnel delineated and a written job description for each category. The scope of nursing service shall include, but is not limited to, nursing care rendered to patients preoperatively, intraoperatively, and postoperatively.

(A) - (D) (No change.)

(E) The facility shall adopt, implement and enforce policies and procedures to comply with Health and Safety Code, Chapter 259 (relating to Surgical Technologists at Health Care Facilities).

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

(b) (No change.)

§135.26. Reporting Requirements.

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

(e) The ASC shall submit reports to the department in accordance with the reporting requirements in Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events).

(f) [~~(e)~~] Occurrences of fire in the ASC shall be reported as specified under §135.41(a)(2) of this title (relating to Fire Prevention and Protection) and §135.43(b)(6) of this title (relating to Handling and Storage of Gases, Anesthetics, and Flammable Liquids).

This 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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Lisa Hernandez
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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER E. DOG AND CAT STERILIZATION

25 TAC §169.102

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §169.102, concerning the Department of State Health Services Animal Friendly Grants.

BACKGROUND AND PURPOSE

The amendment is necessary to comply with Health and Safety Code, Chapter 828, "Dog and Cat Sterilization," which requires the department to make grants to eligible organizations for the purpose of providing low-cost dog and cat sterilization to the general public.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 169.102 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The amendment to §169.102 replaces the definition of "owner" with "custodian;" deletes the definition of "department" because it is defined in Subchapter A which refers to definitions in the chapter; adds a definition of "sterilization" to make the rule consistent with the statute in subsection (b); adds language in subsection (f) to assure that sterilizations are performed in a manner consistent with the statute; updates the department's mailing address in subsection (g); and clarifies the requirements for animal friendly grants to align more closely with current state law, and revises terminology throughout the rule for consistency.

FISCAL NOTE

Adolfo Valadez, M.D., MPH, Division Director, Prevention and Preparedness Services, has determined that for each year of the first five-year period that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Valadez has also determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment. Therefore, an economic impact statement and regulatory flexibility analysis for small and micro-businesses are not required.

PUBLIC BENEFIT

In addition, Dr. Valadez has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section will be the distribution of funding to provide low-cost surgical sterilization of dogs and cats, thereby reducing the public health threat due to stray animals.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by 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 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

The department has determined that the proposed amendment 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 Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Tom Sidwa, DVM, Department of State Health Services, Community Preparedness Section, Zoonosis Control Branch, Mail Code 1956, P.O. Box 149347, Austin, Texas 78714-9347, or by email to Tom.Sidwa@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §828.014, which provides the department with the authority to make grants to eligible organizations for the purpose of providing low-cost dog and cat sterilization to the general public, and requires the department to establish guidelines by rule for spending money in the Animal Friendly account; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rule implements Government Code, §2001.039.

The amendment affects Health and Safety Code, Chapters 828 and 1001; and Government Code, Chapter 531.

§169.102. Department of State Health Services Animal Friendly Grants.

(a) (No change.)

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

(1) (No change.)

(2) Custodian--A person or agency which feeds, shelters, harbors, owns, has possession or control of, or has the responsibility to control an animal.

[(2) Department--Department of State Health Services.]

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

(5) Sterilization--The surgical removal of the reproductive organs of a dog or cat or the use of nonsurgical methods and technologies approved by the United States Food and Drug Administration or the United States Department of Agriculture to permanently render the animal unable to reproduce.

[(5) Owner--A person which feeds, shelters, harbors, has possession or control, or has the responsibility to control an animal.]

(c) (No change.)

(d) Sources and Allocation of Funds.

(1) Funds for the grants shall be provided in accordance with the Texas Health and Safety Code [Health & Safety Code], §828.014, relating to the Animal Friendly account.

(2) - (3) (No change.)

(4) The department shall have the authority and discretion to:

(A) - (B) (No change.)

(C) determine the number, size, and duration of grants; and

(D) (No change.)

(5) (No change.)

(e) (No change.)

(f) Requirements for Grants.

(1) (No change.)

(2) Applicants for grants shall submit as a part of their application a plan of how they intend to provide sterilization services to [and] their target population, compliant with Texas Health and Safety Code, Chapter 828, and this section.

(3) Grant recipients shall make quarterly [semi-annual] reports to the department in a form and at a time determined by the department.

(g) Procedures for Grant Announcements.

(1) (No change.)

(2) The department shall maintain a list of persons to be notified of the request [requests] for proposals. Any person wanting to be placed on the list should contact: Animal Friendly Grants, Zoonosis Control Branch, Mail Code 1956, P. O. Box 149347, Austin, Texas 78714-9347 [1100 West 49th Street, Austin, Texas 78756].

(3) The department shall develop and publish one or more request [requests] for proposals, which shall contain details concerning, but not limited to, the following:

(A) - (F) (No change.)

(h) Procedures for Grant Applications.

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

(4) Applicants will be given a minimum of 60 calendar days to file applications after a request for proposals is published. Applications must be received by the department on or before the closing date specified in the request for proposals [proposal].

(i) (No change.)

(j) Selection Criteria.

(1) (No change.)

(2) A grant application will be given funding preference, in a manner determined by the department and announced in the request for proposals [proposal], to the extent that it:

(A) includes an outreach program targeting pet custodians [targets low-income pets owners, describing how the applicant defines, ascertains, and verifies that the person is financially challenged];

(B) documents the intent and ability of the applicant to communicate and collaborate with the local health departments, animal control agencies, animal welfare agencies, veterinary organizations, and human services organizations;

(C) demonstrates a low cost for sterilization on a per animal basis, thereby maximizing the number of animals which can be sterilized; and [.]

[(D) is a new, qualified program that does not duplicate existing low-cost sterilization efforts in a given community; and]

(D) [~~(E)~~] contains such other information or criteria that the department may specify and include in the request for proposals.

(k) - (l) (No change.)

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

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003407
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§114.2, 114.51, and 114.64; and the repeal of §114.52.

If adopted, the amendments to §114.2 and §114.51 and the repeal of §114.52 would be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP). Section 114.64 is not included in the SIP and the amendments to §114.64 will not be submitted to the EPA.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

A rulemaking adopted by the commission on October 6, 2000, revised an air pollution control strategy involving emissions inspection of vehicles to reduce nitrogen oxides (NO_x) and volatile organic compounds (VOC) necessary for the counties included in the Dallas-Fort Worth (DFW), Houston-Galveston-Brazoria (HGB), and El Paso (ELP) ozone nonattainment areas in order to assist in the ability to demonstrate attainment with the one-hour ozone National Ambient Air Quality Standard (NAAQS). The commission adopted vehicle emissions testing analyzer specifications (TAS) and inspection requirements for acceleration simulation mode (ASM) and on-board diagnostics (OBD) inspections. The revised vehicle emissions inspection program, also known as the Inspection and Maintenance (I/M) program, began on May 1, 2002, in Collin, Dallas, Denton, and Tarrant Counties in the DFW area and Harris County in the HGB area. On May 1, 2003, the I/M program expanded to include Ellis, Johnson, Kaufman, Parker, and Rockwall Counties for the DFW area and Brazoria, Fort Bend, Galveston, and Montgomery Counties in the HGB area. Unlike the two-speed idle (TSI) vehicle emissions inspection that had been in place, the ASM inspection has the ability to detect NO_x emissions, while the OBD inspection has the ability to ensure vehicle emissions control systems are functioning as designed by verification through the vehicle's computer system. Because NO_x is a precursor to ground-level ozone formation, reduced NO_x and VOC emissions result in ground-level ozone reductions. In addition, the inclusion of OBD in the I/M program ensured compliance with a federal mandate requiring all 1996 and newer model-year vehicles to receive an OBD inspection.

On October 24, 2001, the commission adopted rules that implemented portions of House Bill (HB) 2134, 77th Texas Legislature, 2001. The adopted rules defined the term "low-volume emissions inspection station" and required all vehicle emissions inspection stations in the DFW and HGB areas to offer both ASM and OBD inspections to the public with the exception of low-volume emissions inspection stations. The adopted rules also revised the TAS and established the Early Participation Incentive Program (EPIP).

The low-volume emissions inspection station designation was established because the cost of ASM vehicle emissions inspection analyzers, which have the capability to inspect all vehicles required to undergo I/M inspections, is much higher than the cost of OBD-only vehicle inspection analyzers, which only have the capability to inspect 1996 and newer model-year vehicles. To ensure that an adequate number of vehicle emissions inspection stations were available to provide both ASM and OBD inspections at the start of the revised I/M program in the DFW and HGB areas, stations that voluntarily opted to be designated as a low-volume emissions inspection station by the Texas Department of Public Safety (DPS), the agency that implements the I/M program along with the TCEQ, were restricted to a maximum of 1,200 OBD inspections per calendar year.

The EPIP was established as an additional method to ensure that an adequate number of vehicle emissions inspection stations were available to provide both ASM and OBD inspections at the start of the revised I/M program in the DFW and HGB areas. The EPIP encouraged early purchases of ASM analyzers by providing vehicle emissions inspection stations with financial assurance offered by the state if the I/M program was terminated early. The EPIP was available to the first 1,000 eligible vehicle emissions inspection stations that were certified by the DPS to offer ASM and OBD inspections to the public. Vehicle emissions inspection station owners that were accepted into the EPIP and maintained their eligibility could have received a payment of up to $675 per month to cover the cost of the ASM analyzers if the I/M program was terminated within five years of the program start date. As the EPIP expired in all I/M program areas on May 1, 2008, vehicle emissions inspection stations owners are no longer participating in the program.

On October 26, 2005, the commission adopted revisions to §114.51, which required manufacturers of vehicle emissions inspection analyzers used in the I/M program to meet the revised requirements contained in the TCEQ's "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, or in the TCEQ's "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005. Since October 2005, the TAS have been modified four times to improve oversight and enhance effectiveness of the I/M program. The minor modifications did not affect the vehicle emissions inspection procedure or the design and performance criteria for the vehicle emissions inspection analyzer. However, the minor modifications did include updates to accommodate new technology vehicles, enhancements to the method of collecting inspection data that is used to identify the occurrence of possible improper or fraudulent inspections, and updates

to internal reference tables used to determine the applicable vehicle emissions inspection criteria. No modification would be considered a minor non-programmatic modification if it results in additional costs to vehicle inspection station owners. Each time the TAS were modified, staff incorporated the necessary software enhancements into a draft version of the TAS, and these enhancements were implemented on all analyzers by the analyzer manufacturers participating in the I/M program. The modified TAS have not been incorporated by rule.

Rules adopted by the commission on March 27, 2002, implemented the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), which was designed to assist low income individuals with repairs, retrofits, or retirement of vehicles that failed emissions inspections as required by HB 2134, 77th Texas Legislature, 2001. Under the LIRAP, monetary assistance is provided for emissions-related repairs directly related to bringing the vehicle into compliance or for replacement assistance for a vehicle that has failed the required emissions inspection. Due to the requirements of Senate Bill (SB) 12, 80th Texas Legislature, 2007, the commission adopted rules on December 5, 2007, that modified the LIRAP, now commonly referred to as the Drive a Clean Machine program, by requiring funds be transferred to a participating dealer not later than five business days after the sale of a replacement vehicle is completed.

The primary reason for this proposed rulemaking is to implement portions of HB 715 and HB 1796 from the 81st Texas Legislature, 2009, relating to requiring the vehicle emissions inspection limit for low-volume emissions inspection stations to be set at no fewer than 150 OBD inspections per month and increasing the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days, respectively. This proposed rulemaking would also define the TAS as "the most recent version" resulting in a more streamlined process for minor non-programmatic modifications to the TAS and allow staff to implement minor non-programmatic modifications including updates to accommodate new technology vehicles, enhancements to the method of collecting inspection data, and updates to internal reference tables. However, modifications to the I/M program design, performance criteria for the vehicle emissions inspection analyzer, or the vehicle emissions inspection procedure would not be implemented unless commission approval is received through the rule and SIP revision process. In addition, the proposed rulemaking would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references to remove redundant requirements and would also repeal the EPIP.

The EPIP was established as an incentive program and is not a control strategy measure of the I/M program. In addition, the EPIP expired on May 1, 2008. Therefore, removal of the EPIP would not change the stringency or effectiveness of the I/M program.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments associated with the rulemaking for Chapter 114, various stylistic, non-substantive changes are included to update rule language to current Texas Register style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally are not specifically discussed in this preamble. Comments received regarding existing rule language that are not related to incorporating the proposed amendments and the proposed repeal to Chapter 114 or to the specific proposed non-substantive changes discussed in this preamble will not be considered, and no changes will be made based on such comments.

The proposed amendment to §114.2 would modify the definition of a low-volume emissions inspection station. The current definition states that "a low-volume emissions inspection station is a vehicle emissions inspection station that performs only the OBD test and does not exceed 1,200 OBD tests per calendar year." The modified definition would state that "a low-volume inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety." HB 715 prevents the DPS from restricting a vehicle emissions inspection station to fewer than 150 OBD inspections per month. This proposed amendment would ensure that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715.

The proposed amendment to §114.51 would remove the dates associated with the TAS and add language requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS resulting in a more streamlined process for implementing minor non-programmatic modifications to the TAS. The most recent version of the TAS would be the version available at the TCEQ's central office or at *http://www.tceq.state.tx.us/assets/public/implementation/air/ms/IM/txvehanlspecs.pdf.* In addition, the proposed amendment would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references as the specifications for OBD-only vehicle inspection analyzers are also contained in the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program."

The proposed repeal of §114.52 would remove all requirements relating to the EPIP, which has expired, and delete the EPIP requirements that were incorporated into the I/M SIP in the preamble of previous rulemakings adopted on October 24, 2001, October 8, 2003, and September 14, 2004.

The proposed amendment to §114.64 would increase the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule revisions are in effect, no significant fiscal implications are anticipated for the TCEQ or other units of state or local government as a result of administration or enforcement of the proposed rule revisions.

The proposed rulemaking would implement two bills: HB 715, which changes requirements for low-volume emissions inspection stations; and HB 1796, which changes a requirement of the LIRAP. In addition, staff is proposing a revision to the rule regarding the TAS and a rule repeal regarding the EPIP.

Low-Volume Emissions Inspection Stations

Currently, low-volume emissions inspection stations may perform up to 1,200 OBD inspections per year. HB 715 increased this limit to a maximum established by the DPS of at least 150 OBD inspections per month effective December 31, 2010. The vehicle emissions inspection limit for stations that only offer emissions inspections on 1996 and newer model-year vehicles has been a component of the I/M program in the DFW and HGB areas since 2002. The rule was adopted in 2001 because the cost of ASM analyzers, which have the capability to inspect all vehicles required to undergo I/M inspections, is much higher than the cost of OBD-only vehicle inspection analyzers, which only have the capability to inspect 1996 and newer model-year vehicles. The rule did not limit the number of inspections conducted using ASM analyzers in order to provide an incentive for automotive shops to purchase the more expensive ASM analyzers so that more inspection stations could accommodate older cars. The rule has been in place for eight years. With the passage of HB 715, the limit for vehicle emissions inspections at low-volume emissions inspection stations has been increased.

In order to comply with HB 715, the proposed rule revision to §114.2 is needed to replace the vehicle emissions inspection limit in the current definition with language indicating that the station must meet the criteria for obtaining a low-volume waiver from the DPS. This change would ensure that the definition of a low-volume emissions inspection station would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules.

The proposed rule revisions would be implemented by the TCEQ through updating the Texas Information Management System database, which is used to enforce this aspect of the I/M program in the DFW and HGB areas. In order to implement the proposed rule revisions, the TCEQ and the DPS would need to make minor administrative and procedural changes. No significant fiscal implications are anticipated for the TCEQ or the DPS as a result of the proposed rule revisions.

LIRAP

Section 12 of HB 1796 revised a requirement of the LIRAP, which increased the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days. The LIRAP is managed by the TCEQ but administered and implemented in the local areas by county program administrators. The TCEQ does not conduct any reimbursement activities to dealerships. Local governments and their contracted local administrators are expected to experience additional processing and review time for payments to dealerships. The proposed rulemaking extending the time period that counties would have to reimburse participating dealerships is not expected to have significant fiscal impacts on the TCEQ or affected local governments.

TAS

On October 26, 2005, the commission adopted revisions to §114.51, which required manufacturers of vehicle emissions inspection analyzers used in the I/M program to meet the requirements contained in the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, or in the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, which are also referred to as the TAS. Since October 2005, the TAS has been modified four times with minor non-programmatic changes to improve the oversight and effectiveness of the I/M program. The modified TAS has not been incorporated into the rule.

The proposed rule revision would define the TAS as "the most recent version" resulting in a more streamlined process for implementing minor non-programmatic modifications to the TAS. In addition, the rule revision would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references to remove redundant requirements.

EPIP

On October 24, 2001, the commission adopted rules for the EPIP in §114.52. The EPIP was established to ensure that an adequate number of vehicle emissions inspection stations were available to provide ASM and OBD inspections at the start of the I/M program for the DFW and HGB areas. Vehicle emissions inspection station owners that were accepted into the EPIP and maintained their eligibility could receive a payment of up to $675 per month to cover the cost of the ASM analyzer if the I/M program was terminated within five years of the start date. However, now that the EPIP program has expired in all I/M program areas, the proposed rule revisions would repeal this provision. Because the proposed rule revisions would eliminate an expired program, the TCEQ would not experience any fiscal impacts due to this proposed rule repeal.

PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed rule revisions are in effect, the public benefit anticipated from the changes seen in the proposed rule revisions would be compliance with state law and more efficient operation of the state's I/M program.

No significant fiscal implications are anticipated for businesses or for individuals as a result of the implementation or enforcement of the proposed rule revisions.

The proposed changes to the definition of a low-volume emissions inspection station in §114.2 would not impact individuals but may fiscally impact vehicle emissions inspection stations. Low-volume emissions inspection stations may experience an increase in revenue due to the increase in the amount of inspections they are allowed to perform each month, while non low-volume emissions inspection stations, also known as full-service vehicle emissions inspection stations, may experience a corresponding decrease in revenue. Predicting the magnitude of the increase or decrease experienced by each type of station is not possible as the increase or decrease would be determined by the marketplace.

The proposed rule revisions relating to extending the time period that counties would have to reimburse participating dealerships from five to 10 business days is not expected to result in significant fiscal impacts. Participation by dealerships in the LIRAP is voluntary and based on agreements with local program administrators that detail specific program requirements including payment schedules. The proposed rule revisions would provide additional processing and review time that may improve the efficiency of payments to dealerships.

Businesses and motorists would not experience any fiscal impacts due to the proposed rule revisions relating to the TAS. The proposed changes would only affect the way the TCEQ approves minor non-programmatic modifications to the TAS and eliminate redundant requirements.

The proposed changes that would repeal the EPIP would eliminate a requirement for an expired program. Therefore, businesses and motorists would not experience any fiscal impacts as a result of the proposed rule repeal.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

In general, the proposed rule revisions are not expected to adversely affect small or micro-businesses as a result of the implementation or administration of the proposed rule revisions. The proposed rule revisions would affect approximately 531 low-volume emissions inspection stations and approximately 1,011 full-service vehicle emissions inspection stations in the HGB area, and approximately 677 low-volume emissions inspection stations and approximately 1,134 full-service vehicle emissions inspection stations in the DFW area. Low-volume emissions inspection stations may experience an increase in revenue due to the increase in the amount of inspections they are allowed to perform each month. Full-service vehicle emissions inspection stations may experience a corresponding decrease in revenue. Predicting the magnitude of the increase or decrease experienced by each type of station is not possible as the increase or decrease would be determined by the marketplace.

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 rule revisions relating to low-volume emissions inspection stations and the LIRAP are necessary to comply with state law. The rest of the proposed rulemaking is procedural, and all of the proposed rule revisions are consistent with the public health, safety, environmental, and economic welfare of the state.

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 rule revisions do not adversely affect a local economy in a material way for the first five years that the proposed rule revisions 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 proposed rule revisions do not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that 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." Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule, which: "(1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law."

The proposed rulemaking implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, state 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, otherwise known as the FCAA). 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 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 requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410 and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. Furthermore, while states generally are afforded some flexibility in adopting and implementing a SIP, vehicle I/M programs are required elements of the SIP pursuant to 42 USC, §7511(a).

The specific intent of the proposed rulemaking is to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions. To further this specific intent, this rulemaking incorporates the following proposed amendments to the I/M program. The current definition of a low-volume emissions inspection station in §114.2 states that "a low-volume emissions inspection station is a vehicle emissions inspection station that performs only the OBD test and does not exceed 1,200 OBD tests per calendar year." The proposed amendment to §114.2 would modify the current definition to state that "a low-volume emissions inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety." HB 715 prevents the DPS from restricting a vehicle emissions inspection station to fewer than 150 OBD inspections per month. The proposed amendment would ensure that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715. The proposed amendment to §114.64 would increase the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796. The proposed amendment to §114.51 would remove the dates associated with the TAS and add language requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS and remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references. The proposed amendment would improve the efficiency

of the process used by the commission for implementing minor non-programmatic modifications to the TAS and remove redundant requirements. The proposed repeal of §114.52 would repeal all requirements relating to the EPIP, which has expired.

The proposed rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because: 1) the specific intent of the proposed rule revision is not to protect the environment or reduce risks to human health from environmental exposure, but rather to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions; and 2) as discussed in the FISCAL NOTE, PUBLIC BENEFITS AND COSTS, SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS, and the LOCAL EMPLOYMENT IMPACT STATEMENT sections of this preamble, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the proposed rule revisions adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking actually clarifies, improves upon, and increases consistency within the I/M program and the LIRAP. Because the proposed rulemaking is not a major environmental rule, it is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

While the proposed rulemaking does not constitute a major environmental law, even if it did, it would not be subject to a regulatory impact analysis under Texas Government Code, §2001.0225. The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by SB 633 during the 75th Texas 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 will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program; or are adopted solely under the general powers of the TCEQ. 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 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 rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area 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 proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP and rules was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP and rules 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 (LBB) in its fiscal notes. Since 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 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 and rules have a broad impact, that 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.,* 9 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 Indust. 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," Texas Government Code, §2001.035. 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.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rule revisions do not exceed a standard set by federal law or exceed an express requirement of state law since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law - the NAAQS. In addition, the adoption and maintenance of the I/M program is directly required by federal law pursuant to 42 USC, §7511(a). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality,* 128 S.W. 3d 728 (Tex. App. - Austin 2004, *no writ).* In addition, portions of this rulemaking are directly required by HB 715 and HB 1796. Furthermore, no contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the TCEQ but is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code (TWC), which are cited in the

STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017.

This rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), for the following reasons. The proposed rulemaking is not a major environmental law because: 1) the specific intent of the proposed rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, but rather to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions; and 2) the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would it adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state, because the proposed rulemaking actually clarifies, improves upon, and increases consistency within the I/M program and the LIRAP. Furthermore, even if the proposed rulemaking was a major environmental rule, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this rulemaking; and 4) the proposed rulemaking is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act), and the TWC, which are cited in the STATUTORY AUTHORITY section of this preamble.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. 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 the proposed rule revisions and performed an analysis of whether the proposed rule revisions constitute a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) 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 (B) a governmental action that: (i) 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 (ii) 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 the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

The specific purpose of the proposed rulemaking is to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions. Therefore, the proposed rulemaking would substantially advance this stated purpose by: modifying the current definition of a low-volume emissions inspection station to state that "a low-volume emissions inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety"; ensuring that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715; increasing the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796; removing the dates associated with the TAS and adding language requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS and removing the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references; streamlining the process used by the commission for implementing minor non-programmatic modifications to the TAS; removing redundant requirements; and deleting all requirements relating to the EPIP, which has expired.

Promulgation and enforcement of the proposed rule revisions would be neither a statutory nor a constitutional taking of private real property. These proposed rule revisions are not burdensome, restrictive, or limiting of rights to private real property because the proposed rule revisions simply clarify, improve upon, and increase consistency within the existing I/M program and the LIRAP. Furthermore, the proposed rule revisions would benefit the public by improving upon the I/M program and the LIRAP, making them more accessible to the public and subsequently improving their effectiveness. The proposed rule revisions do not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these proposed rule revisions would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rule revisions in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goals applicable to the proposed rulemaking are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. No new sources of air contaminants would be authorized and ozone levels would be reduced as a result of the proposed rulemaking. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in the Code of Federal Regulations to protect and enhance air quality in the coastal area (31 TAC §501.32). This rulemaking proposal would not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone NAAQS by continuing to

implement the existing OBD, ASM, and TSI vehicle inspections as a part of the I/M program. This rulemaking action complies with the Code of Federal Regulations. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. Promulgation and enforcement of these proposed rule revisions would not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule revisions are consistent with these CMP goals and policies and because these propose rule revisions do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal in Fort Worth on July 20, 2010, at 2:00 p.m. at the TCEQ, Region 4 Office, DFW Public Meeting Room, 2309 Gravel Road, Fort Worth, TX 76118; in Austin on July 21, 2010, at 10:00 a.m. at the TCEQ, Building E, Room 201S, 12100 Park 35 Circle, Austin, TX 78753; and in Houston on July 22, 2010, at 3:00 p.m. at the Houston-Galveston Area Council, Conference Room A, 3555 Timmons Lane, Houston, TX 77027. The hearings are 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 hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearings 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 Michael Parrish, 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 2009-027-114-EN. The comment period closes July 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 Edgar J. Gilmore, Jr., Air Quality Planning Section, (512) 239-2069.

SUBCHAPTER A. DEFINITIONS

30 TAC §114.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendment is also proposed under THSC, §382.002, 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; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.;* and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment is proposed pursuant to Texas Transportation Code, §548.3075, which was amended by House Bill 715 from the 81st Texas Legislature, 2009.

The proposed amendment implements Texas Transportation Code, §548.3075.

§114.2. Inspection and Maintenance Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, also known as the Texas Clean Air Act (TCAA), or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following words and terms, when used in Subchapter C of this chapter (relating to Vehicle Inspection and Maintenance; Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program; and Early Action Compact Counties), have the following meanings, unless the context clearly indicates otherwise.

(1) Acceleration simulation mode (ASM-2) test--An emissions test using a dynamometer (a set of rollers on which a test vehicle's tires rest) that applies an increasing load or resistance to the drive train of a vehicle, thereby simulating actual tailpipe emissions of a vehicle as it is moving and accelerating. The ASM-2 vehicle emissions test is comprised of two phases:

(A) the 50/15 mode--in which the vehicle is tested on the dynamometer simulating the use of 50% of the vehicle available horsepower to accelerate at a rate of 3.3 miles per hour (mph) per second at a constant speed of 15 mph; and

(B) the 25/25 mode--in which the vehicle is tested on the dynamometer simulating the use of 25% of the vehicle available horsepower to accelerate at a rate 3.3 mph per second at a constant speed of 25 mph.

(2) Consumer price index--The consumer price index for any calendar year is the average of the consumer price index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of the calendar year.

(3) Controller area network (CAN)--A vehicle manufacturer's communications protocol that connects to the various electronic

modules in a vehicle. CAN provides one protocol that collects information from the vehicle's electronic systems including the on-board diagnostics (OBD) emissions testing system. The United States Environmental Protection Agency requires the CAN protocol to be installed in OBD-compliant vehicles beginning with some model year 2003 vehicles and phasing in to all OBD-compliant vehicles by the 2008 model year.

(4) Low-volume emissions inspection station--A vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety. [~~performs on-board diagnostics (OBD) testing only and does not exceed 1,200 OBD tests per calendar year.~~]

(5) Motorist--A person or other entity responsible for the inspection, repair, and maintenance of a motor vehicle, which may include, but is not limited to, owners and lessees.

(6) On-board diagnostic (OBD) system--The computer system installed in a vehicle by the manufacturer that monitors the performance of the vehicle emissions control equipment, fuel metering system, and ignition system for the purpose of detecting malfunction or deterioration in performance that would be expected to cause the vehicle not to meet emissions standards. All references to OBD should be interpreted to mean the second generation of this equipment, sometimes referred to as OBD II.

(7) On-road test--Utilization of remote sensing technology to identify vehicles operating within the inspection and maintenance program areas that have a high probability of being high-emitters.

(8) Out-of-cycle test--Required emissions test not associated with vehicle safety inspection testing cycle.

(9) Primarily operated--Use of a motor vehicle greater than 60 calendar days per testing cycle in an affected county. Motorists shall comply with emissions requirements for such counties. It is presumed that a vehicle is primarily operated in the county in which it is registered.

(10) Program area--County or counties in which the Texas Department of Public Safety, in coordination with the commission, administers the vehicle emissions inspection and maintenance program contained in the Texas Inspection and Maintenance State Implementation Plan. These program areas include:

(A) the Dallas-Fort Worth program area, consisting of the following counties: Collin, Dallas, Denton, [~~Collin,~~] and Tarrant;

(B) the El Paso program area, consisting of El Paso County;

(C) the Houston-Galveston-Brazoria program area, consisting of Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties; and

(D) the extended Dallas-Fort Worth program area, consisting of Ellis, Johnson, Kaufman, Parker, and Rockwall Counties. These counties became part of the program area as of May 1, 2003.

(11) Retests--Successive vehicle emissions inspections following the failing of an initial test by a vehicle during a single testing cycle.

(12) Testing cycle--Annual cycle commencing with the first safety inspection certificate expiration date for which a motor vehicle is subject to a vehicle emissions inspection.

(13) Two-speed idle (TSI) inspection and maintenance test--A measurement of the tailpipe exhaust emissions of a vehicle while the vehicle idles, first at a lower speed and then again at a higher speed.

(14) Uncommon part--A part that takes more than 30 days for expected delivery and installation, where a motorist can prove that a reasonable attempt made to locate necessary emission control parts by retail or wholesale part suppliers will exceed the remaining time prior to expiration of the vehicle safety inspection certificate or the 30-day period following an out-of-cycle inspection.

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

Filed with the Office of the Secretary of State on June 18, 2010.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER C. VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM; AND EARLY ACTION COMPACT COUNTIES

DIVISION 1. VEHICLE INSPECTION AND MAINTENANCE

30 TAC §114.51

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendment is also proposed under THSC, §382.002, 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; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC,

Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.;* and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment to §114.51 is proposed pursuant to THSC, §382.205.

The proposed amendment implements THSC, Subchapter G, §§382.201 - 382.220, Vehicle Emissions.

§114.51. Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.

(a) Any manufacturer or distributor of vehicle testing equipment may apply to the executive director of the commission or his appointee, for approval of an exhaust gas analyzer or analyzer system for use in the Texas Inspection and Maintenance (I/M) program administered by the Texas Department of Public Safety. Each manufacturer shall submit a formal certificate to the commission stating that any analyzer model sold or leased by the manufacturer or its authorized representative and any model currently in use in the I/M program will satisfy all design and performance criteria set forth in the most recent version of the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program." [~~," dated May 1, 2005, or in "Specifications for On-Board Diagnostics II for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005.~~] Copies of this document [~~these documents~~] are available at the commission's Central Office, located at 12100 Park 35 Circle, Austin, Texas 78753 or at *http://www.tceq.state.tx.us/assets/public/implementation/air/ms/IM/txvehanlspecs.pdf.* The manufacturer shall also provide sufficient documentation to demonstrate conformance with these criteria including a complete description of all hardware components, the results of appropriate performance testing, and a point-by-point response to each specific requirement.

(b) All equipment must [~~shall~~] be tested by an independent test laboratory. The cost of the certification must [~~shall~~] be absorbed by the manufacturer. The conformance demonstration must [~~shall~~] include, but is not limited to:

(1) certification that equipment design and construction conform with the specifications referenced in subsection (a) of this section;

(2) documentation of successful results from appropriate performance testing;

(3) evidence of necessary changes to internal computer programming, display format, and data recording sequence;

(4) a commitment to fulfill all maintenance, repair, training, and other service requirements described in the specifications referenced in subsection (a) of this section. A copy of the minimum warranty agreement to be offered to the purchaser of an approved vehicle exhaust gas analyzer must [~~shall~~] be included in the demonstration of conformance; and

(5) documentation of communication ability using protocol provided by the commission or the commission Texas Information Management System (TIMS) contractor.

(c) If a review of the demonstration of conformance and all related support material indicates compliance with the criteria listed in subsections (a) and (b) of this section, the executive director or his appointee may issue a notice of approval to the analyzer manufacturer that endorses the use of the specified analyzer or analyzer system in the Texas I/M program.

(d) The applicant shall comply with all special provisions and conditions specified by the executive director or his appointee in the notice of approval.

(e) Any manufacturer or distributor that receives a notice of approval from the executive director or the executive director's appointee for vehicle emissions test equipment for use in the Texas I/M program may be subject to appropriate enforcement action and penalties prescribed in the Texas Clean Air Act or the rules and regulations promulgated thereunder if:

(1) any information included in the conformance demonstration as required in subsection (b) of this section is misrepresented resulting in the purchase or operation of equipment in the Texas I/M program that does not meet the specifications referenced in subsection (a) of this section; [~~or~~]

(2) the applicant fails to comply with any requirement or commitment specified in the notice of approval issued by the executive director or implied by the representations submitted by the applicant in the conformance demonstration required by subsection (b) of this section; [~~or~~]

(3) the manufacturer or distributor fails to provide on-site service response by a qualified repair technician within two business days of a request from an inspection station, excluding Sundays, national holidays (New Year's Day, Martin Luther King Jr. Day, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, and Christmas Day), and other days when a purchaser's business might be closed;

(4) the manufacturer or distributor fails to fulfill, on a continuing basis, the requirements described in this section or in the specifications referenced in subsection (a) of this section; or

(5) the manufacturer fails to provide analyzer software updates within six months of request and fails to install analyzer updates within 90 days of commission written notice of acceptance.

This 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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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30 TAC §114.52

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality 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 Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission

to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The repeal is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The repeal is also proposed under THSC, §382.002, 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; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.;* and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The repeal of §114.52 is proposed pursuant to THSC, §382.216.

The proposed repeal implements THSC, Subchapter G, §§382.201 - 382.220, Vehicle Emissions.

§114.52. Early Participation Incentive Program.

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

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DIVISION 2. LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM

30 TAC §114.64

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendment is also proposed under THSC, §382.002, 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; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.;* and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment is proposed pursuant to THSC, §382.210 which was amended by House Bill 1796 from the 81st Texas Legislature, 2009.

The proposed amendment implements THSC, §382.210.

§114.64. LIRAP Requirements.

(a) Implementation. Upon receiving a written request to implement a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) by a county commissioners court, the executive director shall authorize the implementation of a LIRAP in the requesting county. The executive director and county shall enter into a grant contract for the implementation of the LIRAP.

(1) The grant contract must provide conditions, requirements, and projected funding allowances for the implementation of the LIRAP.

(2) A participating county may contract with an entity approved by the executive director for services necessary to implement the LIRAP. A participating county or its designated entity shall demonstrate to the executive director that, at a minimum, the county or its designated entity has provided for appropriate measures for determining applicant eligibility and repair effectiveness and ensuring against fraud.

(3) The participating county shall remain the contracted entity even if the county contracts with another county or another entity approved by the executive director to administer the LIRAP.

(b) Repair and retrofit assistance. A LIRAP must provide for monetary or other compensatory assistance to eligible vehicle owners for repairs directly related to bringing certain vehicles that have failed a required emissions test into compliance with emissions requirements or for installing retrofit equipment on vehicles that have failed a required emissions test, if practically and economically feasible, in lieu of or in combination with repairs performed to bring a vehicle into compliance with emissions requirements. Vehicles under the LIRAP must be repaired or retrofitted at a recognized emissions repair facility. To de-

termine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(1) the vehicle has failed a vehicle emissions test within 30 days of application submittal;

(2) the vehicle can be driven under its own power to the emissions inspection station or vehicle retirement facility;

(3) the vehicle is currently registered in and has been registered in the program county for the 12 months immediately preceding the application for assistance;

(4) the vehicle has passed the safety portion of the Texas Department of Public Safety (DPS) motor vehicle safety and emissions inspection as recorded in the Vehicle Inspection Report (VIR), or provide assurance that actions will be taken to bring the vehicle into compliance with safety requirements;

(5) the vehicle owner's net family income is at or below 300% [~~300 percent~~] of the federal poverty level; and

(6) any other requirements of the participating county or the executive director are met.

(c) Accelerated vehicle retirement. A LIRAP must provide monetary or other compensatory assistance to eligible vehicle owners to be used toward the purchase of a replacement vehicle.

(1) To determine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(A) the vehicle meets the requirements under subsection (b)(1) - (3) and (5) of this section;

(B) the vehicle has passed a DPS motor vehicle safety or safety and emissions inspection within 15 months prior to application submittal; and

(C) any other requirements of the participating county or the executive director are met.

(2) Eligible vehicle owners of pre-1996 model year vehicles that pass the required United States Environmental Protection Agency (EPA) Start-Up Acceleration Simulation Mode (ASM) standards emissions test, but would have failed the EPA Final ASM standards emissions test, or some other criteria determined by the commission, may be eligible for accelerated vehicle retirement and replacement compensation under this section.

(3) Notwithstanding the vehicle requirement provided under subsection (b)(1) of this section, an eligible vehicle owner of a vehicle that is gasoline powered and is at least 10 years old as determined from the current calendar year (i.e., 2010 [~~2007~~] minus 10 years equals 2000 [~~1997~~]) and meets the requirements under subsection (b)(2), (3), and (5) of this section, may be eligible for accelerated vehicle retirement and compensation.

(4) Replacement vehicles must:

(A) be in a class or category of vehicles that has been certified to meet federal Tier 2, Bin 5 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, *Federal Register* (65 FR [~~FedReg~~] 6698);

(B) have a gross vehicle weight rating of less than 10,000 pounds;

(C) be a vehicle, the total cost of which does not exceed $25,000; and

(D) have passed a DPS motor vehicle safety inspection or safety and emissions inspection within the 15-month period before the application is submitted.

(d) Compensation. The participating county shall determine eligibility and approve or deny the application promptly. If the requirements of subsection (b) or (c) of this section are met and based on available funding, the county shall authorize monetary or other compensations to the eligible vehicle owner.

(1) Compensations must be:

(A) no more than $600 and no less than $30 per vehicle to be used for emission-related repairs or retrofits performed at recognized emissions repair facilities, including diagnostics tests performed on the vehicle; or

(B) based on vehicle type and model year of a replacement vehicle for the accelerated retirement of a vehicle meeting the requirements under this subsection. Only one retirement compensation can be used toward one replacement vehicle annually per applicant. The maximum amount toward a replacement vehicle, must not exceed:

(i) $3,000 for a replacement car of the current model year or previous three model years, except as provided by clause (iii) of this subparagraph;

(ii) $3,000 for a replacement truck of the current model year or the previous two model years, except as provided by clause (iii) of this subparagraph;

(iii) $3,500 for a replacement hybrid vehicle of the current model year or the previous model year.

(2) Vehicle owners shall be responsible for paying the first $30 of emission-related repairs or retrofit costs that may include diagnostics tests performed on the vehicle.

(3) For accelerated vehicle retirement, provided that the compensation levels in paragraph (1)(B) of this subsection are met and minimum eligibility requirements under subsection (c) of this section are met, a participating county may set a specific level of compensation or implement a level of compensation schedule that allows flexibility. The following criteria may be used for determining the amount of financial assistance:

(A) model year of the vehicle;

(B) miles registered on the vehicle's odometer;

(C) fair market value of the vehicle;

(D) estimated cost of emission-related repairs necessary to bring the vehicle into compliance with emission standards;

(E) amount of money the vehicle owner has already spent to bring the vehicle into compliance, excluding the cost of the vehicle emissions inspection; and

(F) vehicle owner's income.

(e) Reimbursement for repairs and retrofits. A participating county shall reimburse the appropriate recognized emissions repair facility for approved repairs and retrofits within 30 calendar days of receiving an invoice that meets the requirements of the county or designated entity. Repaired or retrofitted vehicles must pass a DPS safety and emissions inspection before the recognized emissions repair facility is reimbursed. In the event that the vehicle does not pass the emissions retest after diagnosed repairs are performed, the participating county has the discretion, on a case-by-case basis, to make payment for diagnosed emissions repair work performed.

(f) Reimbursements for replacements. A participating county shall ensure that funds are transferred to a participating automobile dealership no later than 10 [~~five~~] business days after the county receives proof of the sale, proof of transfer to a dismantler, and any administrative documents that meet the requirements of the county or designated entity. A list of all administrative documents must be included in the agreements that are entered into by the county or designated entity and the participating automobile dealerships.

(1) A participating county shall provide an electronic means for distributing replacement funds to a participating automobile dealership once all program criteria have been met. The replacement funds may be used as a down payment toward the purchase of a replacement vehicle. Participating automobile dealers shall be located in the State of Texas. Participation in the LIRAP by an automobile dealer is voluntary.

(2) Participating counties shall develop a document for confirming a person's eligibility for purchasing a replacement vehicle and for tracking such purchase.

(A) The document must include at a minimum, the full name of applicant, the vehicle identification number of the retired vehicle, expiration date of the document, the program administrator's contact information, and the amount of money available to the participating vehicle owner.

(B) The document must be presented to a participating dealer by the person seeking to purchase a replacement vehicle before entering into negotiations for a replacement vehicle.

(C) A participating dealer who relies on the document issued by the participating county has no duty to confirm the eligibility of the person purchasing a replacement vehicle in the manner provided by this section.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§116.13, 116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740, and 116.750; and new §116.765.

The amended sections would be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP) with the exception of §§116.711(a)(2)(C)(iii), 116.715(f)(2)(A), 116.730, and 116.740(b).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On September 23, 2009, the EPA published notice in the *Federal Register* (74 *FR* 48480) (hereafter "Notice") of its intent to disapprove the TCEQ flexible permit program rules that were submitted to the EPA as a proposed SIP revision in 1994. Although the Federal Clean Air Act (FCAA) requires that proposed revisions to the SIP be reviewed within 18 months after submittal *(See* 42 United States Code (U.S.C.) §7410(k)(1)(B) and (k)(2)), EPA took 15 years to take any formal action and did so only in response to litigation brought by holders of flexible permits *(see BCCA Appeal Group, et al v. United States EPA et al,* No. 3-08CV1491-G (N.D. Texas)). In the Notice, the EPA cited the following assertions as the basis for disapproval of the flexible permit program as a minor New Source Review (NSR) revision: 1) The program is not clearly limited to use in minor NSR and does not clearly prevent circumvention of major NSR requirements; 2) The program does not require that an applicability determination for major NSR be made first for construction or modification that could potentially be subject to major NSR; 3) The program fails to meet the statutory and regulatory requirements for a SIP revision and is not consistent with guidance on SIP revisions; 4) The program lacks replicable, specific, established implementation procedures for establishing the emission cap in a minor NSR flexible permit; 5) The program is not an enforceable minor NSR permitting program; 6) The program allows the issuance of flexible permits that do not incorporate emission limitations and other requirements of the Texas SIP; and 7) The program lacks the necessary more specialized monitoring, recordkeeping, and reporting (MRR) requirements required for this type of minor NSR program, to ensure accountability and provide a means to determine compliance. The EPA also identified a number of related concerns with the Texas flexible permit program in correspondence to the commission dated March 12, 2008.

The Texas flexible permit program rules (Chapter 116, Subchapter G, Flexible Permits) became effective on December 8, 1994. The flexible permit program was developed in response to direction from the commission at the January 21, 1994, policy agenda meeting. The flexible permit rules were developed after considering the positional papers presented by industry, environmental groups, and local programs under the supervision of Task Force 21. The rules created a new type of permit called a flexible permit, which functions as an optional alternative to the traditional preconstruction permits that are authorized in Subchapter B, New Source Review Permits. Flexible permits were designed to exchange flexibility for emission reductions with the final goal being a well-controlled facility. At the time the flexible permit program was developed, the commission lacked the authority to require an air quality permit for grandfathered facilities. The flexible permit program was intended to provide grandfathered facilities with a voluntary authorization mechanism that would reduce emissions. Only one flexible permit can be issued for a particular plant site or active account. However, multiple emission caps, multiple individual emission limits, or any combination thereof can be included in a flexible permit. The applicant for a flexible permit can combine existing facilities and new facilities into the flexible permit. The flexible permit would then become the controlling authorization for all facilities included in the permit, succeeding any existing minor NSR permits that may have been applicable to all or part of the facilities. The flexible permit is not a substitute for or in lieu of major NSR permitting if federal NSR review is triggered. The flexible permitting program is intended to eliminate the need for owners or operators of participating facilities to submit an amendment application each time certain operational or physical changes are made at the permitted facility. The environmental benefits of the flexible per-

mit program have included the permitting of grandfathered units, substantial emission reductions from the installation of controls, and a comprehensive evaluation of emission impacts.

The commission maintains that its flexible permit program rules, as adopted and implemented, are fully approvable as revisions to the SIP. In fact, the Texas flexible permit program is a minor NSR permit program which requires the application of best available control technology (BACT) to minor sources even though not required to do so under the FCAA. The commission's executive director provided detailed comments in response to the Notice addressing each of the EPA assertions discussed earlier and demonstrating that, as written and administered by the commission, the flexible permit program rules are in full conformity with all applicable federal requirements *(see* Letter from M. Vickery, Executive Director, TCEQ to S. Spruiell, Air Permits Section (EPA Region 6), November 23, 2009). Additionally, permits issued under the flexible permit rules are consistent with the FCAA and EPA rules implementing NSR.

As originally developed and subsequently implemented by TCEQ in 1994, the Texas flexible permit program is a minor NSR program. No provision of the Texas flexible permit program rules may be read to circumvent federal requirements. The rules expressly require compliance with all applicable requirements relating to nonattainment and Prevention of Significant Deterioration (PSD) review.

That limitation, adopted in 1994 as §116.711(8) and (9), continues as proposed §116.711(a)(2)(H) and (I); *see also,* e.g., proposed §§116.710(a)(5), 116.711(a)(2)(C)(ii), and 116.718(b) and (c). The program does not supersede or negate federal requirements. The flexible permit program may not be used as a shield for protection or exemption from federal programs. Persons making changes under a flexible permit must maintain sufficient documentation to demonstrate that the project will comply with Subchapter B, Division 5, Nonattainment Review Permits; Division 6, Prevention of Significant Deterioration Review; and Subchapter E, Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63). A major modification, as defined in §116.12, may not occur without first being subject to a Nonattainment and/or PSD review. Likewise, an owner or operator may not use flexible permit rules to avoid maximum achievable control technology (MACT) requirements for the construction or reconstruction of major sources of hazardous air pollutants (HAP) as they are described and addressed in the 40 Code of Federal Regulations (CFR) Part 63, National Emission Standards for Hazardous Air Pollutants (NESHAP) rules. If a proposed project is determined to be a major modification under Nonattainment and/or PSD rules, or meets the definition of construction or reconstruction under 40 CFR Part 63, the owner or operator must obtain a federal NSR permit or major modification under the appropriate federal NSR program, as well as a HAP permit to meet requirements of FCAA §112(g) if case-by-case MACT applies; and a minor NSR permit amendment. Further, the flexible permit program does not impair the commission's authority to control the quality of the state's air and to take action to control a condition of air pollution if the commission finds that such a condition exists.

As the EPA recognizes, under the applicable federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards (NAAQS). The development of NSR requirements and procedures tailored for the air quality needs of each state is not only consistent with the FCAA, it is encouraged under the law and EPA's implementing regulations (see 42 U.S.C. §7407(a) and 40 CFR §51.101(e) and (g); see also *Safe Air for Everyone v. United States EPA,* 488 F.3d 1088, 1092 (9th Cir. 2007)). States have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans), and may also provide a rationale for why the rules are at least as stringent as the Part 51 requirements where the revisions are different from Part 51. These amendments are intended to remove any doubt that EPA might have, and to reaffirm the commission's position that the rules for the flexible permit program are at least as stringent as the commission's SIP-approved minor NSR permitting program.

SECTION BY SECTION DISCUSSION

§116.13, Flexible Permit Definitions

The commission is proposing detailed MRR requirements in proposed §116.715(c)(5), (6) and (12) and (d); *see also* §116.711(a)(2)(G). To support the proposed MRR requirements, the commission is proposing definitions of continuous emission monitoring system (CEMS), continuous parameter monitoring system (CPMS), and predictive emissions monitoring system (PEMS). The proposed definitions for these terms are derived from similar definitions established in 40 CFR §52.21, with minor changes to account for their use in the flexible permit program. The proposed changes relating to MRR are intended to address the EPA's comment that the Texas flexible permit program lacks the specialized MRR requirements necessary to enforce flexible permits.

The commission proposes to revise the definition of "emission cap" and the definition of "individual emission limitation" under §116.13 to delete references to the "insignificant emissions factor." The commission also proposes to remove the insignificant emission factor from other sections of Subchapter G as discussed in following sections of this preamble. The EPA identified the insignificant emissions factor as a concern in the March 12, 2008, correspondence to the commission. The proposed changes to eliminate the insignificant emissions factor would improve the accounting of emissions authorized under the flexible permit, and would address the EPA's comments that the Texas flexible permit program lacks replicable, specific, established implementation procedures for establishing the emission cap, and does not sufficiently address major NSR requirements.

§116.710, Applicability

The EPA has commented that the Texas flexible permit program is not clearly limited to minor NSR thereby allowing new major stationary sources to construct without a major NSR permit, and has no regulatory provisions clearly prohibiting the use of the program from circumventing the major NSR SIP requirements thereby allowing sources to use a flexible permit to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a major NSR preconstruction permit. As previously discussed in the BACKGROUND AND SUMMARY section, the commission does not concur with the EPA's comment that the flexible permit program allows sources to circumvent or avoid major NSR requirements. However, the commission is proposing §116.710(a)(5) to clarify and emphasize that any project that constitutes a new major stationary source or major modification that would trigger major

NSR requirements must comply with Subchapter B, Division 5 or 6, as applicable. Proposed §116.710(a)(5) also contains a statement to emphasize that Subchapter G, cannot be used to circumvent applicable federal major NSR permit requirements. Proposed §116.710 also contains minor editorial changes to correct outdated cross-references and obsolete terminology throughout the section.

§116.711, Flexible Permit Application

The commission proposes to restructure and renumber the contents of this section to provide improved readability and greater consistency with similar requirements in §116.111. The commission also proposes minor changes throughout this section to update terminology and correct cross-references.

The commission proposes §116.711(a)(2)(C)(i) to more clearly describe the application of BACT to new and existing facilities. All new facilities are required to use BACT. Existing facilities may be considered on a grouped basis, such that some facilities within the group may be controlled at a higher level than BACT in order to provide the emission reductions necessary so that other facilities within the group may be controlled to a lesser degree. The existing level of control may not be reduced for any facility.

The commission proposes §116.711(a)(2)(C)(ii), which contains language to clarify that projects which constitute a new major source or major modification that would be subject to federal PSD or nonattainment permitting must comply with applicable requirements of §§116.150, 116.151, or 116.160 to determine the necessary emission controls. This proposed change is intended to ensure that all applicable federal major NSR control requirements are applied. This proposed change addresses EPA's comments that allege that the flexible permit rules could be used to bypass the federal BACT or Lowest Achievable Emission Rate (LAER) control technology determination that is required for major PSD or nonattainment NSR projects.

The commission proposes amended §116.711(a)(2)(G), which would specify that flexible permits shall specify requirements for initial compliance testing and methods of determining ongoing compliance. The EPA expressed a concern that the existing rule language, which contains the term "may" instead of "shall," is not sufficiently specific. Although flexible permits already specify appropriate compliance testing and compliance determination methods within the conditions of the permit, the commission has proposed to revise the rule language for greater clarity. The proposed change, in combination with others in this proposal, addresses the EPA's comments that the flexible permit program is lacking in supporting MRR requirements, and is not sufficiently enforceable.

The commission proposes amended §116.711(a)(2)(H) and (I), which would specify that prior to applying the requirements of Subchapter G, the applicant must first perform an analysis to determine the applicability or nonapplicability of federal nonattainment NSR requirements or PSD requirements. These proposed changes address EPA's comment that the flexible permit program could be used to exempt or shield changes from federal permitting requirements because the program does not require that first an applicability determination be made whether the construction or modification is subject to major NSR.

The commission proposes amended §116.711(a)(2)(J), which would add a requirement that any permit application for a new flexible permit, or permit amendment, shall include an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the NAAQS. This proposed change addresses EPA's comment that the flexible permit program does not sufficiently protect the NAAQS.

The commission proposes to amend §116.711(a)(2)(M)(iv) by adding language to ensure that permit applicants provide a complete description of the emission point numbers (EPNs) and facilities that will be included in an emissions cap. This proposed change addresses the EPA's comment that flexible permits must be structured in such a way that they sufficiently identify which units are subject to emission caps and individual emission limits.

The commission proposes §116.711(a)(2)(M)(vi) to specify that calculations to determine the controlled emission rates from each facility shall be performed in accordance with TCEQ Air Permits Division guidance.

The commission proposes §116.711(a)(2)(M)(vii) to specify that the flexible permit application must identify any terms, conditions, and representations in any Subchapter B permit or permits which will be superseded or incorporated under a flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit. This proposed change is intended to address the EPA's comment that existing SIP permits' major and minor NSR terms, limits and conditions, must be tracked and accounted for.

§116.715, General and Special Conditions

The commission proposes to restructure and renumber portions of §116.715, and proposes other minor changes to improve readability and update terminology and cross references throughout the section.

The commission proposes to amend §116.715(a) by deleting existing language concerning the executive director's ability to limit the use of standard permits or permits by rule in cases where the increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to federal PSD or nonattainment permitting. This requirement has been reorganized and relocated to §116.715(f).

The commission proposes an amendment to §116.715(b) to clarify that a flexible permit may contain more than one emission cap for a specific air contaminant. The commission also proposes to add language to specify that a permit holder shall comply with any emission caps and individual emission limitations in the permit, and that an exceedance of a flexible permit emission cap(s) or individual emission limitations is a violation of the permit. These proposed changes are in response to comments in the EPA's correspondence to the commission dated March 12, 2008.

The commission proposes amendments to §116.715(c)(5). Proposed §116.715(c)(5)(A) would require that each flexible permit specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit. Proposed §116.715(c)(5)(B) would require that each flexible permit specify emission calculation methods for calculating annual and short term emissions for each pollutant when continuous emission monitoring or continuous operating parameter monitoring is not required. These proposed changes address the EPA's concerns that the flexible permit rules are not sufficiently specific concerning the monitoring and enforcement of flexible permit emission caps and individual emission limits.

The commission proposes to amend §116.715(c)(6). The proposed amendment would reorganize the recordkeeping requirements applicable to flexible permits, and add specific new recordkeeping requirements to address certain EPA comments in the Notice and in the March 12, 2008, correspondence from the EPA to the commission. The proposed recordkeeping requirements would require flexible permit applicants to maintain records of any other permit applications associated with the flexible permit; would require specific recordkeeping to document compliance with annual and short term emission caps and individual emission limitations; and would require that flexible permit holders maintain records for five years instead of two years, as suggested by the EPA's March 12, 2008, correspondence.

The commission proposes §116.715(c)(8), concerning compliance with representations in a flexible permit application. This requirement parallels existing requirements relating to representations under §116.116.

In the Notice, the EPA commented that the flexible permit program lacked sufficient MRR to ensure accountability and determine compliance with flexible permits. The commission does not concur with the EPA's comment, as each individual permit establishes appropriate MRR requirements on a case-by-case basis. However, more specific rule language relating to MRR may be appropriate to clearly establish MRR requirements in the rule, especially relating to emission caps. The commission proposes §116.715(c)(12) and (d), which would specify MRR procedures associated with emission caps in a flexible permit. The proposed rules would require semiannual reporting relating to compliance with long and short term emission caps, similar to the semiannual reporting suggested by the EPA's March 12, 2008, correspondence to the commission. The proposed rules include requirements to address absence of monitoring data, require revalidation of site-generated data, and define minimum characteristics of the monitoring system. The proposed rules are intentionally structured in a manner similar to federal regulations for recordkeeping, reporting, and monitoring associated with Plant-wide Applicability Limits, for which the commission has adopted rules in Subchapter C, Plant-wide Applicability Limits, with minor changes as necessary for compatibility with the flexible permit program.

§116.716, Emission Caps and Individual Emission Limitations

The commission is proposing minor changes throughout this section to improve readability and update terminology. Other proposed changes throughout §116.716 are intended to address EPA's comment that the flexible permit program lacks replicable, specific, established implementation procedures for determining an emissions cap, and address several of the EPA's comments in the March 12, 2008, correspondence to the commission.

The commission is proposing §116.716(a)(1), which would specify that only like-kind facilities could be included in an emissions cap. As an alternative to this requirement, a site-wide emission cap could be established to cover all facilities at a site. Like-kind facilities means those facilities which are similar in operational nature and in emissions, such that all the facilities within an emission cap would share certain basic characteristics. Examples of like-kind facilities could include, but are not limited to: engines; turbines; boilers and process heaters; storage vessels; or similar chemical or refining process units. The executive director would reserve the right to exclude a proposed facility from an emissions cap if the executive director determines that the inclusion of the facility in the cap could interfere with the ability to monitor compliance with the permit, or determines that the inclusion of the facility in the cap could interfere with the protection of human health and the environment. The EPA expressed concern in the Notice that under the existing rules, hundreds of unrelated emission sources could be subject to one emission cap and/or individual emission limitations. The proposed change would address this concern by narrowing the scope of the types of sources that could be included together in an emission cap, referred to as a like-kind facilities cap. The commission has also included the option to have a site-wide cap.

The commission is proposing §116.716(a)(2)(B), which would add language to clarify and reinforce the application of federally-required control technology for any project that constitutes a federal major source or major modification. This provision is intended to further address EPA's stated concerns that the flexible permit program could allow a facility to avoid federally-required control technology.

The commission is proposing §116.716(a)(3), which would require that facilities subject to LAER in accordance with Subchapter B, Division 5, must be included in a separate emissions cap or provided with individual emission limitations. This provision is intended to ensure that sources subject to LAER are fully controlled as required by federal NSR regulations and Subchapter B.

The commission is proposing §116.716(a)(5) to specify that a permit applicant may propose an emission cap that is lower than the emission cap determined by subsection (a)(4), if the permit applicant provides technical information to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

The commission is proposing §116.716(c), which would require that each flexible permit clearly identify, by a table or other appropriate means, the facilities that are subject to an emission cap, and the facilities that are subject to individual emission limitations. This proposed change addresses EPA's comment that each flexible permit must be structured in such a manner that it will be clear which facilities are included under the permit and emission cap, and which facilities are subject to individual emission limitations.

The commission proposes to delete existing §116.716(d), which currently allows an emission cap or individual limitation to include an insignificant emissions factor of up to 9%.

The commission proposes §116.716(d) which would clarify how an emission cap is to be adjusted or determined for several situations. Proposed §116.716(d)(1) would require that an emission cap be adjusted downward to account for the shutdown of a facility for a period longer than six months. The current rule does not require the emission cap to be adjusted until a facility is shut down for longer than 12 months. The time period has been proposed to be reduced from 12 months to ensure that the emissions cap corresponds to the actual operation of the facilities under the cap and to ensure that appropriate emission control is maintained even when some sources within the cap are not operating. Proposed §116.716(d)(1) also includes language to clarify how the emission cap is to be adjusted when a previously shut down facility is restored to operation. The commission proposes §116.716(d)(2) to clarify that a permit amendment is required to add a facility to a flexible permit emission cap. Proposed §116.716(d)(3) further explains how the emission cap shall be determined when the permit is amended.

Proposed §116.716(e) would require that each emission cap or individual emission limitation have an annual emission limit, based on a 12-month rolling period. The proposed rule would also require that each emission cap or individual emission limitation include an appropriate short term (such as hourly) emission limit.

§116.717, Implementation Schedule for Additional Controls

The commission proposes an amendment to §116.717 to clarify that any control implementation schedule contained in a flexible permit is a requirement of the permit, such that if the schedule cannot be met, the permit holder must obtain a permit amendment or alteration to revise the control schedule in order to maintain compliance with the permit. The permit amendment or alteration would have to be approved by the executive director before the control schedule deadline specified in the permit passes. In addition, the commission has added language to this section to acknowledge and emphasize that certain federally-required controls, such as BACT or LAER required by PSD or nonattainment NSR, must be in place and operational before the permitted facility can begin operation. The proposed amendment addresses the EPA's comments relating to implementation schedules in the March 12, 2008, correspondence from the EPA to the commission, and would further ensure that the flexible permit program cannot be used to forestall or avoid major NSR control requirements.

§116.718, Significant Emission Increase

The commission proposes §116.718(b) to clarify that this section may not be used to authorize an emission increase under a flexible permit for any project that constitutes a federal major modification. Proposed §116.718(b) further requires that the permit holder must document that any increases under this section are not major modifications. The proposed changes further address the EPA's comments that the flexible permit program could be used to avoid applicable major NSR requirements.

The commission proposes §116.718(c) which would require a permit holder to perform an air quality analysis to demonstrate that any increases under this section would not interfere with attainment and maintenance of the NAAQS. This proposed change addresses the EPA's comment in the Notice that the flexible permit program does not contain sufficient assurances that the NAAQS will not be violated.

§116.720, Limitation on Physical and Operational Changes

The commission proposes minor editorial changes to §116.720 to improve readability.

§116.721, Amendments and Alterations

The commission proposes amendments to §116.721 to clarify under what circumstances a flexible permit amendment is required. The proposed rule under §116.721(a) includes new language to state that any action that would relax emission controls, add a new facility or facilities, or would constitute a major modification would require the permit holder to obtain a permit amendment. Similar language is proposed to be added to §116.721(c) for the same purpose. The proposed change is intended to prevent "backsliding" of emission controls, and ensure that projects that constitute a major modification are subject to an appropriate review for applicable federal requirements. The commission also proposes minor editorial changes to this section to update terminology and improve readability.

The Notice stated that the proposed disapproval was based, in part, on the EPA's understanding that the flexible permit program allows holders of a flexible permit to make de facto amendments of existing SIP permits, including changes in the terms and conditions (such as throughput, fuel type, hours of operation) of minor and major NSR permits, without a preconstruction review. The Notice further stated that while the EPA has recognized that under certain circumstances changes to PSD permits may be appropriate, such changes are generally not allowed without a review of the new circumstances by the permitting authority. The EPA stated that any time a change to a permit limit founded in BACT is being considered, a corresponding reevaluation (or reopening) of the original BACT determination may be necessary, and cited a memo from 1987.

The EPA's understanding of the Texas flexible permit rule is incorrect, and the case cited by EPA does not match the point EPA is attempting to support. Authorizing facilities in a flexible permit emission cap (regardless of their previous status) is a modification and requires a complete preconstruction review. Once established in a flexible permit, changes in the terms and conditions (such as any restrictions on throughput, fuel type, or hours of operation) of minor and major NSR permits without a preconstruction review are not allowed. Section 116.721(b)(2) provides that any change to permit conditions requires executive director approval. In general, flexible permits will not have conditions that restrict throughput or hours of operation unless they are necessary for BACT or to ensure acceptable off-site impacts. Changing any condition related to BACT requires a permit amendment, pursuant to §116.721(a). Any change in permit conditions that could result in a major modification as well as any fuel switch must undergo a preconstruction review, §116.721(a).

§116.730, Compliance History

The commission proposes minor editorial changes to §116.730 to improve readability and update terminology.

§116.740, Public Notice and Comment

The commission proposes minor editorial changes to §116.740 to improve readability and correct outdated cross-references. In a concurrent rulemaking, the commission has proposed new and amended rules regarding public participation in Chapter 39, Public Notice, Subchapters H and K, and in Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment, Subchapter E. Some of these changes apply to flexible permit applications.

§116.750, Flexible Permit Fee

The commission proposes an amendment to §116.750 that would revise how fees for flexible permits are determined. Since the inception of the flexible permit program in 1994, fees for flexible permits have been determined based on the quantity of emissions authorized, at a rate of $32 per ton (with a minimum fee of $900, and a maximum fee of $75,000). The proposed changes would require that flexible permit fees be based on a percentage of project capital cost, rather than based on emission rate. The proposed changes would make flexible permits subject to the existing fee system used for Subchapter B air permits, as specified in §116.141. The minimum fee of $900 and the maximum fee of $75,000 would be retained. The commission is proposing this change because the relatively small volume of flexible permit actions in relation to the number of Subchapter B permit actions does not justify maintaining a separate fee system.

§116.765, Delayed Effective Date

The commission proposes new §116.765 to specify that the rule changes proposed in this action would not become effective until the earlier of 60 days after the EPA publishes final approval of these sections as revisions to the Texas SIP, or December 1, 2012. Until such time, the existing Subchapter G rules concerning flexible permitting would remain in effect.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules will base the calculation of the flexible permit fee on the capital cost of a project instead of annual emissions. The impact on agency revenue will vary depending on the complexity of each project, but the overall impact to agency revenue is not expected to be significant. Most local governments are not expected to experience fiscal impacts as a result of the proposed rules, but some governmental entities that have flexible permits could experience fiscal impacts if they choose to apply for a new flexible permit or modify facilities in a way that would require them to request an amendment to a flexible permit.

The EPA has proposed to disapprove existing rules in Subchapter G that relate to the flexible air permits program. The existing flexible permits program allows different sources to be grouped together under an emissions cap instead of having an individual emission limit for every emission point in a permit. The proposed rules are intended to address the EPA's concerns so that it will approve the flexible permits program.

For the most part, the proposed rules are clarifications of already existing agency practices and policies concerning the review and issuance of flexible permits. The proposed rules provide more detail, reorganize existing requirements, clarify and reference applicable federal requirements if a project triggers federal NSR permitting, clearly state that the flexible permits program cannot be used to circumvent federal NSR permitting, clearly state that exceedance of flexible permit caps or individual emission limitations is subject to enforcement action, and detail other requirements that are not expected to have a fiscal impact on regulated entities.

The proposed rules also incorporate provisions that are expected to have fiscal impacts, although these impacts are not expected to be significant. The proposed rules will only have fiscal impacts on regulated entities if they apply for a new flexible permit or are required to amend an existing flexible permit. Provisions of the proposed rules that may have a fiscal impact on regulated entities include changes to require that new permit or amendment applications include an air quality analysis to demonstrate that proposed actions will not interfere with attainment and maintenance of NAAQS, and specify a five-year record retention period.

The proposed rules may have a fiscal impact on agency revenue, but the impact is not expected to be significant. The basis for calculating the flexible permit fee will change from being based on tons of emissions per year to a percentage of project capital cost, which is the same basis used to assess a fee for a construction permit. Based on historical data, the average fee for an initial flexible permit has been $19,000, but a new flexible permit could range from $900 to $75,000. The number of initial flexible permits has been five to seven per year, and the number of flexible and construction amendments have averaged 30 per year. The average fee for a flexible permit amendment has been about $5,700. The average fee for an initial construction permit has been $11,000 and the fee for an amendment has been $5,700. If an average of six initial flexible permits and 30 flexible amendments are issued in a year, the estimated decrease in agency revenue could be as much as $48,000 per year in Account 151 - Clean Air Account. However, since projects requiring flexible permits are often complex, the effect on agency revenue due to the change in the basis for assessment could vary considerably. If a large number of complex projects are submitted, fees assessed could actually increase agency revenue.

Agency records indicate that there may be as many as one local government, one state agency, and one federal installation that could experience fiscal implications as a result of the proposed rules if they need a new flexible permit or are required to amend an existing flexible permit. Fiscal implications will vary depending on the complexity of each project. Permit fees will vary depending on the complexity of the project, but based on the difference in average fees charged for flexible and construction permits under current rules, the fee for an initial flexible permit could decrease by $8,000 per permit. New or amended flexible permits will require a local government or other governmental entity to conduct an air quality analysis. An air quality analysis would be a one-time cost that could range from $5,000 to $20,000 per analysis. A governmental entity would also be required to keep records for five years instead of two, which could increase record storage costs. The increase in storage costs is expected to be minimal and will depend on storage costs in different locations around the state.

The proposed rules modify the types of emission units allowed in a group to determine emission caps. Instead of allowing any kind of unit in an emission cap, the proposed rules allow that an emission cap have similar units. As an alternative to this requirement, permit applicants would also have the option to establish a site-wide emission cap that would cover all facilities at the site. Local governments with flexible permits could experience cost increases if facilities are placed in different emission caps. However, as permit applicants can elect to use a site-wide cap, instead of a like-kind cap for similar units, no fiscal impacts are expected as a result of the proposed rules for those situations.

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 consistency with federal requirements and additional clarity regarding the flexible permit program.

Individuals are not expected to experience fiscal impacts as a result of the proposed rules. Individuals do not typically operate facilities that would elect to use the flexible permit program for operational flexibility.

Large businesses will be affected by the proposed rules if they elect to apply for a new flexible permit or elect to modify facilities in a way that requires an amendment of a flexible permit. Trends suggest that there may be as many as 37 plants per year that could be affected by the proposed rules, and examples of businesses that might be affected include chemical plants, refineries, pipeline companies, oil and gas companies, power plants, and others. Fiscal implications will vary depending on the complexity of each project. Permit fees paid will vary depending on the com-

plexity of the project, but based on the difference in average fees charged for flexible and construction permits under current rules, the fee for an initial flexible permit could decrease by $8,000 per permit. If the project is more complex, a flexible permit fee could increase. New or amended flexible permits will require a local government or other governmental entity to conduct an air quality analysis. An air quality analysis would be a one-time cost that could range from $5,000 to $20,000 per analysis. A large business would also be required to keep records for five years instead of two, which could increase record storage costs. The increase in storage costs is expected to be minimal and will depend on storage costs in different locations around the state. Businesses could also experience higher costs for monitoring or control devices if they choose to place facilities in different emission cap groupings. However, as permit applicants can elect to use a site-wide cap, instead of a like-kind cap for similar units, no fiscal impacts are expected as a result of the proposed rules for those situations.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that operate facilities under flexible permits unless they apply for a new flexible permit or modify facilities in a way that would require them to amend their flexible permits. Agency records indicate that most flexible permits are held by large businesses, but there may be as many as ten small businesses that have flexible permits. If these small businesses elect to apply for a new flexible permit or modify facilities in a way that requires an amendment of a flexible permit, they will experience the same fiscal impacts as those experienced by a large business.

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 amendments to the rules are required for approval as part of the Texas SIP. The approval will be based on whether the commission's flexible permit program rules meet federal requirements. For purposes of the fiscal analysis, the requirements of the flexible permit program apply to both large and small businesses alike.

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 rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

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 specific intent of the proposed rules is to amend various sections of Subchapter G to address concerns expressed by the EPA regarding the agency's flexible permit program submitted by the commission as a revision to the SIP. The proposed changes to established rules for the flexible permit program are necessary to ensure that the rules can be a federally approved part of the Texas SIP. Specifically, these amendments: 1) include detailed MRR requirements; 2) propose replicable, specific, established implementation procedures for establishing the emission cap; 3) clearly limit the rules to minor NSR; 4) include regulatory provisions clearly prohibiting the use of the program from circumventing the major NSR permitting; 5) ensure that the rules cannot be used to bypass the federal BACT or LAER control technology determination that is required for major PSD or Nonattainment NSR projects; 6) specify requirements for initial compliance testing and methods of determining ongoing compliance; 7) ensure that the NAAQS are sufficiently protected; 8) include requirements for clarity of which facilities are included under the permit and any emission cap, and that there are sufficient monitoring and enforcement requirements for the emission caps and individual emission limits; and 9) provide for a delayed effective date.

As defined in the Texas Government Code, §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 action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments were developed to correct EPA-identified deficiencies in the commission's flexible permit program to ensure SIP approval by the EPA and thus meet a requirement of federal law. This rulemaking action does not exceed an express requirement of 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 to meet the requirements of the Texas SIP, and the requirements of the FCAA and its associated regulations, and is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble.

Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). Comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS portion 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 §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 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to amend the rules related to flexible permits in order to obtain federal approval of the rules into the Texas SIP. The proposed rules will not create any additional burden on private real property. The proposed 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 proposal 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. Therefore, the proposed rulemaking 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 Chapter 281, Applications Processing, Subchapter B. 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(l)). The proposed amendments will benefit the environment by ensuring that the flexible permit program meets applicable federal requirements, and is adequately enforceable so that air quality is protected. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, 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

Chapter 116 is an applicable requirement under Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, 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 adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on July 29, 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 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 Michael Parrish, 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 2010-007-116-PR. The comment period closes August 2, 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 Mr. Michael Wilhoit, Air Permits Division, at (512) 239-1222.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.13

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the 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 (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §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; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 382.0513, and 382.0514.

§116.13. Flexible Permit Definitions.

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

(1) Continuous emission monitoring system (CEMS)--All of the equipment that may be required to meet the data acquisition and availability requirements of Subchapter G of this chapter, to sample, condition (if applicable), analyze, and provide a record of emissions on a continuous basis.

(2) Continuous parameter monitoring system (CPMS)--All of the equipment necessary to meet the data acquisition and availability requirements of Subchapter G of this chapter, to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, O_2 or CO_2 concentrations), and to record average operational parameter value(s) on a continuous basis.

(3) [~~(1)~~] Emission cap--Emission limit for a specific air contaminant based on total emissions of that pollutant [~~adjusted by an insignificant emissions factor~~] from all facilities [~~sources~~] that are included in a flexible permit.

(4) [~~(2)~~] Expected maximum capacity--The maximum capacity of a facility according to its physical and operational design and planned operation.

(5) [~~(3)~~] Individual emission limitation--Emission limit for a specific air contaminant [~~not covered by an emission cap~~] for an individual facility [~~adjusted by an insignificant emissions factor~~].

(6) Predictive emissions monitoring system (PEMS)--All of the equipment necessary to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, O_2 or CO_2 concentrations), and calculate and record the mass emissions rate (for example, pounds per hour) on a continuous basis.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003435
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 239-2548

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SUBCHAPTER G. FLEXIBLE PERMITS

30 TAC §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740, 116.750, 116.765

STATUTORY AUTHORITY

The amendments and new rule are proposed under Texas Water Code, §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the 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 (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §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; §381.0511, concerning Permit Consolidation and Amendment; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0514, concerning Sampling, Monitoring, and Certification; §382.0515, concerning Application for Permit, §382.0517, concerning Determination of Administrative Completion of Application, §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified; §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing; and §382.062, concerning Application, Permit, and Inspection Fees.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 381.0511, 382.0512; 382.0513, 382.0514, 382.0515, 382.0517, 382.0518, 382.056 and 382.062.

§116.710. Applicability.

(a) Flexible permit. A person may obtain a flexible permit which allows for physical or operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or in lieu of amending an existing permit under §116.116 of this title (relating to Amendments and Alterations). A person may obtain a flexible permit under §116.711 of this title (relating to Flexible Permit Application) for a facility, group of facilities, or account before any actual work is begun, provided however:

(1) only one flexible permit may be issued for [~~at~~] an account [~~site~~];

(2) modifications to existing facilities included in [~~covered by~~] a flexible permit may be authorized by [~~handled through~~] the amendment of an existing flexible permit;

(3) [~~permitting of~~] a new facility may be authorized by [~~handled through~~] the amendment of a flexible permit; [~~and~~]

(4) a flexible permit may not cover facilities [~~sources~~] at more than one account; and [~~site.~~]

(5) a flexible permit application, review, and issued permit used to authorize any facility, group of facilities, account, or any change to existing facilities that constitutes a new major stationary source or major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), shall be completed in accordance with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively), as applicable. No person shall use this subchapter to circumvent applicable requirements of Subchapter B, Division 5 or 6 of this chapter.

(b) Change in ownership. The new owner of a facility, group of facilities, or account shall comply with §116.110(e) [~~§116.110(d)~~] of

this title, provided however, that all facilities authorized [~~covered~~] by a flexible permit must change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a permit alteration allocating the emission caps or individual emission limitation prior to the transfer of the permit by the commission. After the sale of a facility, or facilities, but prior to the transfer of a permit requiring a permit alteration, the original permit holder remains responsible for ensuring compliance with the existing flexible permit and all rules and regulations of the commission.

(c) Submittal under seal of Texas licensed professional engineer. All applications for a flexible permit or flexible permit amendment shall comply with §116.110(f) [~~§116.110(e)~~] of this title.

(d) Responsibility for flexible permit application. The owner of the facility, group of facilities, or account or the operator of the facility, group of facilities, or account who is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.

§116.711. Flexible Permit Application.

[~~Any application for a new flexible permit or flexible permit amendment must include a completed Form PI-1 General Application. The Form PI-1 must be signed by an authorized representative of the applicant. The Form PI-1 specifies additional support information which must be provided before the application is deemed complete.~~] In order to be granted a flexible permit or flexible permit amendment, the owner or operator of the proposed facility shall submit a permit application which must include: [~~information to the commission which demonstrates that all of the following are met.~~]

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following:

(A) [~~(1)~~] Protection of public health and welfare.

(i) The emissions from the proposed facility, group of facilities, or account as determined under §116.716 of this title (relating to Emission Caps and Individual Emission Limitations), will comply with all applicable rules [~~and regulations~~] of the commission and with the intent of the TCAA, including protection of the health and physical property of the people.

(ii) In considering the issuance of a flexible permit for construction or modification of any facility, group of facilities, or account within 3,000 feet or less of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility, group of facilities, or account may have on the individuals attending these school facilities.

(B) [~~(2)~~] Measurement of emissions. The proposed facility, group of facilities, or account will have provisions for measuring the emission of air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission Sampling Procedures Manual."

(C) [~~(3)~~] Best available control technology (BACT).

(i) All new facilities must [~~The proposed facility, group of facilities, or account will~~] utilize BACT[~~, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis~~]. Existing facilities shall utilize BACT with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility or group of existing facilities basis. Control technology beyond BACT may be used on certain existing facilities to provide the emission reductions necessary to comply with this requirement on a group of existing facilities [~~or account~~] basis, provided however, that the existing level of control may not be lessened for any facility. [~~For new facilities and proposed affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the use of BACT shall be demonstrated for the individual facility or affected source.~~]

(ii) For pollutants from new or modified facilities that constitute a new major stationary source or major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), control technology shall be demonstrated as required by §§116.150, 116.151, or 116.160 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas; New Major Source or Major Modification in Nonattainment Area Other Than Ozone; and Prevention of Significant Deterioration Requirements, respectively), as applicable, for each new or modified facility.

(iii) For new facilities and proposed affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the use of BACT shall be demonstrated for the individual facility or affected source.

(D) [~~(4)~~] New Source Performance Standards (NSPS). The emissions from each affected facility as defined in 40 Code of Federal Regulations (CFR), Part 60 will meet at least the requirements of any applicable NSPS as listed under Title 40 CFR Part 60, promulgated by the EPA under authority granted under the FCAA, §111, as amended.

(E) [~~(5)~~] National Emission Standards for Hazardous Air Pollutants (NESHAPS). The emissions from each facility as defined in 40 CFR Part 61 will meet at least the requirements of any applicable NESHAPS, as listed under 40 CFR Part 61, promulgated by EPA under authority granted under the FCAA, §112, as amended.

(F) [~~(6)~~] NESHAPS for source categories. The emissions from each affected facility shall meet at least the requirements of any applicable maximum achievable control technology (MACT) standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR 63)).

(G) [~~(7)~~] Performance demonstration. The proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit application. The applicant may be required to submit additional engineering data after a flexible permit has been issued in order to demonstrate further that the proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit. In addition, initial compliance testing with ongoing compliance determined through engineering calculations based on measured process variables, parametric or predictive monitoring, stack monitoring, or stack testing shall [~~may~~] be required as specified in each flexible permit.

(H) [~~(8)~~] Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, each facility shall comply with all applicable requirements concerning nonattainment review in this chapter. Prior to the application of this subchapter to a proposed facility, group of facilities, or account; or any change at an existing facility, group of facilities, or account; a separate analysis shall be made for the project to determine the applicability or nonapplicability of federal Nonattainment New Source Review requirements.

(I) [~~(9)~~] Prevention of Significant Deterioration (PSD) review. If the proposed facility, group of facilities, or account is located in an attainment area, each facility shall comply with all applicable requirements in this chapter concerning PSD review. Prior to the application of this subchapter to a proposed facility, group of facilities, or account; or any change at an existing facility, group of facilities, or account; a separate analysis shall be made for the project to determine the applicability or nonapplicability of federal PSD review.

(J) [~~(10)~~] Air dispersion modeling or ambient monitoring. Any permit application for a new flexible permit, or permit amendment to increase a flexible permit emission cap or individual emission limitation, shall include an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the National Ambient Air Quality Standards. Computerized air dispersion modeling and/or ambient monitoring may be required by the commission's Air [~~New Source Review~~] Permits Division to determine the air quality impacts from the facility, group of facilities, or account. In conducting a review of a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) [~~(11)~~] Federal standards of review for constructed or reconstructed major sources of hazardous air pollutants. If the proposed source is an affected source (as defined in §116.15(1) of this title), it shall comply with all applicable requirements under Subchapter E [~~C~~] of this chapter.

(L) [~~(12)~~] Mass cap and trade allocations. If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(M) [~~(13)~~] Application content. In addition to [~~any~~] other requirements of this chapter, the applicant shall:

(i) [~~(A)~~] identify each air contaminant for which an emission cap is desired;

(ii) [~~(B)~~] identify each facility to be included in the flexible permit;

(iii) [~~(C)~~] identify each source of emissions to be included in the flexible permit and for each source of emissions identify the Emission Point Number (EPN) and the air contaminants emitted;

(iv) [~~(D)~~] for each emission cap, identify all associated EPNs and facilities (including description, common name, and facility identification number) and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;

(v) [~~(E)~~] for each individual emission limitation, identify the EPN and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;[~~.~~]

(vi) include calculations used to determine the controlled emission rates from each facility performed in accordance with TCEQ Air Permits Division guidance; and

(vii) if the flexible permit application includes facilities currently authorized by a permit issued under Subchapter B of this chapter (relating to New Source Review Permits), the applicant shall identify any terms, conditions, and representations in the Subchapter B permit or permits which will be superseded by or incorporated into the flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit.

(N) [~~(14)~~] Proposed control technology and compliance demonstration. The applicant shall specify the control technology proposed for each unit [~~to meet the emission cap~~] and demonstrate compliance with all emission caps at expected maximum production capacity.

§116.715. General and Special Conditions.

(a) Flexible permits may contain general and special conditions. The holders of flexible permits shall comply with any and all such conditions. [~~Upon a specific finding by the executive director that an increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to review under §116.150 and §116.151 and §§116.160 - 116.163 of this title (relating to Nonattainment Review or Prevention of Significant Deterioration Review) or Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the permit may include a special condition which requires the permittee to obtain written approval from the executive director before constructing a facility under a standard permit or a permit by rule under Chapter 106 of this title (relating to Permits by Rule).~~]

(b) A pollutant specific emission cap or [~~multiple emission caps and/or~~] individual emission limitations shall be established for each air contaminant for all facilities authorized by the flexible permit. A flexible permit may contain more than one emission cap for a specific air contaminant. The holder of a flexible permit shall comply with all flexible permit emission cap(s) and individual emission limitations. An exceedance of the flexible permit emission cap(s) or individual emission limitations is a violation of the permit.

(c) The following general conditions shall be applicable to every flexible permit.

(1) Applicability. This section does not apply to physical or operational changes allowed without an amendment under §116.721 of this title (relating to Amendments and Alterations).

(2) Construction progress. The permit holder shall report the start of construction, construction interruptions exceeding 45 days, and completion of construction [~~shall be reported~~] to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(3) Start-up notification.

(A) The permit holder shall notify the appropriate regional office of the commission and any local program having jurisdiction [~~shall be notified~~] prior to the commencement of operations of the facilities authorized by the permit in such a manner that a representative of the commission may be present.

(B) The permit holder shall provide a separate notification for the commencement of operations for each unit of phased construction, which may involve a series of facilities commencing op-

erations at different times. [Phased construction, which may involve a series of facilities commencing operations at different times, shall provide separate notification for the commencement of operations for each facility.]

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Air Permits Division [Office of Permitting, Remediation, and Registration] the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(4) Sampling requirements.

(A) If sampling [of stacks or process vents] is required, the flexible permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures.

(B) All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission.

(C) The flexible permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(5) Monitoring, Calculations, and Equivalency of Methods.

(A) Each flexible permit shall specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit.

(B) Each flexible permit shall specify methods for calculating annual and short term emissions for each pollutant for a given type of facility when continuous emission monitoring or continuous operating parameter monitoring is not required to be used to monitor emissions for that type of facility.

(C) [It shall be the responsibility of the] The flexible permit holder must [to] demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring or calculation methods proposed as alternatives to methods indicated in the conditions of the flexible permit. Requests for alternative [Alternative] emission control, sampling, monitoring, or calculation methods [shall be applied for] must be submitted in writing for review and approval [and must be reviewed and approved] by the executive director prior to their use in fulfilling any requirements of the permit.

(6) Recordkeeping. The permit holder shall:

(A) maintain a [A] copy of the flexible permit (and any permit applications associated with the flexible permit) along with information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit [shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information may include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the flexible permit. Information in the file shall be retained for at least two years following the date that the information or data is obtained]. This information and data shall include, but is not limited to:

(i) emission cap and individual emission limitation calculations based on a 12-month rolling basis;

(ii) emission cap and individual emission limitation calculations corresponding to any short term emission limitation; and

(iii) Production records and operating hours.

(B) keep all required records in a file at the plant site. If, however, the facility site normally operates unattended, records must be maintained at an office within Texas having day-to-day operational control of the facility site;

(C) make the records available at the request of personnel from the commission or any local air pollution control agency having jurisdiction over the site, which, upon request, the commission shall make any such records of compliance available to the public in a timely manner;

(D) comply with any additional recordkeeping requirements specified in special conditions in the permit; and

(E) retain information in the file for at least five years following the date the information or data is obtained.

(7) Maximum allowable emission rates. A flexible permit covers only those sources of emissions and those air contaminants listed in the table entitled "Emission Sources, Emissions Caps and Individual Emission Limitations" in [attached to] the flexible permit. Flexible permitted facilities [sources] are limited to the emission limits and other conditions specified in the table in [attached to] the flexible permit.

(8) Representations and conditions. The following are the conditions upon which a flexible permit or a flexible permit amendment is issued:

(A) representations with regard to construction plans and operation procedures in an application for a permit or permit amendment; and

(B) any general and special conditions included in the permit.

(9) [(8)] Emission cap readjustment. If a schedule to install additional controls is included in the flexible permit and a facility subject to such a schedule is taken out of service, the emission cap contained in the flexible permit will be readjusted for the period the unit is out of service to a level as if no schedule had been established. Unless a special condition [provision] specifies the method of readjustment of the emission cap, a permit alteration shall be obtained.

(10) [(9)] Maintenance of emission control. The facilities authorized [covered] by the flexible permit shall not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with §101.201 and §101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements).

(11) [(10)] Compliance with rules. Acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all applicable Rules[, Regulations,] and Orders of the commission issued in conformity with the Texas Clean Air Act [TCAA] and the conditions precedent to the granting of the permit. If more than one state or federal rule or regulation or flexible permit condition are applicable, then the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated. Acceptance of the permit includes consent to

the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the flexible permit.

(12) Emissions Caps. The following requirements apply to facilities with emissions subject to emission caps.

(A) Recordkeeping and reporting.

(i) A semiannual report shall be submitted to the executive director within 30 days of the end of each reporting period that contains:

(I) the identification of the owner and operator and the permit number;

(II) total annual emissions (in tons per year) based on a 12-month rolling total for each month in the reporting period;

(III) the identification of any exceedances of a short-term emission cap during the reporting period;

(IV) all data relied upon, including, but not limited to, any quality assurance or quality control data, in calculating the monthly and annual emission cap pollutant emissions, and short-term emission cap pollutant emissions;

(V) a list of any facility modified as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) during the preceding six-month period and the documentation required by §116.718(b) of this title (relating to Significant Emission Increase);

(VI) the number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration checks), and any corrective action taken. For facilities that are subject to the federal operating permits program in Chapter 122 of this title (relating to Federal Operating Permits Program) this may be satisfied by referencing the flexible permit number in the semiannual report for the site submitted under §122.145 of this title (relating to Reporting Terms and Conditions);

(VII) a notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, whether the facility monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the emissions determined by method included in the permit;

(VIII) the readjusted emission cap for each pollutant if a facility subject to an emission cap is shut down for a period longer than one week as required by §116.716(e)(1) of this title (relating to Emission Caps and Individual Emission Limitations); and

(IX) a signed statement by the owner or operator certifying the truth, accuracy, and completeness of the information provided in the report.

(ii) The reporting period for the semiannual report required under this section shall begin on the earliest date any facilities in an emission cap commence operation under the cap.

(iii) The owner or operator shall submit the results of any revalidation test or method to the executive director within three months after completion of such test or method.

(B) Absence of monitoring data. A facility owner or operator shall record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for a facility during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the flexible permit special conditions.

(C) Revalidation. Any site generated test data used to determine the emission rates for facilities under the cap must be revalidated through performance testing or other scientifically valid means approved by the executive director. Such testing must occur at least once every five years after the facility has been added to an emission cap.

(d) Each permit with emission caps must include special conditions that satisfy the following requirements for facilities subject to those caps. These requirements do not apply to facilities that are not subject to an emission cap.

(1) The monitoring system must accurately determine all emissions of the pollutants in terms of mass per unit of time. Any monitoring system authorized for use in the permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation.

(2) The monitoring system must employ one or more of the general monitoring approaches meeting the minimum requirements as described in subparagraphs (A) - (D) of this paragraph.

(A) An owner or operator using mass balance calculations to monitor pollutant emissions from activities using coating or solvents shall meet the following requirements:

(i) provide a demonstrated means of validating the published content of the pollutant that is contained in, or created by, all materials used in or at the facility;

(ii) assume that the facility emits all of the pollutant that is contained in, or created by, any raw material or fuel used in or at the facility, if it cannot otherwise be accounted for in the process; and

(iii) where the vendor of a material or fuel that is used in or at the facility publishes a range of pollutant content from such material, the owner or operator shall use the highest value of the range to calculate the pollutant emissions unless the executive director determines that there is site-specific data or a site-specific monitoring program to support another content within the range.

(B) An owner or operator using a continuous emission monitoring system (CEMS) to monitor pollutant emissions shall meet the following requirements.

(i) The CEMS must comply with applicable performance specifications found in 40 Code of Federal Regulations Part 60, Appendix B.

(ii) The CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(C) An owner or operator using a continuous parameter monitoring system (CPMS) or a predictive emission monitoring system (PEMS) to monitor pollutant emissions shall meet the following requirements:

(i) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the pollutant emissions across the range of operation of the facility; and

(ii) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes or at another less frequent interval approved by the executive director, while the facility is operating.

(D) An owner or operator using emission factors to monitor pollutant emissions shall meet the following requirements:

(i) All emission factors must be adjusted as specified by the permit, if appropriate, to account for the degree of uncertainty or limitations in the factors' development;

(ii) The facility must operate within the designated range of use for the emission factor, if applicable; and

(iii) The owner or operator of a significant facility as defined in §116.12 of this title that relies on an emission factor to calculate pollutant emissions shall conduct validation testing to determine a site-specific emission factor within six months of permit issuance or start of operation of the facility, whichever is later, unless the executive director determines that testing is not required.

(E) An alternative monitoring system must meet the requirements in paragraph (1) of this subsection and be approved by the executive director.

(3) Where an owner or operator of a facility cannot demonstrate a correlation between monitored parameter(s) and the pollutant emissions rate at all operating points of the facility, the executive director shall:

(A) establish default value(s) for determining compliance with the emission cap based on the highest potential emissions reasonably estimated at such operating point(s); or

(B) determine that operation of the facility during operating conditions when there is no correlation between monitored parameter(s) and the pollutant emissions is a violation of the emission cap.

(e) [~~(d)~~] There may be additional special conditions included in [~~attached to~~] a flexible permit upon issuance or amendment of the permit. Such conditions in a flexible permit may be more restrictive than the requirements of this title.

(f) The executive director may require as a special condition that the permit holder obtain written approval before constructing a source under a standard permit under Subchapter F of this chapter (relating to Standard Permits) or a permit by rule under Chapter 106 of this title. Such written approval may be required if the executive director specifically finds that an increase of a particular pollutant could either:

(1) result in a significant impact on the air environment, or

(2) cause the facility, group of facilities, or account to become subject to review under:

(A) Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)); or

(B) the provisions in Subchapter B, Divisions 5 and 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively).

§116.716. Emission Caps and Individual Emission Limitations.

(a) Emission caps. Each emission cap for a specific pollutant will be established as follows:

(1) either as a site-wide cap or a like-kind facilities cap. The executive director reserves the right to reject or exclude any facility from an emissions cap if necessary to ensure compliance with the permit or to ensure the protection of human health and the environment.

(2) [~~(1)~~] emissions will be calculated for each facility within an emission cap as follows: [~~based on application of current Best Available Control Technology at expected maximum capacity;~~]

(A) based on application of best available control technology at expected maximum capacity; or

(B) if the permit is used to authorize any facility, group of facilities, or account, or any change to existing facilities, that constitutes a new major stationary source or major modification for the pollutant as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), emissions shall be based on control technology determined in accordance with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively) as applicable, at expected maximum capacity.

(3) pollutants emitted from facilities subject to lowest achievable emission rate review in accordance with Subchapter B, Division 5 of this chapter must be included in a separate emissions cap or listed as individual emission limitations.

(4) [~~(2)~~] the calculated emissions for all facilities within an emission cap will be summed.

(5) a lower emission cap than that determined by paragraph (4) of this subsection may be proposed by the permit applicant if technical information is provided to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

(b) Individual emission limitations. An individual emission limitation will be established in the same permit for each pollutant not included in [~~covered by~~] an emission cap for facilities authorized[~~covered~~] by the flexible permit. In addition, an individual emission limitation may be established for a pollutant included in [~~covered by~~] an emission cap when the expected capacity of a facility is less than the expected maximum capacity to prevent a facility from exceeding emission levels appropriate for the proposed controls.

(c) The permit shall clearly identify, by a table or other appropriate means, the facilities that are subject to an emission cap, and the facilities that are subject to individual emission limitations. A facility may be subject to both an emission cap and an individual emission limitation.

(d) [~~(c)~~] Adjustment [~~Readjustment~~] of emission cap.

(1) If a facility subject to an emission cap is shut down for a period longer than six [~~12~~] months, the emission cap shall be adjusted [~~readjusted~~] by lowering the emission cap by an amount that the shut down facility contributed to the original calculation of the emission cap. If a shut down facility is returned to operation, the emission cap shall be adjusted by increasing the emission cap by the amount that the facility contributed to the original calculation of the emission cap; however, the emission cap cannot be increased beyond the original emission cap amount.

(2) If a [~~new~~] facility is to be added to [~~brought into~~] the flexible permit, a permit amendment is required to establish a revised emission cap[~~, an emission cap shall be adjusted by modifying the emissions cap accordingly~~].

(3) If an existing emission cap is to be increased through a permit amendment as a result of adding a new facility or the modification of a facility within the emission cap, the emission cap shall be increased by the sum of the emissions from each of the new or modified facilities determined in accordance with subsection (a) of this section and decreased by the sum of the previous emission cap contributions from the facilities to be modified. For the purpose of determining whether an increase in the emission cap constitutes a major modification for the pollutant as defined by §116.12 of this title, all facilities under that cap shall be considered modified unless there has been

no physical modification of that facility and a separate permit limit or physical constraint limits its potential to emit.

[~~(d) Insignificant emission factor. The emission caps and individual emissions limitation calculated pursuant to this section may include an Insignificant Emissions Factor which does not exceed 9.0% of the total emission cap or individual emission limitation.~~]

(4) [~~(e)~~] An emission cap will be adjusted [~~readjusted~~] downward for any facility authorized [~~covered~~] by a flexible permit if that facility becomes subject to any new state or federal rule or regulation which would lower emissions or require an emission reduction. The adjustment will be made [~~at~~] the next time the flexible permit is amended or altered. If an amendment to a flexible permit is not required to meet the new requirement [~~regulation~~], then within 60 days of making the change, the permittee must submit a request to alter the permit and include information describing how compliance with the new requirement will be demonstrated.

(e) Each emission cap or individual emission limitation shall specify an annual emission limitation in tons per year, based on a rolling 12-month period. Each emission cap or individual emission limitation shall also specify a practically enforceable short term emission limitation.

§116.717. Implementation Schedule for Additional Controls.

If a facility requires the installation of additional control or controls to meet an emission cap for a pollutant, the flexible permit shall specify an implementation schedule for such additional controls. The permit may also specify how the emission cap will be adjusted if such a facility is taken out of service [~~or fails to install the additional control equipment as provided by the implementation schedule~~]. In the event that the controls and implementation schedule specified by a flexible permit cannot be met, a permit amendment or alteration to modify the controls and implementation schedule must be approved by the executive director before the applicable control schedule deadline. Control technology that is required by federal major new source review requirements must be operational at start of operation and is not eligible for an implementation schedule under this section.

§116.718. Significant Emission Increase.

(a) An increase in emissions from operational or physical changes at an existing facility authorized [~~covered~~] by a flexible permit is insignificant, for the purposes of minor [~~state~~] new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility.

(b) This section does not apply to any change or series of related changes that would constitute a major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions). Unless a plant-wide applicability limit has been established for the pollutant under Subchapter C of this chapter (relating to Plant-wide Applicability Limits), the permit holder shall document that the change is not a major modification as defined in §116.12 of this title, and maintain the documentation required by §116.121 of this title (Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases). When determining whether a change is a major modification as defined in §116.12 of this title, the project emissions increase and the project net shall be determined as specified as defined in §116.12 of this title, regardless of how the existing facilities are authorized. For new facilities or modified facilities under an emission cap for the pollutant where the permit holder elects to use potential to emit rather than projected actual emissions from the facility to determine the project emissions increase, the potential to emit shall be considered as the proposed emissions cap unless a separate permit limit or physical constraint limits the facility's potential to emit. If the project emission increase is such that a *de minimis* threshold test (netting) is required for a pollutant, the analysis shall be submitted to the commission for review and approval prior to making the change. If netting is not required, the information shall be submitted with the next permit amendment or renewal application.

(c) The permit holder shall complete an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the National Ambient Air Quality Standards if there may be an increase in emissions from operational or physical changes at an existing facility authorized by a flexible permit and the area is not designated as nonattainment for the pollutant. If the emission increase may result in off-site ambient concentrations greater than *de minimis* for that pollutant, the air quality analysis shall be submitted to the commission for review and approval prior to making the change.

§116.720. Limitation on Physical and Operational Changes.

Operational or [~~Neither operational nor~~] physical changes authorized under this subchapter may not result in an increase in actual emissions at facilities not authorized [~~covered~~] by the flexible permit unless those affected facilities are authorized pursuant to §116.110 of this title (relating to Applicability).

§116.721. Amendments and Alterations.

(a) Flexible permit amendments. All representations with regard to construction plans and operation procedures in an application for a flexible permit or flexible permit amendment, as well as any general and special conditions [~~provisions attached~~], become conditions upon which the subsequent flexible permit is issued. It shall be unlawful for any person to vary from such representation or flexible permit provision if the change will cause a change in the method of control of emissions or[~~,~~] the character of the emissions, will relax emission controls, will add a new facility or facilities, [~~or~~] will result in a significant increase in emissions, or will constitute a major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) unless application is made to the executive director to amend the flexible permit in that regard and such amendment is approved by the executive director or commission. Applications to amend a flexible permit shall be submitted with a completed Form PI-1 and are subject to the requirements of §116.711 of this title (relating to Flexible Permit Application).

(b) Flexible permit alterations.

(1) A flexible permit alteration is for any variation from a representation in a flexible permit application or a general or special provision of a flexible permit that does not require a flexible permit amendment.

(2) All flexible permit alterations which may involve a change in a general or special condition contained in the flexible permit, or affect control equipment performance must receive prior approval by the executive director. The executive director shall be notified in writing of all other flexible permit alterations within ten days of implementing the change, unless the permit provides for a different method of notification. Any flexible permit alteration request or notification shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.711 of this title, including the protection of public health and welfare. The appropriate commission regional office and any local air pollution program having jurisdiction shall be provided copies of all flexible permit alteration documents.

(3) Flexible permit alterations shall not be subject to the requirements of Best Available Control Technology identified in §116.711(3) of this title.

(c) Changes not requiring an amendment or alteration. The following changes do not require an amendment or alteration, except that an amendment is required if the change will cause a change in the method of control of emissions or[~~,~~] the character of the emissions, will relax emission controls, will add a new facility, [~~or~~] will result in a significant increase in emissions as determined under §116.718 of this title (relating to Significant Emission Increase), constitutes a major modification as defined by §116.12 of this title, or conflicts with an existing permit condition:

(1) a change in throughput; or

(2) a change in feedstock.

(d) Permit by rule under Chapter 106 of this title (relating to Permits by Rule) in lieu of permit amendment or alteration.

(1) Notwithstanding subsections (a) or (b) of this section, no permit amendment or alteration is required if the changes to the permitted facility qualify for a permit by rule under Chapter 106 of this title unless prohibited by permit provision as provided in §116.715 of this title (relating to General and Special Conditions). All such changes permitted by rule to a permitted facility shall be incorporated into that facility's permit at such time as the permit is amended or renewed.

(2) Emission increases authorized by Chapter 106 of this title at an existing facility authorized [~~covered~~] by a flexible permit shall not cause an exceedance of the emissions cap or individual emission limitation.

§116.730. Compliance History.

As part of a flexible permit review, or the review of an amendment of a flexible permit, or renewal of an existing flexible permit, the requirements of [~~provisions found in~~] Chapter 60 of this title (relating to Compliance History) shall be applicable to the facility, group of facilities, or account being permitted, amended, or renewed.

§116.740. Public Notice and Comment.

(a) Any person who applies for a flexible permit or an amendment to a flexible permit shall comply with the requirements [~~provisions~~] in Chapter 39 of this title (relating to Public Notice).

(b) Any person who applies for an amendment to a flexible permit regarding an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E [~~C~~] of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the requirements [~~provisions~~] in Chapter 39 of this title [~~(relating to Public Notice)~~].

§116.750. Flexible Permit Fee.

(a) Fees required. Any person who applies for a flexible permit or for an amendment to an existing flexible permit shall remit, at the time of application for such permit, a fee as set forth in subsection (b) of this section. Fees will not be charged for flexible permit alterations, changes of ownership, or changes of location of permitted facilities.

(b) Fee amounts. The fee to be remitted with a flexible permit application shall be determined as set forth in §116.141 of this title (relating to Determination of Fees) [~~based on the total annual allowable emissions from the permitted facility, group of facilities, or account for which the flexible permit is being sought. The fee shall be $32 per ton with the minimum fee being $900 and the maximum fee $75,000. For flexible permit amendments, the fee shall be calculated based on $32 per ton for the incremental emission increase with the minimum fee being $900 and the maximum fee being $75,000~~].

(c) Payment of fees. All permit fees for a flexible permit shall be remitted in the form of a check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality and delivered with the application for flexible permit or flexible permit amendment to the commission's Air [~~New Source Review~~] Permits Division. Required fees must be received before the agency will begin examination of the application.

(d) Return of fees. Fees must be paid at the time an application for a flexible permit or flexible permit amendment is submitted. If the applicant withdraws the application prior to issuance of the flexible permit or flexible permit amendment, one-half of the fee will be refunded, except that the entire fee will be refunded for any such application for which a permit by rule under Chapter 106 of this title (relating to Permits by Rule) is allowed. No fees will be refunded after a deficient application has been voided, denied, or after a flexible permit or flexible permit amendment has been issued by the agency.

§116.765. Delayed Effective Date.

The amendments to §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740 and 116.750 of this title (relating to Applicability, Flexible Permit Application, General and Special Conditions, Emission Caps and Individual Emission Limitations, Implementation Schedule for Additional Controls, Significant Emission Increase, Limitation on Physical and Operational Changes, Amendments and Alterations, Compliance History, Public Notice and Comment, and Flexible Permit Fee; respectively) adopted by the commission on December 1, 2010, shall be effective on the earlier of 60 days after publication in the *Federal Register* of the final approval by the United States Environmental Protection Agency of these sections as revisions to the Texas State Implementation Plan, or December 1, 2012. Until such time, these sections, as they existed prior to the adoption of these amendments, remain in effect.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003436
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 239-2548

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CHAPTER 305. CONSOLIDATED PERMITS
SUBCHAPTER P. EFFLUENT GUIDELINES AND STANDARDS FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMITS

30 TAC §305.541

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §305.541.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The rulemaking is necessary to adopt by reference the new United States Environmental Protection Agency (EPA) construction storm water rules, which were adopted in 40 Code of

Federal Regulations (CFR) Part 450 and became effective on February 1, 2010. The rule applies to construction activities that are already required to be authorized under the Texas Pollutant Discharge Elimination System (TPDES) program, meaning that it applies to sites that are one or more acres in size, as well as smaller sites that are part of a larger common plan of development or sale that will disturb one or more acre. This rule requires all regulated construction activities to meet a series of non-numeric effluent limitations established to provide minimum national requirements. Besides the non-numeric effluent limits that all regulated sites are required to meet, construction sites that disturb ten or more acres will also be required to collect and analyze storm water discharges from the site and comply with a numeric effluent limitation for turbidity.

Non-numeric effluent limits are narrative requirements for best management practices to address erosion, sediment control, soil stabilization, and pollution prevention that prevent or minimize the amount of construction site pollutants, such as sediment, in storm water runoff. The requirements in the rule are similar to the existing requirements in the TPDES Construction General Permit (CGP), TXR15000 reissued on March 5, 2008.

The federal numeric effluent limitation is for turbidity and is set at 280 nephelometric turbidity units. This new requirement is achievable at a well-managed construction site without specialized treatment through the use of routine best management practices. Turbidity does not require laboratory analysis to determine the level present in the discharge. Analysis can be performed at the construction site with a hand-held turbidity meter.

The CGP is due for renewal in 2013. The non-numeric effluent limitations and turbidity effluent limitation will be incorporated into the renewal of the CGP. Construction site operators will not be required to comply with the new requirements until the CGP is reissued.

Currently, §305.541 adopts by reference certain parts of 40 CFR that were in effect at the time Texas was awarded delegation of the National Pollutant Discharge Elimination System program, and specific parts that were adopted after delegation. This rulemaking will add 40 CFR Part 450 to the list of parts adopted after delegation.

SECTION DISCUSSION

Proposed amended §305.541 adds the adoption by reference of 40 CFR Part 450 as amended, which contains regulations related to controlling storm water from regulated construction sites.

COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, fiscal implications, although not significant, are anticipated for the agency. The agency will be required to purchase new equipment, increase public outreach, modify forms, update educational materials, modify inspection protocols, and modify the requirements of the CGP when it is renewed in 2013. The agency will use currently available resources to implement the proposed rule. Units of state or local governments that engage in regulated construction activities or that operate regulated Municipal Separate Storm Sewer Systems (MS4s) will also experience fiscal implications as a result of implementation or enforcement of the proposed rule. However, any fiscal implications are not expected to be significant.

Many types of construction activities are affected by the proposed rule. Some examples are: residential construction, highway construction, commercial building construction, public building construction, and power line construction. The federal rules require all regulated construction activities to comply with non numeric effluent limitations, which are essentially required best management practices. For large sites (ten acres or more), construction activities must also monitor (i.e., sample and analyze) discharges from construction sites and comply with a numeric effluent limitation for turbidity. The CGP will incorporate the non-numeric limitations and numeric limitations upon its renewal in 2013. No costs will be incurred by any regulated entity until the CGP is reissued in 2013, the third year after the proposed adoption of this rulemaking.

Small construction sites (at least one but less than ten acres or part of a larger plan of development) will be required to utilize best management practices that address erosion and sediment control, soil stabilization, and pollution prevention methods that are similar to the requirements in the requirements of the existing CGP. These prescribed methods (berms, barriers, etc.) are already used at many construction sites to comply with non-numeric effluent limitations, and any cost increase under the proposed rule is expected to be negligible. The proposed rule is not expected to have a significant fiscal impact on small construction sites that disturb less than ten acres.

Large construction sites, which for the purpose of this rule are those disturbing ten or more acres, including smaller sites that are part of a larger common plan of development that will disturb ten or more acres, will be required to comply with the non-numeric effluent limitations described above, monitor discharges from the site, and comply with a numeric effluent limitation for turbidity. The proposed rule is not expected to have a significant fiscal impact on entities that engage in construction activities. Prescribed methods to comply with non-numeric effluent limitations are already used at many construction sites, and any cost increase to use prescribed methods is not expected to be significant. In order to monitor discharges and comply with the numeric effluent limit, operators of large construction sites will need to have a turbidity meter and trained staff available to sample and analyze storm water when there is a rainfall event sufficient to cause a discharge. The cost to purchase a turbidity meter and associated equipment could range from $900 to $1,325. This purchase is expected to be a one-time purchase of equipment that can be used at multiple construction sites. The annual purchase of verification standards used to calibrate the meter is estimated to cost $15 per year. Training and sampling costs are not expected to be significant since the meters come with instructions and current construction site staff can be trained while on the job to sample and monitor storm water. In addition, sampling and monitoring will only be required when there is a rainfall event sufficient to cause a discharge. The TCEQ will determine the frequency of sampling in the renewal of the CGP in 2013.

State agencies and local governments that engage in regulated construction activities will be affected by the proposed rule, but any cost increases are not expected to be significant. MS4 operators (e.g., cities or counties) that regulate construction storm water may need to adjust their oversight programs and investigation protocols to include the new requirements. They may need to purchase turbidity meters to verify permittees' sample results. One-time costs for turbidity meters and associated equipment could range from $900 to $1,325. The annual purchase of verification standards used to calibrate the meter is estimated to cost $15 per year. MS4 operators could increase permit fees to cover these costs, if they choose to do so.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be greater control over storm water discharges from regulated construction sites resulting in less sediment, turbidity, and other pollutants in construction storm water discharges from reaching waters in the state.

The proposed rule is not expected to result in significant fiscal implications for individuals or businesses.

Businesses that engage in regulated construction activities will be affected by the proposed rule, but not until the construction general permit is renewed in 2013. Costs to comply with the proposed non-numeric effluent limitations for small construction sites are not expected to be significant since many of the prescribed methods are used in current construction activities. Businesses may incur one-time equipment costs for a turbidity meter and related equipment, which is estimated to range from $900 to $1,325, if they have large construction sites. The annual purchase of verification standards used to calibrate the meter is estimated to cost $15 per year. Training on equipment use is expected to occur on the job and is not expected to be significant since the meters come with instructions. Sampling and monitoring will occur only when there is a rainfall event that causes storm water runoff.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that engage in regulated construction activities. A small business is expected to incur the same costs as a large business to comply with the non-numeric effluent limitations and numeric effluent limitations of the proposed rule. For small construction sites, a small business will be required to use the prescribed methods, many of which are currently used, to comply with non-numeric effluent limitations. For large construction sites, a small business will be required to monitor runoff when there is a significant rainfall event and comply with the numeric effluent limitations. A small company may incur one-time costs for a turbidity meter and associated equipment, which is estimated to range between $900 and $1,325. The annual purchase of verification standards used to calibrate the meter is estimated to cost $15 per year. Training, sampling, and monitoring costs are not expected to be significant since they can be done using current personnel and with on the job training.

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 rule is required to comply with federal regulations, and any cost increases are not expected to affect a small or micro-business in a material way for the first five years that the proposed rule is 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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rule change is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as defined in the statute.

A "major environmental rule" is defined in Texas Government Code, §2001.0225(a) as applying to rules adopted by a state agency that: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the proposed rule change is to modify TCEQ's rules to implement new federal storm water regulations affecting construction activities that disturb one or more acres, and smaller sites that are part of larger common plans of development that will disturb one or more acres. Title 40 CFR Part 450 has new requirements that took effect on February 1, 2010. These rules would be adopted by reference in §305.531. Since these rules are being adopted by reference to conform to both federal rules and the NPDES delegation agreement; and this rule does not exceed any express requirement of state law or adopted solely under the general powers of TCEQ, the commission concludes that this rule does not meet the definition of "major environmental rule."

The commission invites public comment on the draft regulatory impact analysis determination.

DRAFT TAKINGS IMPACT ASSESSMENT

The commission evaluated this rule and performed an assessment of whether the proposed rule change constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule change is to incorporate new federal storm water regulations into state rules.

Promulgation and enforcement of this rule would be neither a statutory nor a constitutional taking of private real property because it involves only additional control of storm water runoff during construction activities on sites disturbing ten acres or more.

There are additional storm water control requirements imposed on private real property during construction activities that disturb one or more acres, but the benefits to society are increased by reducing discharges of pollutants from construction sites disturbing these particular construction sites. The rule change does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond what would otherwise exist in the absence of the regulation. Therefore, this rule change, if adopted, does not constitute a taking under the Texas Government Code, Chapter 2007.

The commission invites public comment on the draft takings impact assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rule in accordance with Coastal

Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. This rulemaking fulfills the CMP goal to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

Written comments on the consistency of this rulemaking with the CMP goals may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on July 29, 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 Patricia Duron, 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 2010-015-305-OW. The comment period closes August 2, 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 Sherry Smith at (512) 239-0571.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

The proposed amendment implements 40 Code of Federal Regulations Part 450.

§305.541. Effluent Guidelines and Standards for Texas Pollutant Discharge Elimination System Permits.

Except to the extent that they are less stringent than the Texas Water Code or the rules of the commission, 40 Code of Federal Regulations (CFR), Subchapter N, Parts 400 - 471, except 40 CFR Part 403, which are in effect as of the date of the Texas Pollutant Discharge Elimination System program authorization, as amended, and Parts 437 (Federal Register, Volume 65, December 22, 2000), 442 (Federal Register, Volume 65, August 14, 2000), 444 (Federal Register, Volume 65, January 27, 2000), [~~and~~] 445 (Federal Register, Volume 65, January 19, 2000), and 450 (Federal Register, Volume 74, December 1, 2009), as amended, are adopted by reference.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003424
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 239-6087

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board (Board) proposes the repeal of Chapter 375, §§375.1 - 375.4, 375.11 - 375.21, 375.31 - 375.42, 375.51 - 375.53, 375.61, 375.62, 375.71 - 375.73, 375.81 - 375.87, 375.101 - 375.105, 375.201, 375.211 - 375.214, 375.221, 375.222, 375.301, 375.302, 375.325 - 375.329, 375.350 - 375.363, and 375.400 - 375.408. The Board proposes the repeal of current Chapter 375, relating to the Clean Water State Revolving Fund (CWSRF), because the Board is proposing a new Chapter 375. This proposal to repeal and the Board's proposal to adopt the new Chapter 375 are published simultaneously to allow the Board's repeal of current Chapter 375 to occur when the Board adopts proposed new Chapter 375.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT.

Ms. Melanie Callahan, Chief Financial Officer of the Board states that for the first five years this repeal will be in effect, the following statements are correct and accurate to the best of the Board's ability to project future economic trends.

Ms. Callahan does not expect any additional estimated costs to the state and to local governments as the result of administering this repeal. These rules apply only to those entities that voluntarily apply for financial assistance from the CWSRF and therefore do not have any general effect on costs to the state or to local governments. The loan origination fees have not been altered; the interest rates are tied to market conditions.

Ms. Callahan does not expect any cost reductions to either state or local government because the Board's loan processing costs and the costs of administering the program are not expected to change.

Ms. Callahan does not expect this proposed repeal to have any impact on state or local revenues. The rules apply only to those

eligible governmental entities that apply for a loan and there are no foreseeable implications relating to costs or revenues.

PUBLIC BENEFIT AND COSTS.

For the first five years this proposed repeal will be in effect, the public benefits expected include more precise funds management. Certain timelines in the proposed new rules are expected to provide more capacity for the CWSRF to provide financial assistance to more entities. There will be no anticipated economic effect on small businesses or individuals.

LOCAL EMPLOYMENT IMPACT STATEMENT.

Pursuant to Government Code §2001.022, this proposed repeal has been examined and there will not be any direct effect on local employment.

REGULATORY ANALYSIS.

Pursuant to Government Code §2001.0225, requiring a regulatory analysis of a major environmental rule, it has been determined that this proposed repeal is not a major environmental rule under §2001.0225 and therefore the analysis required under that section is not applicable.

TAKINGS IMPACT ANALYSIS.

The Board has determined that the proposed repeal will constitute neither a statutory nor a constitutional taking of private real property. The proposed repeal does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed repeal does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed repeal does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS.

Comments on the proposed repeal and the new Chapter 375, proposed elsewhere in this issue of the *Texas Register,* will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 475-2053. Additionally, the Board will hold a public hearing on Tuesday, July 27, 2010, at 8:00 a.m. to solicit public comments on the proposal. Comments received in any of these formats indicated will be considered and addressed.

SUBCHAPTER A. GENERAL PROVISIONS
DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §§375.1 - 375.4

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.1. Scope of Rules.
§375.2. Definitions of Terms.
§375.3. Policy Declarations.
§375.4. Date of Applicability of Rules.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003509
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §§375.11 - 375.21

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.11. Public Hearings.
§375.12. Types of Assistance.
§375.13. Activities Funded.
§375.14. Project Priority List.
§375.15. Criteria and Methods for Distribution of Funds.
§375.16. Rating Process.
§375.17. Intended Use Plan.
§375.18. Administrative Cost Recovery.
§375.19. Financial assistance for projects benefiting disadvantaged communities.
§375.20. Criteria and Methods for Distribution of Funds for Disadvantaged Communities for fiscal year 2004 intended use plan.
§375.21. Criteria and Methods for Distribution of Funds for Disadvantaged Communities beginning with fiscal year 2005 intended use plan.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003510
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 3. APPLICATIONS FOR ASSISTANCE

31 TAC §§375.31 - 375.42

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.31. Preapplication Conferences.

§375.32. Required General Information.

§375.33. Required Legal Information.

§375.34. Required Fiscal Information.

§375.35. Required Environmental Review and Determination.

§375.36. Engineering Feasibility Data.

§375.37. Required Water Conservation Plan.

§375.38. Review of Applications by the Executive Administrator.

§375.39. Pre-Design Funding Option.

§375.40. Applicant Resolution and Financing Agreement.

§375.41. Rural Hardship Grants.

§375.42. Capital Improvements Plan Option.

This 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 4. BOARD ACTION ON APPLICATIONS

31 TAC §§375.51 - 375.53

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.51. Formal Action by the Board.

§375.52. Lending Rates.

§375.53. Financial Guarantees for Political Subdivision Bonds and Required Reserves.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003512
Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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DIVISION 5. ENGINEERING REQUIREMENTS

31 TAC §375.61, §375.62

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.61. Contract Documents.

§375.62. Approval of Contract Documents.

This 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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DIVISION 6. PREREQUISITES TO RELEASE OF FUNDS

31 TAC §§375.71 - 375.73

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating

to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.71. Loan Closing.

§375.72. Release of Funds.

§375.73. Movement of Funds Between Approved Projects.

This 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-201003514
Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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DIVISION 7. BUILDING PHASE

31 TAC §§375.81 - 375.87

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.81. Awarding Construction Contracts.

§375.82. Inspection During Construction.

§375.83. Alterations in Approved Contract Documents.

§375.84. Contractor Bankruptcy.

§375.85. Building Phase Submittals.

§375.86. Retainage.

§375.87. Disbursements and Outlay Reports.

This 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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DIVISION 8. POST BUILDING PHASE

31 TAC §§375.101 - 375.105

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.101. Responsibilities of Applicant.

§375.102. Final Accounting.

§375.103. Audits.

§375.104. Certificate of Approval.

§375.105. Final Release of Retainage.

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

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SUBCHAPTER B. PROVISIONS RELATING TO USE OF CAPITALIZATION GRANT FUNDS
DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §375.201

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.201. Scope of 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.

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DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §§375.211 - 375.214

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.211. Capitalization Grant Application.

§375.212. Capitalization Grant Requirements.

§375.213. Distribution of Funds.

§375.214. Required Environmental Review and Determination.

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

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DIVISION 3. PREREQUISITES TO RELEASE OF FUNDS

31 TAC §375.221, §375.222

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.221. Pre-Design Funding Option.

§375.222. Lending Rates.

This 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 C. NONPOINT SOURCE POLLUTION CONTROL PROJECT AND ESTUARY MANAGEMENT FINANCIAL ASSISTANCE PROGRAMS

DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §375.301, §375.302

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.301. Scope of Subchapter.

§375.302. Definitions of Terms.

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

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DIVISION 2. NONPOINT SOURCE POLLUTION LOAN AND ESTUARY MANAGEMENT PROGRAM

31 TAC §§375.325 - 375.329

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.325. Purpose.

§375.326. Eligible Projects.

§375.327. Application for Assistance.

§375.328. Promissory Notes and Loan Agreements.

§375.329. Lending Rates.

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

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DIVISION 3. NONPOINT SOURCE POLLUTION LINK DEPOSIT PROGRAM

31 TAC §§375.350 - 375.363

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.350. Purpose.

§375.351. Authorization to Execute Agreements.

§375.352. Conditions Prior to Execution.

§375.353. Project Certifications.

§375.354. Board Obligations in Linked Deposit Agreements.

§375.355. Lending Institution Obligations in Linked Deposit Agreements.

§375.356. Requirements after Execution.

§375.357. State Liability.

§375.358. Collateral for Linked Deposits.

§375.359. Records of Depository.

§375.360. Deposit of Pledged Securities with Custodian.

§375.361. Custodian's Deposit of Pledged Security with Another Institution.

§375.362. Records of Custodian.

§375.363. Audits and Examinations.

This 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 D. PROVISIONS RELATING TO APPLICATIONS FOR FINANCIAL ASSISTANCE FILED IN RESPONSE TO SPECIAL CAPITALIZATION GRANTS; EXPEDITED REVIEW, PROCESSING AND LOAN CLOSING REQUIREMENTS

31 TAC §§375.400 - 375.408

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.400. Purpose.

§375.401. Definitions.

§375.402. Eligibility Requirements.

§375.403. Intended Use Plan.

§375.404. Applicable Rules.

§375.405. Review of Applications by the Executive Administrator.

§375.406. Formal Action by the Board.

§375.407. Lending Rates.

§375.408. Waiver of Rules.

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

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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board (Board) proposes for adoption a new Chapter 375, §§375.1, 375.2, 375.10 - 375.19, 375.30 - 375.33, 375.40 - 375.44, 375.50 - 375.56, 375.60 - 375.70, 375.80 - 375.83, 375.90 - 375.93, 375.100 - 375.110, and 375.200 - 375.214 relating to the Clean Water State Revolving Fund. In this issue of the *Texas Register,* the Board is proposing the repeal of current Chapter 375.

BACKGROUND AND INTRODUCTION.

The Clean Water State Revolving Fund (CWSRF) is authorized pursuant to the Federal Water Pollution Control Act, 33 USCA §§1251 et seq. (1972), as amended, and Texas Water Code, Chapter 15, Subchapter J. Each federal fiscal year an appropriation to the Environmental Protection Agency (EPA) is dedicated to capitalization grants for state revolving fund programs. The State of Texas, through the Board, provides a 20% match for the federal capitalization grant. The capitalization grant constitutes the federal funds portion of the CWSRF and is used to provide loans and loan guarantees to eligible wastewater systems for expenditures to facilitate full compliance. The CWSRF is designed to remain available in perpetuity. In addition to the federal capitalization grant, the CWSRF consists of the following: direct appropriations; investment earnings on amounts credited to the CWSRF; all payments of principal and interest and all proceeds from the sale; and refunding or prepayment of bonds.

During the applicable year, the Board solicits project information forms from potentially eligible applicants; the forms describe a proposed project and provide information about the wastewater problems or issues that will be addressed and remedied by the proposed project. After receipt of the project information forms, Board staff rates the projects. Board staff prioritizes projects based on the rating and other identified criteria. These projects are part of the Board's intended use plan (IUP). The IUP provides information for public review and comment about the planned expenditures of the capitalization grant funds.

New Chapter 375 relating to the CWSRF is proposed to clarify and streamline the rules applicable to loan recipients and to improve the efficiency and administration of the CWSRF. First, the Board's recent experience in administering the American Recovery and Reinvestment Act of 2009 and the latest EPA procedures for capitalization grants demonstrate the need for the Board to increase flexibility in developing the list of fundable projects. These proposed new rules provide that the criteria and methods of distribution of funds will primarily be contained in the IUP instead of in the rules. Thus, the Board can quickly adapt to changing federal capitalization grant requirements.

Second, the EPA prefers that capitalization grant funds be disbursed as efficiently as possible. These rules address that preference by proposing shortened time frames for loan closings. Additionally, these proposed rules provide a loan for planning, acquisition and design only and for construction only. These proposed new loans will become the Board's preferred method of financial assistance. Although the current pre-design funding option remains in the rules, it is not the preferred type of loan and is expected to be phased out over time. The purpose of this change is to provide more efficient use of funds instead of committing funds to a construction project whose scope is undetermined at the time of pre-design funding. The new proposed types of loans will enable the applicant to specify more precise loan amounts and therefore will result in more projects being funded when they are ready to proceed to construction instead of years before the costs are accurately known. The loans for construction will follow this same logic and will be available only when the eligible project is ready to proceed. These changes enable the Board to spend federal capitalization grant funds as efficiently as possible.

Third, the EPA's procedures for implementing the FY 2010 capitalization grant includes a minimum of 30% of a portion of the capitalization grant be allotted in subsidy for entities not otherwise able to afford a CWSRF loan. This is the first time, outside of the American Recovery and Reinvestment Act, that subsidy has been authorized for CWSRF. This is another reason that the Board prefers to place criteria in the annual IUP instead of in the rules. The EPA recommends that program requirements refer to guidance documents where possible and the Board has responded to that recommendation by removing many details of the numerous federal requirements for expenditures of federal funds by reference to the Board's comprehensive engineering guidance documents. Another new requirement for capitalization grants is that 20% of the grant must be expended on green projects. Although these proposed rules provide notice about the existence of the green project reserves, the detailed requirements will be in the IUP and in Board and EPA guidance documents.

Fourth, current Board rules include rules relating to the Board's internal processes and procedures. These sections include portions of current §§375.14 - 375.17 and portions of other rules contained in Chapter 375. Pursuant to the Texas Supreme Court decision in *El Paso Hospital District v. Texas Health and Human Services Commission,* 247 S.W.3d 709, 714 (2008), the Board has removed those rules and portions of rule that address only "internal management or organization of a state agency and not affecting private rights or proceedings."

Fifth, these proposed rules combine previously redundant sections relating to rating, methods and criteria for distribution of funds, and the pre-design funding option into single sections instead of the current separate sections. The only sections that contain different requirements due to the funding source, state or federal, are Lending Rates at proposed §375.15 and Environmental Reviews and Determinations at proposed §§375.50 - 375.56 for state funded loans and proposed §§375.60 - 375.70. Proposed Subchapters B, C, D, F, G, and H apply to both state and federally funded loans.

Finally, the proposed rules delete Subchapter D relating to Application for Financial Assistance filed in response to Special Capitalization Grants; Expedited Review, Processing and Loan Closing requirements. This subchapter was adopted to expedite the review of applications submitted pursuant to the American Recovery and Reinvestment Act of 2009 and is no longer needed.

BRIEF EXPLANATION OF THE PROPOSED RULES.

Proposed new Chapter 375 generally is a reorganization and rewrite of existing Chapter 375. All subchapters except Subchapter I (relating to Nonpoint Source Pollution Linked Deposits Program) have been rewritten for clarity and consistency and have been reorganized for ease of use. Subchapter I in these proposed rules is identical to current Subchapter C, Division 2. Improved organization is manifested by, for example, locating information relating to application requirements in one subchapter, proposed Subchapter D, in contrast to the current rule where the requirements were located in several different locations. The environmental review section is reorganized to follow the sequence of the environmental review process and contains Division 1, applicable to state-funded loans, and Division 2, applicable to

federally-funded loans. This preamble discusses proposed substantive changes from current rules.

Subchapter A. General Program Requirements.

There are changes to the definitions in Subchapter A; however, because the eligibility of entities, projects, costs, and activities are constrained by federal law, many of these sections remain substantively the same as current rules. Not only have certain definitions in §375.1 been revised for clarification purposes, several definitions have been eliminated. A number of new terms have been added to the definitions in Subchapter A including Davis-Bacon Act, federally funded loans, force majeure, green project, green project reserve, investment pool, private placement memorandum, project information form, ready to proceed, state depository institution, state-funded loans, trust and agency certificate, trust institution and trustee in order to reflect new EPA priorities and to clarify existing rules.

Three new sections have been added to Subchapter A. Proposed §375.2 specifies the entities and the activities that are eligible for CWSRF financial assistance; these entities include political subdivisions seeking to construct, alter and improve wastewater treatment facilities as well as persons seeking to implement a nonpoint source pollution project or a national estuary program, reflecting the EPA and the Board's increased interest in funding these types of projects. Subsection (b) defines certain terms of importance to the nonpoint source pollution program and subsection (c) provides that CWSRF funding is also available for national estuary program projects.

Subchapter B. Financial Assistance.

Major changes to the current rules are in proposed new Subchapter B, §§375.10 - 375.20. A significant change is proposed in §375.10 to clarify that the executive administrator and not the Applicant determines the type of loan or grant that will be recommended to the Board for commitment. The executive administrator takes into account the availability of funds and program priorities.

Proposed new §375.11 relating to refinancing consolidates the various provisions relating to refinancing that appear throughout the current Chapter. Subsection (a) allows the executive administrator to accept applications for refinancing provided that sufficient funds are available, a project information form is submitted timely after receipt of a Board invitation to apply for funding and a complete application is filed. Application requirements are detailed in subsection (b). The consolidation of these provisions does not substantively change the conditions under which refinancing may be considered by the Board.

Significant changes are also proposed relating to the types and conditions of financial assistance. Proposed §§375.12, 375.13 and 375.14 authorize the Board to award financial assistance for planning, acquisition and design activities only or for construction activities only, thereby segregating project financing into two phases for purposes of funding: the planning, acquisition and design phase or "PAD" and the construction phase of the project. Although the pre-design funding option, which allows the financing of a complete project from preliminary planning through construction, is maintained in proposed §375.14, the intent is to phase this option out in order to enable the Board to more efficiently manage CWSRF funds and to expedite the completion of projects.

Proposed new §375.15, relating to Lending Rates, has been reorganized; it now contains the lending rates for both state-funded and federally-funded loans. Currently, the lending rates are in §375.52 and §375.222. Proposed §375.15 contains several changes. The major change allows the Board to adopt lending rates in an IUP as noted in proposed subsection (b); this provides flexibility and better funds management in a changing economy. The procedures for determining lending rates for state-funded loans and for federally-funded loans are generally similar; however the percentage of reduction from the market rates are changed for state funded loans. The change in lending rates is designed to address changing programmatic needs and to increase Board flexibility. Section 375.16 relating to fees is not different from the current fee requirement. Proposed new §375.17 relating to the term of the loan is significantly different in that it allows up to ten years for a planning, acquisition and design loan. Finally, a new §375.18 is being proposed that relates to certain subsidies that may be applied to the award of financial assistance based on affordability criteria and other factors that will be detailed in the applicable IUP. Proposed §375.19 relating to financial guarantees for political subdivision bonds has not been changed.

Subchapter C. Intended Use Plan.

A major change relating to the IUP is evident in proposed §375.31 and §375.33 relating to rating process and distribution of funds; these sections are substantially shorter because details on rating and distributing funds will be detailed in the IUP instead of in these rules. Additionally current §§375.15, 375.16, and 375.213 contained internal procedures that do not appear in the proposed rules. One example of this proposed new approach is §375.31 containing the federal project rating criteria; it is not as comprehensive as current §375.16 relating to the rating process. Another major change is contained in proposed §375.30 and relates to the submission of project information forms. Secondary projects will no longer be permitted, resulting in a more focused project management approach as well as a more efficient use of surplus funds, as described in proposed §375.93.

Another major change is the consolidation of current §§375.15, 375.20, 375.21 and 375.213 all relating to criteria and methods for distribution of funds, into proposed new §375.33. One significant change is the use of a bypass process whereby projects for which no application is received or for which the application is incomplete shall be bypassed and other projects may be bypassed if necessary to fund the minimum number of projects required by certain categories; the change allows the Board to expedite the distribution of funds. These changes are proposed to consolidate similar rules into one section for ease of use and to emphasize the use of the IUP to describe distinctive methods and criteria for distribution of federal capitalization grant funds. Current rules delineated all of the requirements usually contained in capitalization grants but the most recent capitalization grant contains new and different requirements, including subsidies and green project reserve requirements. Moving the specific requirements from the rules and into the IUP allows the Board to be fully responsive to federal requirements without needing to undergo future rule changes. Additionally, moving distribution of funds criteria to the IUP allows for the more specific targeting of projects as well as more flexibility in use of loan subsidies to assist communities that cannot otherwise afford a CWSRF loan.

Subchapter D. Application for Assistance.

This proposed subchapter contains new requirements relating to the timeliness of an application and additional requested information or data; these proposed changes are contained in

§375.41. Additionally, new requirements relating to the time for loan closing are contained in proposed §375.44 relating to Board approval of funding. Loan commitments will either automatically expire or will expire on the date in the loan commitment resolution. A single extension of time for loan closing is allowed. The other proposed sections in this subchapter are not substantively different from current rules although they have been reorganized and rewritten.

Subchapter E. Environmental Reviews and Determinations.

This proposed subchapter contains two divisions. The first containing §§375.50 - 375.56 applies to state funded loans and the second containing §§375.60 - 375.70 applies to federally funded loans. A significant change to the state-funded loans environmental review is that, if detailed in the IUP, the Board may decide to require a full National Environmental Policy Act (NEPA) environmental review on state funded projects. The purpose of proposing that option is to increase the speed of drawing down federal funds for the program. Proposed Subchapter E is a complete rewrite and reorganization of current §375.35 and §375.214 relating to the environmental review and determinations that apply to state-funded and federally-funded projects. This proposed subchapter follows the EPA rules for NEPA review. The substantive legal requirements are the same as those in the current rules.

Subchapter F. Engineering Review and Approval.

Proposed Subchapter F relating to engineering review and approval does not contain any major substantive changes. However language has been added to proposed §375.82 and §375.83 to clarify that review and approval of construction contract documents may include documents created for alternative methods of project delivery such as design-build. This proposed subchapter describes the information required and directs applicants to use the Board's engineering guidance documents and forms.

Subchapter G. Loan Closings and Availability of Funds.

A major change is proposed under §375.92 which requires outlays on a periodic basis until all loan funds are disbursed. Projects must proceed in accordance with approved project schedules and outlays are submitted in accordance with this section. Another change is contained in proposed §375.93 relating to surplus funds and limiting the use of such funds to those listed and clarifying that the executive administrator, and not the Applicant, who determines the use of all surplus funds.

Subchapter H. Construction and Post-Construction Requirements.

Proposed Subchapter H is reorganized to more closely follow the normal course of events during the construction of a project. There are no major changes, but some minor changes. Proposed §375.101 relating to inspections during construction adds the project schedule as an element of inspection. Proposed §375.102 clarifies that it is for changes initiated by both a change order and also for changes proposed prior to construction. These proposed rules provide the Board with information necessary to ensure the funds are expended only on projects and their components that are consistent with remedying the problems identified.

Subchapter I. Nonpoint Source Pollution Linked Deposits Program.

This subchapter remains the same as current Subchapter C, Division 3.

SECTION BY SECTION DISCUSSION OF THE PROPOSED RULES.

Subchapter A.

Subchapter A relating to General Program Requirements provides definitions and information about which entities, projects and activities are eligible for funding. The sections in Subchapter A are not substantively different from current sections on the same topics; the new sections are proposed to consolidate similar information and to rewrite certain section to improve clarity and ease of use. The types of entities and projects eligible for funding are generally proscribed by the Federal Water Pollution Control Act, as amended, and the federal rules set forth at 40 CFR Part 35, Subpart J, relating to Clean Water State Revolving Funds.

Section 375.1 relating to Definitions provides definitions for the words used in the subchapter. New words and phrases defined include: applicant, Davis-Bacon Act, disadvantaged community, federally funded loans, force majeure, green project, green project reserve, private placement memorandum, project information form, ready to proceed, state depository institution, state-funded loans, trust and agency certificate, trust institution and trustee.

The word "Applicant" has been redefined to include not only entities that apply for financial assistance but also loan recipients and owners of funded projects. This allows for consistent use throughout the chapter.

The term "Davis-Bacon Act" is defined because compliance with that statute is required for any project that utilizes federal funds.

There is a substantive change in the definition of "Disadvantaged community;" the change substitutes the word "or" for "and" between subparagraphs (B) and (C). This change is proposed to provide greater flexibility in providing subsidies to disadvantaged communities. The EPA advises that CWSRF loans should be provided to those entities who cannot otherwise afford an SRF loan. This proposed change allows the Board to provide the funding to entities that may, for example, have a median household income several points above 75% of the state median and who also have a high household cost factor. These communities are unlikely to be otherwise able to afford a loan and this proposed change will allow the Board to subsidize more communities that are otherwise unable to afford a loan.

A new definition of "disaster" is included because EPA has recently advised the Board that, in certain specified instances, the CWSRF may be used in spill response or other emergency situations. This definition is the same as the definition in §418.004(a)(1) of the Texas Government Code, Chapter 481 relating to Emergency Management.

A new definition of "environmental affirmation" is proposed to refer to the Board's acceptance of the environmental determination made prior to the release of design funds for federally-funded projects utilizing the pre-design funding option.

A new definition of "federally funded loans" is inserted to refer to loans that are funded directly out of the federal capitalization grant; these loans have been referred to as "Tier III" loans or equivalency loans meaning that the terms and conditions of these loans must comply with all federal requirements. The use

of this proposed new term provides clarity about the source of the funding.

A definition of "force majeure" is added because proposed §375.41 and §375.91 provide strict timelines to submit applications and information and to close a loan. If force majeure applies, then the executive administrator has greater latitude to grant extensions to an applicant.

The terms "green project" and "green project reserve" have been added in recognition of certain EPA initiatives that are now mandated in capitalization grant agreements and refer to projects that, once implemented, will result in increased energy efficiency, water efficiency, green infrastructure or environmental innovation. The green project reserve refers to the EPA directive requiring that a portion of loan proceeds be used for green projects.

A definition of the term "investment pool" has been added to this section to refer to an entity created under the Public Funds Investment Act that invests loan and grant proceeds in authorized investments.

The term "private placement memorandum" has been added to the Definitions section which refers to a document required by the Depository Trust Company at each closing. This term is used in proposed §375.91 relating to loan closings.

The term "project information form" has been added to refer to the form that must be submitted by an applicant by a date certain after a solicitation for CWSRF funding has been received from the Board. This term is used in proposed §375.30 relating to submission of project information forms.

Ready to proceed is a new term used in §375.17 and it refers to a project that is ready to commence construction of a project.

The term "state depository institution" has been added to refer to those entities who may be approved to manage CWSRF loan proceeds as escrow agents until such time as the funds are released to the construction account for project implementation. This term is used in proposed §375.91 relating to loans secured by bonds or other authorized securities.

The term "state funded loans" is proposed to refer to loans that are funded solely from repayments and interest payments; these loans have been referred to as "Tier II" loans or non-equivalency loans meaning that the terms and conditions of these loans need not comply with all federal requirements, unless determined otherwise in an IUP as noted in proposed §375.15.

The term "trust and agency certification" refers to the instrument that may be executed between the executive administrator and a home-rule municipality with a population of more than 1,000,000 whose charter provides for an elected comptroller, auditor or treasurer to govern the management of CWSRF proceeds. This term is used in proposed §375.91 relating to loans secured by bonds or other authorized securities. The terms "trust institution" and "trustee" have also been added to clarify that an applicant may use either an approved escrow agent or a properly-chartered trust institution to manage CWSRF loan and grant proceeds until such time as they are ready to be released to the applicant for project implementation.

Numerous definitions were deleted because they either were not used or were used infrequently in the current rules.

In order to identify those entities that are eligible to participate in CWSRF financing, a new §375.2 is proposed that provides that any municipality, interstate or state agency is eligible for CWSRF financing if the project involves the construction of or improvements to a publicly-owned treatment works. Any person seeking to implement a nonpoint source pollution or national estuary project may be eligible for funding.

Proposed §375.2(b) defines several terms of importance in the nonpoint source pollution and national estuary programs including BMP, national estuary program, nonpoint source loan program and nonpoint source management report. Provisions relating to nonpoint source pollution and national estuary programs have been consolidated in Subchapter A and Subchapter I. In order to be eligible for financial assistance, nonpoint source pollution and national estuary projects must be consistent with certain agency activities and programs. These practices and programs are identified in proposed §375.2.

Section 375.2 also allows applicants to apply for financing for nonpoint source pollution and national estuary project funding and provides that the Board may either purchase bonds issued by an applicant or may enter into a loan agreement and execute a promissory note with an applicant unless the applicant is a governmental entity authorized to issue bonds, in which case the Board would only accept the bonds as security for CWSRF financing.

Subchapter B.

Subchapter B relating to Financial Assistance describes the types of loans available to eligible entities; it also includes information about lending rates, subsidies and financial guarantees.

Section 375.10(a) relating to Types and Conditions of Financial Assistance states that the type of financial assistance offered to an applicant is the executive administrator's decision and will be based on the information submitted with the project information forms, as described in proposed §375.30, applications and the availability of funds. Current rules do not clearly state that the executive administrator decides on the type of financial assistance that will be awarded to a particular applicant; this change enables the Board to better manage its loan portfolio. Subsections (b) and (c) of proposed §375.10 are substantially equivalent to §375.12(a), (c) and (d) of the existing rules.

A proposed new §375.11 relating to refinancing is being proposed in order to consolidate the various provisions relating to financing. Subsection (a) allows the executive administrator to accept applications for refinancing provided that sufficient funds are available, a project information form is submitted in a timely fashion after receipt of a Board solicitation and a complete application is filed. Application requirements are detailed in subsection (b). The consolidation of these provisions is not intended to substantively revise the conditions under which refinancing may be considered by the Board.

Proposed §375.12 relating to Planning, Acquisition and Design Funding provides for a loan for planning, acquisition and design to allow entities to perform the necessary pre-construction activities without taking on debt for construction. This is a new method of providing financial assistance that is not present in the current rules. Subsection (a) describes the project phases that will be funded under this section. Subsection (b) is entirely new and provides for a priority for construction funding if the planning, acquisition and design phases of the project are completed within three years. Section 375.13 relating to construction funding allows the Board to finance projects which are ready to proceed to construction.

Section 375.14 relating to Pre-Design Funding Option provides for financial assistance for all phases of a project from planning

through construction. This type of financial assistance is available only in the circumstances described in subsection (a). Subsection (b) allows for funding projects using alternative delivery methods, such as design-build and allows the modification of release of funds and other rules to accommodate this type of project delivery.

Section 375.15 relating to Lending Rates for state-funded projects provides notice to loan applicants about how interest rates are set for CWSRF loans. Pursuant to Texas Water Code §15.604(a)(1)(A), the Board makes CWSRF loans at or below market interest rates. This rule is significantly changed from current §375.52. The proposed addition to subsection (b) allows the Board to use a procedure to set interest rates in an IUP instead of using the procedure in this proposed section. Proposed subsection (c)(2) amends the basis point reduction from market rate so that the reduction in interest rates will not exceed 130 basis points below that market rate based on a level debt service schedule for state funded loans. The proposed reduction of basis points from market interest rate remains at an amount not to exceed 195 for federally funded loans pursuant to subsection (d). A significant change is the addition of "not to exceed" language in each subsection describing the reduction from market rates; these changes provide the Board with the flexibility needed to maintain the CWSRF on a sound financial footing in changing economic times. Under proposed new §375.15, fixed lending rates will be determined based on proposed subsections (b), (c) and (d).

Proposed subsection (f) relating to private and taxable borrowers provides that the interest rate for loan agreements for those certain private and taxable issuers will be 140% of the rate assessed pursuant to subsections (b), (c) and (g) of this section. Finally proposed subsection (g) provides notice that the interest rate may change depending upon the borrower's credit rating.

Section 375.16 relating to Fees of Financial Assistance describes the loan origination fee and emphasizes that the fee is not calculated on the subsidy portion of a loan; this is substantively the same as current §375.18(c) relating to loan origination charge.

Section 375.17 relating to Term of Loan describes the different terms available to eligible applicants including subsection (a) which provides that a loan for planning, acquisition and design shall be for up to a ten year term; this is a new provision. A construction loan is available for a term of up to 30 years; however, subsection (b) states no loan term may exceed the design life of the project.

Section 375.18 relating to Loan Subsidies describes the types of loan subsidies available and provides for further loan subsidies as described in the annual IUP. This section replaces current §375.21 relating to disadvantaged communities. The calculation and the level of subsidy available to disadvantaged communities will be detailed in the IUP except that there is a definition of disadvantaged that contains new language in proposed §375.1 relating to definitions.

Section 375.19 relating to Financial Guarantees for Political Subdivision Bonds describes the types of financial guarantees and the Board's conditions for accepting such guarantees. This proposed section is the same as current §375.53.

Subchapter C.

Subchapter C relating to Intended Use Plan describes eligibility, rating factors, subsidies and other requirements of the annual federal capitalization grant. This subchapter has significant changes and new language. The primary purpose of the changes is to provide increased flexibility in the CWSRF program to meet the changing requirements in federal capitalization grants.

Section 375.30 relating to Submission of Project Information Forms describes the initial process for an eligible entity interested in receiving a CWSRF loan. Subsection (a) details the minimum specific information required on a project information form. The major change to this section is the removal of the principal and secondary projects category. The Board will fund only the rated and ranked projects instead of allowing any surplus funds to be used on other projects.

Section 375.31 relating to the Rating Process describes the federally required criteria for rating specific projects and is substantially different from current §371.16 which lists all criteria. The Board's policy in proposed §375.31 is that the rating process should be performed with the goals of achieving water quality management consistent with public health and water quality standards. Instead of ranking projects based on population categories, projects will be rated on the substantive criteria set forth in subsection (b); in the event of a tie, funding will be made first to projects in which a sewage treatment plant is at the greatest percentage of its rated capacity and then to the applicant with the lowest per capita income. The change allows the Board to adapt each year's IUP to changed federal requirements and to provide financial assistance focused on particular clean water issues. Nonpoint source pollution projects will be rated in the manner described in the IUP. Finally, the Board now has explicit authority to issue an emergency IUP to provide financial assistance for projects which require immediate attention in order to protect public health under §375.31(f).

Section 375.32 relating to Public Notice provides a short statement about the requirement to provide an opportunity for public comment about a proposed IUP.

Section 375.33 relating to Criteria and Methods for Distribution of Funds describes the process for distributing funds and consolidates current §§375.14, 375.15, 375.16 and 375.17 into this one section. The current sections are repetitive varying only with respect to the type of entity or the type of project; this proposed change makes the rules clearer and easier to use. Subsection (a) and (b) state that available funds and subsidies will be determined annually. Subsection (c) provides a specific amount of available funds be provided to small systems and states that at least 15% of available funds will be awarded to small communities. Subsection (d) describes the methods used to rank the priority list of projects and allows for bypass in subsection (d)(3). Bypass is a new process and allows the executive administrator to bypass higher rated projects in favor of lower rated projects to ensure that subsidy percentages in statute and in a capitalization grant are met. For example, EPA is requiring that 20% of funded projects meet the green project criteria and that percentage may require bypassing otherwise higher ranked projects. Subsection (e) describes the funding line and the invitation to apply for a loan. Subsection (f) describes the application of additional funds and the redrawing of the funding line. Subsection (g) describes re-ranking when not all invited applicants apply for a loan. The project is iterative and subsection (h) provides for re-invitations for loans to ensure all categories of funds are fully expended. Subsections (i) and (j) respectively discuss the process for situation where there are extra funds or a shortage of funds.

Subchapter D.

Subchapter D relating to Application for Assistance details the information required to complete an application for financial assistance. It also describes the Board's review and approval of an application. Finally it provides notice that the Board must approve all applications at an open meeting.

Section 375.40 relating to Pre-application Conferences provides the opportunity for potential applicants to meet with Board staff to increase the likelihood of receipt of a complete application and to provide preliminary information to the applicant about eligibility requirements.

Section 375.41 relates to Timeliness of Application and Required Application Information. Subsection (a) lists new deadlines for submitting the application and for supplying additional information or data as requested. These proposed new timelines will result in more rapid disbursement of loan funds creating greater efficiencies in the use of federal funds. Proposed subsection (a)(4) allows for limited extensions of time to submit the application and requires applicants to show good cause or the occurrence of a force majeure event to receive an extension of time. This change provides for better management of each federal grant and allows the Board to provide loans to those applicants who are prepared to close the loan in a more limited time period frame. Subsection (b) includes the information that is required in applications for financial assistance and combines current §§375.32, 375.33 and 375.34 so that application information is contained in one section.

Section 375.42 relating to Review of Applications for Financial Assistance provides notice to applicants about the executive administrator's review process, including possible requests for additional information. Subsection (b) explains that the failure to timely submit requested information will result in the project being bypassed.

Section 375.43 relating to Required Water Conservation Plan references the current rule at §363.15. This is the same as the current rule.

Section 375.44 relating to Board Approval of Funding contains subsections (a) - (c) which are substantively the same as current §375.51. However, subsection (d) provides new limits on the length of the Board's loan commitment and limits extensions of time to only those situations where there is good cause or a force majeure event.

Subchapter E.

Subchapter E relating to Environmental Reviews and Determinations contains the procedures for review of potential environmental impacts of projects funded by the CWRSF.

Division 1, State-Funded Projects. For state-funded financial assistance, a state may apply the procedures at 40 CFR Part 6 to its own environmental review rules; Subdivision 1 of this subchapter applies to state-funded projects. This proposed subchapter is substantively similar in content to current §375.35 but is reorganized and rewritten to provide greater ease of use, including ordering the sections to follow the required environmental review process.

Section 375.50 contains a statement of applicability and defines terms that apply to the environmental review process including affected community, avoidance, minimization and mitigation. Additionally, proposed §375.50(a) constitutes a major change in these rules by limiting the use of Division 1, if so stated in an IUP. The purpose of this proposed change is to increase the rate at which the State draws down federal funds. State dollars provide approximately two-thirds of the amount lent under the CWSRF program. Where state-funded loans comply with NEPA, the Board may use those loan outlays to draw on the capitalization grant, thereby increasing the rate of flow of federal dollars to the State. Therefore, the Board may, from time to time, require that state-funded loans comply with NEPA and proposed Division 2 of this subchapter.

Proposed §375.51 relating to Environmental Review Process provides an overview of the environmental review process required for state-funded projects. Section 375.52 relating to Types of Environmental Determinations: Categorical Exclusions describes when categorical exclusions are appropriate and lists those projects that may be eligible for a categorical exclusion in subsection (a). Section 375.5 relating to Types of Environmental Determinations: Full Review outlines when and how a full review must be performed and specifies the type of documentation needed in order to document its completion. Proposed §375.54 describes the requirements that an applicant must meet in order to develop an approvable environmental assessment when a project cannot be categorically excluded. Proposed §375.55 addresses proposed project alterations and the approval procedure that is used to review the environmental review and determinations and whether they require amendment based on such project alterations and §375.56 addresses the use of environmental review activities and determinations prepared by other governmental entities.

Division 2, Federally-funded Projects. The Board reviews the potential environmental impact of the decision to federally fund projects under a structure required by the NEPA, 42 U.S.C. 4321 *et seq.* The proposed rules set forth in Subdivision 2 of Subchapter E are based on the EPA rules set forth at 40 CFR Part 35 and at 40 CFR Part 6 relating to Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions. The proposed rules in Division 2 are substantively similar to the existing rule set forth at §375.214 but have been reorganized and rewritten to provide greater ease of use.

Section 375.60 defines certain terms that are applicable to federal environmental review requirements including affected community, avoidance, NEPA, Indian tribes, minimization, and mitigation. Proposed §375.61 relating to Environmental Review Process provides an overview of the environmental review process required for federally-funded projects. Subsection (a) specifically notes that these rules follow EPA procedures and also requires the completion of the environmental review prior to the release of federal funds. Subsection (b) lists the type of environmental determinations that may issue after the review. Subsection (c) provides a general description of the inter-disciplinary, inter-agency and public review process and describes when a previous environmental determination may be used by the Board.

Section 375.62 relating to Types of Environmental Determinations: Categorical Exclusions describes when categorical exclusions are appropriate and lists those projects that may be eligible for a categorical exclusion in subsection (a). Subsection (b) lists the types of projects that are not eligible for a categorical exclusion. Subsection (c) lists the extraordinary circumstances that may preclude the use of a categorical exclusion and subsection (d) states that a categorical exclusion may be rescinded upon the discovery of extraordinary circumstances. Subsection (e) lists the documents that applicant must provide to be eligible for a categorical exclusion. Subsections (f) and (g) discuss the

review of the applicants' information and the required public notice respectively.

Section 375.63 relating to Types of Environmental Determinations: Finding of No Significant Impact describes the purpose and applicability of a FNSI in subsection (a). Subsection (b) requires the preparation of an environmental assessment when the executive administrator preliminarily determines that any adverse impacts will not be significant and those impacts may be adequately addressed by ordinary mitigation measures. Subsection (c) provides detail about the contents of an environmental assessment and subsection (d) provides detail about the contents of the FNSI. Subsection (d) provides notice that the executive administrator may issue a statement of findings about the outcome of required mitigation measures. Subsection (e) describes the required public notice period.

Section 375.64 relating to Environmental Information Document: Applicant Requirements contains subsection (a) which requires the applicant to prepare an environmental information document then the executive administrator determines that neither a categorical exclusion nor a FNSI is appropriate for the proposed project or preliminarily determines that an environmental impact statement may be required. The specific contents of the environmental information document will be communicated to the applicant and will vary depending upon the issues specific to the proposed project. Subsection (b) provides notice to the applicant about the interagency coordination that is required in developing the environmental information document. Subsection (c) requires notice to the executive administrator about changes to the proposed project. Subsection (d) describes the required contents of an environmental information document.

Section 375.65 relating to Decision to Prepare an Environmental Impact Statement: Notice of Intent, subsection (a), explains that a recommendation to issue an environmental impact statement must be published for public notice and contain the information required by subsection (b).

Section 375.66 relating to Types of Environmental Determinations: Record of Decision provides a general description of a record of decision in subsection (a). Subsection (b) provides notice of the required contents of a record of decision and subsection (c) explains that the issuance of the record of decision allows the project to proceed and subjects the project to avoidance, minimization and mitigation measures. Subsection (d) provides notice that the executive administrator shall ensure monitoring of required mitigation measures and requires inclusion of those measures in all relevant project construction documents.

Section 375.67 relating to Environmental Impact Statements describes the purpose of an environmental impact statement in subsection (a). Subsection (b) lists events which require the preparation of an environmental impact statement.

Section 375.68 relating to Environmental Impact Statements: Applicant Requirements requires an applicant, in conjunction and coordination with the executive administrator, to hire a third party contractor to prepare the environmental impact statement. Subsection (b) requires the executive administrator's approval of the contractor. Subsection (c) prohibits the contractor from having any financial interest in the proposed project and requires a disclosure statement. Subsection (d) discusses the contract with the third party and requires a contract clause indemnifying the Board and the EPA. Subsection (e) describes the working relationship between the contractor and the Board.

Section 375.69 relating to Proposed Project Alterations requires an applicant to notify the executive administrator when alterations are proposed for a project that has already received an environmental determination pursuant to proposed subsection (a). Subsection (b) describes the executive administrator's review and the potential results of the review. Subsection (c) provides notice that proposed changes to the project which do not result in potential adverse impacts that were not previously reviewed will generally not require additional environmental review.

Section 375.70 relating to Use of Environmental Determinations Prepared by Other Entities provides, in subsection (a), for the adoption of a determination issued by the EPA or other federal agency; such previous determination shall be reviewed to determine whether further information is required. Subsection (b) provides notice that previous requirements for mitigation measures shall be incorporated into the Board's documents. Subsection (c) describes the executive administrator's review of a previous determination and his issuance of a statement of findings.

Subchapter F.

Subchapter F relating to Engineering Review and Approval describes the Board's engineering review of proposed projects. It requires applicants for financial assistance to provide information to the Board and describes the review of the information. This subchapter also details requirements for construction contracts and the Board's approval process for construction contract documents.

Section 375.81 relating to Engineering Feasibility Report describes the requirements and process for the Board's review and approval of the engineering report. Subsection (a) requires the applicant's submission of a report and describes the required elements of the report, including a new requirement for a detailed project schedule with milestones. This new requirement will enhance the Board's ability to ensure that loan funds are drawn down in a timely manner because the details in the project schedule will also serve as a guide to the required outlays described in proposed §375.92. Subsection (b) describes the information required for the executive administrator's approval of the report. Subsection (c) provides notice to applicants that a significant change in the proposed project may require additional engineering review and amendments to the report.

Section 375.82 relating to Contract Documents: Review and Approval requires the submission of contract documents prior to advertising for bids for the project and describes the purpose of the review. Proposed subsection (a) defines contract documents to include traditional construction contract and other contracts containing construction phase work. This change recognizes that traditional distinctions between design and construction are not as clearly delineated in project delivery methods like design-build. Proposed subsection (b) reminds the applicant to coordinate approval of the contract documents from other relevant agencies.

Section 375.83 relating to Advertising and Awarding Construction Contract requires the applicant to comply with relevant procurement laws and rules pursuant to subsection (a). Applicants who receive grants will be required to comply with federal regulations at 40 CFR Part 31 pursuant to subsection (b). Proposed subsection (b) requires executive administrator's approval of advertisement of bids for construction work prior to advertising. Subsection (c) prohibits the applicant from making any substantive changes to the approved contract documents after the Board's approval. Proposed subsection (d) requires

the awarded construction contract or any contract containing alternative project delivery methods such as design-build to conform to the previously approved documents regarding same. Subsection (e) requires the applicant to conduct a pre-construction conference on significant projects and to advise the executive administrator prior to same. Subsection (f) provides that upon approval of the documents, the executive administrator will advise the applicant that a notice to proceed may issue. Subsection (g) reiterates the legal principle that the Board is not liable for any event arising out of or relating to the construction or the construction contracts.

Subchapter G.

Subchapter G relating to Loan Closings and Availability of Funds provides details about the types of documentation needed to close a loan when the Board purchases local entities' bonds. The subchapter also describes the methods for disbursing loan proceeds and the restrictions that apply to the use of surplus funds.

Section 375.91 relates to Loans Secured by Bonds or other Authorized Securities. Subsection (a) requires a disbursement of loan funds at closing and subsection (b) describes the documents required for loan closing.

Proposed §357.91(b)(2)(A) relating to the establishment of an escrow or trust account has been revised to clarify the types of institutions that can manage loan proceeds and the requirements that apply to the management of loan proceeds. Specifically, loan proceeds must be released into a separate escrow or trust account at either an approved official state depository institution designated by the Office of the Comptroller or a properly-chartered trust institution at loan closing unless the loan recipient is a home-rule municipality with a population in excess of 1,000,000 in which case the loan recipient may execute a trust and agency certificate relating to the management of loan proceeds.

Proceeds cannot be released unless approved by the executive administrator and the executive administrator has issued written authorization for the release of funds into a separate construction account. Escrow and trust account statements must be submitted to the Board on a monthly basis. Any investments of proceeds must comply with the Public Funds Investment Act and the accounts must be properly collateralized in accordance with the Public Funds Collateral Act.

Proposed §375.91(b)(7) requires delivery of a private placement memorandum or official statement with the closing documents; this change conforms to new requirements by the Depository Trust Company. Subsection (c) requires submission of the transcript of the proceedings relating to the debt purchased by the Board within 60 days of closing. Subsection (d) allows for phased loan closings in particular circumstances.

Section 375.92 relating to Disbursement of Funds provides that reimbursements and corresponding releases from the escrow or trust account must be consistent with the approved project schedule. Subsection (b) describes the sequence of allowable disbursement; this section allows disbursements only for the phase of the project in progress. Proposed subsection (c) requires the regular submission of outlays. This is a new requirement designed to ensure timely expenditures of capitalization grant funds. Subsection (d) relates to the Board's affirmation of the environmental mitigation measures applicable to the project. A new subsection (e) notes that the executive administrator may release funds to an escrow or trust account at the time of loan closing. Finally, a new subsection (f) charges the executive administrator with ensuring that projects proceed in accordance with approved project schedules, that outlays are submitted as required in subsection (c) and that schedules are adhered to as closely as possible.

Section 375.93 relating to Surplus Funds defines, in subsection (a), surplus funds. Subsection (b) limits the uses of surplus funds and requires the executive administrator's approval for any use of surplus funds.

Subchapter H.

Subchapter H relating to Construction and Post-Construction Requirements provides notice to loan recipients about the Board's inspection powers and processes, including approval of completion of project work under prime contracts and the final project contract approval. The subchapter also describes the Board's process and conditions for approving change orders and the use of force account labor. Finally, the subchapter describes administrative requirements for final accounting, as build plans, records retention and release of retainage.

Section 375.101 relating to Inspection during Construction contains subsection (a) requiring the use of a registered professional engineer or a person under the supervision of same to inspect the project during construction. Subsection (b) describes the Board's authority to inspect the project during construction, including a new statement that the inspection will consider the approved project schedule. Proposed subsection (c) describes the scope of the Board's inspections. Subsection (d) allows Board inspectors to document issues that may result in recommendations to the owner to undertake corrective measures to ensure compliance with applicable laws and rules. Subsection (e) requires applicants to provide a response to any issues relating to compliance with contract documents; this is a new statement but not a change in Board practices.

Section 375.102 relating to Alterations During Construction requires the owner of the project to notify the executive administrator pursuant to subsection (a) when a change to the project is recommended after approval of the engineering report. Subsection (b) describes the process for change orders issued during construction.

Section 375.103 relating to Force Account states the Board's policy regarding that the use of force account labor which requires the prior approval of the executive administrator and it also states that force account labor is only allowed in limited circumstances.

Section 375.104 relating to As-Built Plans requires the Applicant to notify the executive administrator when he received a complete set of As-Built drawings.

Section 375.105 relating to Certificate of Approval and Project Completion describes the issuance of a certificate of approval at the completion of each prime construction contract in subsection (a). Subsection (b) describes the final certificate of approval issued at the completion of the last prime construction contract. The final certificate of approval is accompanied by a statement from the Board that the inspection process is complete.

Section 375.106 relating to Final Accounting requires the Applicant to provide a final accounting within 60 days of the receipt of a certificate of approval for the final prime construction contract.

Section 375.107 relating to Records Retention requires the Applicant to retain all documents and records for three full years from the receipt of the certificate of approval for the final construction contract.

Section 375.108 relating to Release of Retainage requires the executive administrator's approval of the release of retainage after the owner's engineer and governing body approve the release of all retainage in subsection (b). Subsection (a) requires withholding a minimum of five percent of each payment and subsection (c) allows for the partial release of retainage when the project is substantially complete.

Section 375.109 relating to Responsibilities of Applicant emphasizes the applicant's ongoing responsibility to comply with all covenants in the loan documents and provides notice of the executive administrator's authority to monitor the project through the final loan payment.

Section 375.110 relates to Authority of Executive Administrator. Subsection (a) states that the executive administrator shall periodically monitor the project after completion of construction. Subsection (b) lists specific post-construction inspection authority of the executive administrator.

Subchapter I.

Subchapter I relating to Nonpoint Source Pollution Linked Deposits Program has not been modified from the existing rules in Subchapter C, Division 3 of Chapter 375.

FISCAL NOTE.

Ms. Melanie Callahan, Chief Financial Officer, has approved the fiscal note and has determined that for each of the first five years these rules will be in effect, the following statements are correct and accurate to the best of the agency's ability to project future economic trends.

There is no expected additional cost to state or local governments expected as the result of administering these rules. The loan origination fee amounts have not been increased. The interest rates are tied to market conditions and the Board is not increasing interest rates or financial terms of loans as detailed in the unchanged method for calculating interest rates.

These rules are not expected to result in reductions in costs to either state or local governments because the loan processing costs for the Board is not significantly affected and there is no change for local entities that apply for loans because there is no change in the loan fees.

These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

The Board has also determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking.

PUBLIC BENEFIT AND COSTS.

For the first five years these rules will be in effect, the public benefits expected are enhanced funds management that will result in more funds available for loans and other financial assistance for communities to maintain and enhance the quality of public drinking water. Ms. Callahan has determined that there will be no economic cost to persons required to comply with these rules because the requirements of these rules apply only to those persons who voluntarily seek assistance from the State Revolving Fund and because there is no proposed increase to program fees.

LOCAL EMPLOYMENT IMPACT STATEMENT.

Pursuant to §2001.022 of the Texas Government Code, these proposed rules have been examined and there will not be any direct effect on local employment. These rules are applicable to projects funded by the CWSRF in any geographic area of the State. A local governmental entity may decide to apply for financial assistance from the CWSRF to construct a project and that voluntary decision would create additional jobs for the duration of the construction. However, the adoption of these rules alone has no impact on local employment in any geographic region of the State.

REGULATORY ANALYSIS FOR MAJOR ENVIRONMENTAL RULE.

Pursuant to §2001.0225 of the Government Code, requiring a regulatory analysis of a major environmental rule, it has been determined that these rules are not major environmental rules under §2001.0225 and therefore the analysis under that section is not required.

TAKINGS IMPACT ANALYSIS.

The Board has determined that the proposed rules will constitute neither a statutory nor a constitutional taking of private real property. The proposed rules do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rules do not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

REQUEST FOR COMMENTS.

Comments on the proposed new Chapter 375 and the repeal proposed elsewhere in this issue of the *Texas Register* will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 475-2053. Additionally, the Board will hold a public hearing on Tuesday, July 27, 2010, at 8:00 a.m. in Room 1-170 of the Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas, to solicit public comments on the proposal. Comments received in any of these formats indicated will be considered and addressed.

SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

31 TAC §375.1, §375.2

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.1. Definitions.

The following words and terms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Chapter 15 of the Texas Water Code, and not defined here shall have the meanings provided by the chapter or subchapter as appropriate.

(1) Act--The Federal Water Pollution Control Act, as amended, 33 U.S.C.A. 1251 et. seq., as amended

(2) Applicant--The entity applying for financial assistance, the entity receiving financial assistance, and the entity owning the project funded under this chapter or an entity authorized to act on behalf of another eligible Applicant.

(3) Application--The forms provided by the executive administrator that must be completed for consideration for financial assistance.

(4) Authorized representative--The person authorized by the Applicant and directed by the Applicant's governing body to file the application and to sign documents relating to the project, on behalf of the Applicant.

(5) Board--The Texas Water Development Board.

(6) Bonds--All bonds, notes, certificates of obligation, book-entry obligations, and debt obligations authorized to be issued by any political subdivision.

(7) Capitalization grant--The federal grant awarded annually by the EPA to the State to fund the CWSRF.

(8) Clean Water State Revolving Fund (CWSRF)--The financial assistance program authorized by Texas Water Code, Chapter 15, Subchapter J.

(9) Closing--The exchange of the Applicant's approved debt instruments or loan agreement in return for CWSRF financial assistance.

(10) Commission--The Texas Commission on Environmental Quality or TCEQ.

(11) Commitment--An action of the Board, evidenced by a resolution, approving a request for financial assistance pursuant to this chapter.

(12) Construction--The erection, acquisition, alteration, remodel, rehabilitation, improvement or extension of wastewater facilities.

(13) Construction fund--A dedicated source of funds, created and maintained by the Applicant at a designated state depository institution, used solely for a Board approved project.

(14) Construction contract documents--The engineering drawings, maps, technical specifications, design reports, instructions and other contract terms, conditions and forms developed in sufficient detail to allow contractors to bid on the work.

(15) Davis Bacon Act--The federal statute at 40 U.S.C.A. §3141 et seq., as amended and in conformance with the U.S. Department of Labor regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction) and 29 CFR Part 3 (Contractors and Subcontractors on Public Work Financed in Whole or in Part by Loans or Grants from the United States).

(16) Debt--All bonds or other documents issued by any political subdivision to be used to pledge repayment of the Board's financial assistance.

(17) Design phase--The project phase during which the Applicant prepares the project design documents including surveys, plans, working drawings, specifications and any procedures and protocols to be used during the design of the project.

(18) Disadvantaged community--The service area of a political subdivision, or the service area of a community that is located outside the political subdivision, that has an adjusted median household income that is no more than 75% of the state median household income for the most recent year for which statistics are available; and

(A) if the service area is not charged for sewer services, has a household cost factor for water rates that is greater than or equal to one percent; or

(B) if the service area is charged for water and sewer services, has a combined household cost factor for water and sewer rates that is greater than or equal to two percent; or

(C) that qualifies as a disadvantaged community based on factors as determined by the Board.

(19) Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency as defined in Texas Government Code §418.004.

(20) Eligible applicant--A waste treatment management agency including any interstate agencies, or any city, commission, county, district, river authority, or other public body created by or pursuant to state law that has authority to dispose of sewage, industrial wastes, or other waste; or an authorized Indian tribal organization; or any person applying for financial assistance to build a nonpoint source pollution control project pursuant to the Act, §319; or any person applying for financial assistance for an estuary management project pursuant to the Act, §320.

(21) Engineering feasibility report--Those necessary plans and studies that directly relate to the project and that are needed in order to assure compliance with the enforceable requirements of the Act and state statutes. The engineering feasibility data should consist of a systematic evaluation of alternatives that are feasible in light of the unique demographic, topographic, hydrologic, and institutional characteristics of the area that is also demonstrated to be cost-effective.

(22) Environmental affirmation--The Board's acceptance of the environmental determination made prior to the release of design or construction funds for federally funded pre-design financial assistance.

(23) EPA--The United States Environmental Protection Agency.

(24) Escrow--The transfer of funds to an eligible state depository institution until such funds are eligible for release.

(25) Escrow agent--The state depository institution appointed to hold the funds that are not eligible for release to the Applicant.

(26) Estuary management plan--A plan for the conservation and management of an estuary of national significance as described in the Act, §320.

(27) Estuary management project--A project to develop or implement an estuary management plan.

(28) Executive administrator--The executive administrator of the Board or a designated representative.

(29) Financial assistance--Loans, including principal forgiveness and negative interest loans as well as grants to eligible Applicants.

(30) Federally funded loans--Financial Assistance funded in whole or in part from the federal funds portion of the CWSRF; also known as equivalency or Tier III loans.

(31) Force majeure--Acts of god, strikes, lockouts or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other inabilities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, which by the exercise of due diligence and care such party could not have avoided.

(32) Fund--The CWSRF created pursuant to the Texas Water Code, Subchapter J, Chapter 15.

(33) Green project--A project or project components that, when implemented, will result in energy efficiency, water efficiency, green infrastructure or environmental innovation and that are characterized as green projects either categorically or by utilizing a business case approved by the executive administrator.

(34) Green project reserve--A federal directive requiring a specified portion of the capitalization grant to be used for green projects.

(35) Intended use plan--A document prepared annually by the Board, subject to public review and comment that identifies the intended uses of all CWSRF program funds and describes how those uses support the goals of the CWSRF.

(36) Investment pool--An entity created under the Public Funds Investment Act, Chapter 2256, Government Code, as amended, to invest public funds jointly on behalf of the entities that participate in the pool and whose investment objectives in order of priority are:

(A) preservation and safety of principal;

(B) liquidity; and

(C) yield.

(37) Lending rate--The rate of interest applicable to a particular CWSRF loan.

(38) Market interest rate--Interest rates comparable to those attained for municipal securities in an open market offering.

(39) Municipality--A city, town, county, district, association or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, municipal and industrial wastes, or other wastes or an approved management agency under the Act

(40) Nonpoint source pollution plan--A plan for managing nonpoint source pollution as described in the Act, §319. Nonpoint source pollution is any source of water pollution that does not enter water from a point source and includes pollution generally resulting from land runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification.

(41) Nonpoint source pollution project--A project implemented pursuant to a nonpoint source pollution plan.

(42) Permit--Any permit, license, registration and other legal document required from any local, regional, state or federal government for construction of the project.

(43) Person--An individual, corporation, partnership, association, State, municipality, commission or political subdivision of the State, or any interstate body.

(44) Point source--Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(45) Priority list--The section of the IUP that lists projects ranked according to priority order based on criteria described within the applicable IUP.

(46) Private Placement Memorandum--A document functionally similar to an official statement used in connection with an offering of municipal securities in a private placement.

(47) Project--The planning, acquisition of land and permits, environmental review, design, construction and other activities designed to improve, extend, rehabilitate and construct wastewater treatment facilities and nonpoint source or national estuary program projects.

(48) Project engineer--The engineer retained by the Applicant to provide professional engineering services during any phase of a project.

(49) Project information form--The Board form that must be submitted by Applicants invited to apply for funding from the CWRSF.

(50) Ready to proceed--A project that has obtained all permits, legally required authorizations, and all land, and has complied with all engineering and environmental planning review requirements and other Board requirements and design is complete.

(51) Release--The time at which financial assistance funds are made available to the loan recipient.

(52) State--The State of Texas.

(53) State depository institution--A state or national bank designated by the comptroller in accordance with the Local Government Code, Chapter 404, Subchapter C, as amended.

(54) State funded loans--Financial assistance funded solely from the state funds portion of the CWSRF; also known as non-equivalency or Tier II loans.

(55) Subsidy--Any special financial terms and conditions available including loan forgiveness, negative interest rates, grants or other financial incentives as detailed in an IUP.

(56) Treatment works--Any devices, facilities and systems that are used in the storage, treatment, recycling, and reclamation of waste or that are necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of, or used in connection with, the treatment process (including land used for the storage of treated water in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment; or facilities to provide for the collection, control, and disposal of waste. The term also means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff; and waste combined in storm water and

sanitary sewer systems, the type of projects that often arise in response to emergency events.

(57) Trustee--The person holding the property in trust including an original, additional or successor trustee, whether or not the person is appointed or confirmed by a court.

(58) Trust and agency certificate--The instrument executed between the executive administrator and a home-rule municipality with a population of more than 1,000,000 whose charter provides for an elected comptroller, auditor or treasurer governing the management of CWSRF loan and grant proceeds;

(59) Trust institution--A bank, credit union, foreign bank, savings association, savings bank or trust company that is authorized by its charter to conduct trust business.

(60) Water conservation plan--A report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area.

(61) Water conservation program--A comprehensive water conservation program with a schedule and description of the methods and means to be used to implement and enforce a water conservation plan.

(62) Water quality management plan--A plan prepared and updated annually by the state and approved by the Environmental Protection Agency that determines the nature, extent, and causes of water quality problems in various areas of the state and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

§375.2. Entities and Activities Eligible for Assistance.

(a) Financial assistance from the CWSRF is available to the following entities:

(1) any municipality, interstate or state agency for the construction of or improvements to publicly-owned treatment works;

(2) any person for the implementation of a non-point source project under §319 of the Act; and

(3) any person for the development and implementation of a conservation and management plan for bays and estuaries under §320 of the Act.

(b) Financial assistance from the CWSRF is available for nonpoint source pollution projects consistent with the following definitions:

(1) BMP--Best management practices are those practices determined to be the most efficient, practical, and cost-effective measures identified to guide a particular activity or address a particular problem.

(2) National Estuary Program--A program created by the Water Quality Act of 1987 and administered according to §320 of the Act.

(3) NPS Loan Program--Nonpoint Source Pollution Loan Program established to provide low interest loans to persons for the implementation of approved nonpoint source pollution control and abatement projects and estuary management projects.

(4) NPS Management Report--The most recent Texas Nonpoint Source Pollution Assessment Report and Management Program adopted by the commission.

(c) Financial assistance from the CWSRF is available for nonpoint source pollution projects consistent with the following eligibilities:

(1) The executive administrator may provide financial assistance to persons for nonpoint source pollution control projects or for national estuary program projects.

(2) An Applicant for financial assistance for a nonpoint source or estuary program project shall submit an application in the form and number prescribed by the executive administrator. The executive administrator shall determine the type of financial assistance available to an Applicant for a nonpoint source pollution project or a national estuary program project.

(3) The Board may provide financial assistance to applicants by either purchasing bonds issued by such applicant or by receiving a promissory note and entering into a loan agreement with such Applicant. If, however, an Applicant is a governmental entity that is fully authorized to issue bonds, the Applicant may not enter into a loan agreement as provided in this section.

(d) Financial assistance from the CWSRF is available for nonpoint source pollution projects consistent with the following conditions:

(1) an identified practice within a Water Quality Management Plan;

(2) a nonpoint source management activity that has been identified in the Texas Comprehensive Groundwater Protection Program; or

(3) a BMP listed in the NPS Management Report and the EPA approved Nonpoint Source Management Plan and or the National Estuary Program efforts for the State of Texas.

(e) Financial Assistance from the CWSRF is available for national estuary program projects consistent with the EPA approved National Estuary Program efforts for the State of Texas.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003499
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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SUBCHAPTER B. FINANCIAL ASSISTANCE

31 TAC §§375.10 - 375.19

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.10. Types of Financial Assistance.

The executive administrator shall determine the type of financial assistance available to the Applicant based on the evaluation of the project information forms, the application and the availability of funds.

§375.11. Refinancing.

(a) The executive administrator may accept applications to refinance existing debt for eligible projects when sufficient funds are available. If refinancing funds are available in an IUP, then the eligible Applicant shall describe the water quality need for construction of the eligible project and provide other specific information detailed in the project information form.

(b) An application for refinancing of existing debt shall be the same as an application for financial assistance under this chapter. The executive administrator may consider an application for refinancing when:

(1) the project meet all of the requirements for a federally funded project under this chapter, including information evidencing that the environmental review and engineering criteria considered by the original lender shall meets the criteria required under current this chapter and law for the same or similar projects; and

(2) the federal tax regulations allow such refinancing if Board bond proceeds will be used to refinance.

§375.12. Planning, Acquisition, and Design Funding.

(a) This type of financial assistance is available for the planning, acquisition of land, and the design for a proposed project.

(b) Applicants who have completed the planning, acquisition, and design for a proposed project within three years of the loan closing date will receive priority for construction funding when the project is ready to proceed.

§375.13. Construction Funding.

This type of financial assistance is available for the construction of an eligible project that is ready to proceed.

§375.14. Pre-Design Funding.

(a) Description. This type of financial assistance is available for the planning, design, acquisition and construction of a project. The funds for the construction phase of a project will be released only when construction contracts have been executed and the project is ready to proceed. This option is available only when the executive administrator recommends it to the Board based on a preliminary determination that there are no significant permitting, social, contractual, environmental, engineering or financial issues that would make a Finding unavailable.

(b) Alternative methods of project delivery. Design-Build, Construction Manager at Risk, and other alternative methods of project delivery are eligible for the pre-design funding option and loan commitments may include construction funding. The executive administrator may break a project into phases for purposes and may modify the requirement of this chapter for alternative project delivery methods.

§375.15. Lending Rates.

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

(1) Average life--The number determined by dividing the sum of the payment periods of all maturities of a loan by the total number of maturities.

(2) Borrower--Each eligible Applicant receiving a loan from the Board.

(3) Delphis--Delphis Hanover Corporation Range of Yield Curve Scales.

(4) Loan interest rate--The individual interest rate for each maturity of a loan as identified by the executive administrator under this chapter.

(5) Market rate--The individual interest rate for each maturity of a loan payment that is the borrower's market cost of funds based on the Delphis index's scale for the borrower as identified under subsection (c)(1) of this section.

(6) Payment period--The number determined by multiplying the total principal amount due for an individual maturity as set forth in the loan by the standard period for the loan.

(7) Standard period--The number identified by determining the number of days between the date of delivery of the funds to a borrower and the date of the maturity of a bond or loan payment pursuant to which the funds were provided calculated on the basis of a 360-day year composed of twelve 30-day periods and dividing that number by 360.

(b) Procedure for setting fixed interest rates. The interest rates will be determined by this section or as described in an IUP.

(1) The executive administrator will set fixed rates for loans on a date that is:

(A) five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the execution of a loan agreement; and

(B) not more than 45 days before the anticipated closing of the loan from the Board.

(2) After 45 days from the assignment of the interest rate on the loan, rates may be extended only with the executive administrator's approval.

(c) Fixed Rates for State Funded Loans. The fixed interest rates for CWSRF loans under this chapter will be determined as provided in this subsection or as detailed in an IUP. The executive administrator will identify the market rate for the borrower, determine the amount of adjustment from the market interest rate appropriate for the borrower, apply the identified interest rate adjustment to the market rate for the borrower to determine the loan interest rate, and apply the loan interest rate to the proposed principal schedule, as more fully set forth in this subsection.

(1) To identify the market rate:

(A) for borrowers that have a rating by a recognized bond rating entity and will not have bond insurance, the executive administrator will rely on the higher of the Delphis scale for the current bond rating of the borrower or the Delphis 90 index;

(B) for borrowers with no rating by a recognized bond rating entity or for borrowers with a rating that is less than investment grade as determined by the executive administrator, the executive administrator will rely on the Delphis 90 index; or

(C) for borrowers that are rated by a recognized rating entity with bond insurance or for borrowers with no rating by a recognized bond rating entity with insurance, the executive administrator will rely on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.

(2) The program is designed to provide borrowers with a reduction not to exceed 130 basis points below the market rate based on a level debt service schedule. Notwithstanding the foregoing, in no event shall the loan interest rate as determined under this section be less than zero.

(3) To determine the loan interest rate, the following procedures will apply:

(A) Unless otherwise requested by the borrower under subparagraph (B) of this paragraph, the loan interest rate will be deter-

mined based on a debt service schedule that provides interest only to be paid in the first year of the debt service schedule and in which the remaining annual debt service payments are level, as determined by the executive administrator. The executive administrator will identify the appropriate Delphis scale for the borrower and identify the market rate for the maturity due in the year preceding the year in which the average life is reached. The executive administrator will reduce that market rate by the number of basis points applicable according to paragraph (2) of this subsection and thereby identify a proposed loan interest rate. The proposed loan interest rate will be applied to the proposed principal repayment schedule. If the resulting debt service schedule is level to the satisfaction of the executive administrator, then the proposed loan interest rate will be the loan interest rate for the loan. If the resulting debt service schedule is not level to the satisfaction of the executive administrator, then the executive administrator may adjust the interest rate for any or all of the maturities to identify the loan interest rate that as closely as possible achieves the interest savings applicable.

(B) A borrower may request a debt service schedule in which the annual debt service payments are not level through the term of the loan, as determined by the executive administrator. In this event, the executive administrator will approximate a level debt service schedule for the loan amount and identify a proposed loan interest rate that provides for annual debt service payments that are level for the term of the loan following the procedures set forth in paragraph (1)(A) of this subsection. From the level debt service schedule, the executive administrator will determine the amount of the subsidy that would have been provided if the annual debt service payments had been level. The executive administrator will then identify the loan interest rate that as closely as possible provides the borrower the identified subsidy amount for the principal schedule requested by the borrower.

(d) Fixed rates for federally funded loans. The fixed interest rates for CWSRF loans under this subchapter are set at rates not to exceed 195 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) of this subsection, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (2) of this subsection. The fixed rate index rates shall be established for each uninsured borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales (Delphis) or the 90 index scale of the Delphis for borrowers with either no rating or a rating less than investment grade, using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale. The fixed rate index rates shall be established for each insured borrower based on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.

(1) Under §375.16 of this chapter (relating to Fees of Financial Assistance) an additional reduction not to exceed 25 basis points will be used, for total fixed interest rates not to exceed 195 basis points below the fixed index rates for such borrower.

(2) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the Board for borrowers filing applications on or after September 21, 1997 for loans that have debt schedules less than 20 years and that produce a total fixed lending rate reduction in excess of a standard loan structure (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraph (1) of this subsection to determine the total fixed lending rate reduction.

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the Board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan that has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan that has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The Board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(e) Variable Rates. The interest rate for CWSRF variable rate loans under this chapter will be set at a rate equal to the actual interest cost paid by the Board on its outstanding variable rate debt plus the cost of maintaining the variable rate debt in the CWSRF. Variable rate loans are required to be converted to long-term fixed rate loans within 90 days of project completion unless an extension is approved in writing by the executive administrator. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the executive administrator and submittal of a resolution requesting such conversion. The fixed lending rate will be calculated under the procedures and requirements of subsections (b), (c) and (d) of this section.

(f) Private and taxable borrowers. The interest rate for loan agreements for those borrowers receiving financial assistance who are determined to be private or taxable issuers will be 140% of the rate pursuant to subsections (b), (d), and (g) of this section.

(g) Adjustments. The executive administrator may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

§375.16. Fees of Financial Assistance.

Loan Origination Fee. A loan origination fee equal to 1.85% of the CWSRF loan amount will be assessed, as a one-time non-refundable charge. The fee is due and payable at the time of loan closing and may be financed as a part of the CWSRF loan. However, no fees or costs shall be assessed on those projects or portions that are subsidized though loan forgiveness or other subsidies as detailed in the IUP.

§375.17. Term of Loan.

(a) The Board may offer loans for the following terms:

(1) up to ten years for the planning, acquisition, and design of an eligible project; or

(2) up to 30 years for the construction of an eligible project

(b) Notwithstanding the terms in subsection (a) of this section, the term of a loan may not exceed the design life of an eligible project.

§375.18. Subsidies.

(a) The Board may provide subsidies for financial assistance for:

(1) an entity that meets the affordability criteria established in this chapter and in the IUP for a Disadvantaged Community; or

(2) an entity that meets the criteria established in the IUP for other subsidies allowed under the federal appropriations law or the capitalization grant.

(b) Total amount of subsidies. The total amount of subsidies may not exceed the percentages established by federal law or by the capitalization grant.

§375.19. Financial Guarantees for Political Subdivision Bonds.

(a) Financial Guarantees. The Board will consider accepting surety bonds in lieu of required cash reserve deposits and insurance policies for political subdivision bonds. At the time of loan commitment and at loan closing, only those financial guarantors that have been approved by the Board are authorized to underwrite financial guarantee policies on political subdivision bonds approved by the Board.

(b) Criteria for Authorized List. The Board will maintain a list of authorized financial guarantors. In order to be considered for placement on the list, a guarantor must meet the following minimum criteria:

(1) the financial guarantor must be a nationally recognized provider of municipal bond insurance and must have a triple-A stable insurer financial strength rating with Standard & Poor's, Moody's Investors Service, Inc. and Fitch, Inc.; and

(2) the financial guarantor must have a triple-A insurer financial enhance rating with Standard & Poor's.

(c) Review of Policies. The executive administrator shall review all policies of insurance submitted by authorized financial guarantors and may reject any policy of insurance or surety bond that does not protect the interests of the Board's financial program.

(d) Removal from Authorized List. The executive administrator may remove a financial guarantor from the authorized list at any time that a change in status would cause the financial guarantor to fail to meet the minimum criteria.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003500
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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SUBCHAPTER C. INTENDED USE PLAN

31 TAC §§375.30 - 375.33

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.30. Submission of Project Information Forms.

(a) The executive administrator will request eligible Applicants to submit a project information form for rating and ranking on the applicable IUP. Applicants shall submit a complete and accurate project information form by the date included in the notice. The required information will include, but is not limited, to the following:

(1) a detailed description of the proposed project;

(2) a county map(s) showing the location of the service area;

(3) an estimated total project cost which:

(A) for an estimated financial assistance amount greater than $100,000, the project information form shall be certified by a registered professional engineer; or

(B) for an estimated financial assistance amount less than $100,000, the project information form shall be accompanied by a statement signed by the system operator establishing the basis for the estimate;

(4) an estimated project schedule;

(5) the population currently served by the Applicant;

(6) the status of the Applicant's water conservation plan;

(7) signature of the Applicant's authorized representative; and

(8) additional information, as detailed within the solicitation for project information forms, needed to establish the priority rating score.

(b) The Applicant's failure to submit all of the information requested may result in a failure to include the project in the IUP.

§375.31. Rating Process.

(a) Rating Criteria. For the Act's §212 projects involving the construction or improvements to publically owned treatment works the following factors will be considered:

(1) Impacts to water quality--Projects that protect stream segments and groundwater from pollution.

(2) Unserved areas--Projects that will bring individual systems into a centralized system or projects that address on-site systems.

(3) Regionalization of treatment works--Projects that will consolidate and eliminate systems.

(4) Reduction or prevention of sewer system overflows and inflow and infiltration.

(5) Emergency relief--Projects which are affected by disaster.

(6) Affordability--A Project located in a disadvantaged community shall have an affordability rating factor as defined within the IUP.

(7) Additional factors as designated within the applicable IUP and determined by the executive administrator.

(b) Previously funded projects. Planning, acquisition, or design phase projects, completed within three years from loan closing will receive a priority for construction funding if there are no significant changes that affect the original project rating and the project is ready to proceed.

(c) Nonpoint source and estuary management projects will be rated as described in the IUP and based on the following:

(1) Public health--Ability to improve conditions that a public health official has determined are a nuisance and are dangerous to public health and safety and that may result from water supply and sanitation problems in the area to be served by the proposed project.

(2) Groundwater--Minimization of impact of pollutants to an aquifer or groundwater.

(3) Impaired water body--Ability to improve conditions in any water body that does not meet applicable water quality standards or is threatened for one or more designated uses by one or more pollutants.

(d) Subsequent to adoption of an IUP, certain changes to a ranked project may be allowed without requiring re-ranking in the following circumstances:

(1) the Applicant for a proposed project may change;

(2) the number of participants in a regional project may change provided that the change does not affect the total rating points assigned to the project; and

(3) the total cost of a proposed project may not increase in an amount more than 10% of the amount listed in the adopted IUP.

§375.32. Public Notice.

In accordance with the Act, the Board shall hold public hearings or allow a period for public review and comment before considering the adoption and approval of the IUP, the project priority list and any amendments thereto.

§375.33. Criteria and Methods for Distribution of Funds.

(a) Amount of Available Funds. Annually, the executive administrator will determine the amount of funds available for wastewater system improvements and other projects for the fiscal year.

(b) Subsidy limits. The total amount of subsidies in any fiscal year may not exceed the percentages established by federal law or by the capitalization grant.

(c) Small systems. Small systems are those systems that serve a population of not more than 10,000 individuals. Projects with identical combined rating scores, including rating scores of zero, will be listed in order of population. Projects serving fewer people will be listed above those projects serving a greater number of people.

(1) To the extent that eligible Applicants are available, a minimum of 15% of the funds will be made available to small systems.

(2) If small system projects above the funding line are less than 15%, then the executive administrator may bypass projects for systems serving larger populations to ensure inclusion of small system projects for at least 15% of available funds.

(d) Priority list of projects. Available program funds will be applied to the list of projects designated to receive funding. The methods used for ranking include:

(1) Project costs. Project costs will be determined by cost estimates contained in the project information form if the executive administrator deems those costs reasonable and acceptable; the costs also will be reflected in the IUP.

(2) Tie-breakers. If two or more projects receive the same rating, then the executive administrator will use the tie-breaker procedures described in the IUP.

(3) Bypass procedure. The executive administrator may pass over higher rated and ranked projects to ensure that funding is dedicated to disadvantaged communities, green project reserve, additional subsidization, and other priorities described in the IUP.

(e) Funding line and invitation and intent to apply for funds. After projects have been rated and ranked, funding lines will be drawn on the priority list to the limit of available funds. Applicants with projects above the funding line will be invited to submit applications for financial assistance and shall confirm their intent to apply as directed by the executive administrator. The intent to apply must be received within 30 days from the executive administrator's invitation or the project will be bypassed for the applicable funding cycle.

(f) Additional funds. When invited Applicants decline the invitation to apply for funds or when additional funds become available, the executive administrator shall redraw the funding line and shall continue the process described in this section to ensure the use of all available funds.

(g) Bypass. All projects for which no or incomplete applications for financial assistance are received or where invitations to apply were declined shall be bypassed. This process shall continue to ensure the use of all available funds.

(h) Invitation to apply for funds. After the funding line is redrawn, the executive administrator shall provide written notice to all potential Applicants about the availability of funds for their project and shall invite the submittal of applications for financial assistance. Applicants shall submit their complete application within three months of the invitation or the project will be ineligible for funding in the applicable IUP.

(i) Utilization of remaining funds. If there are insufficient applications for financial assistance to obligate available funds for the funding year, then the executive administrator shall utilize the remaining funds during the next funding year.

(j) Fund shortages. When the amount of funds required to fund all complete applications for financial assistance exceeds the amount of funds available in the funding year, a shortage of funds exists. In such an instance, the Board will fund Applicants in order of priority ranking until all funds have been utilized.

This 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §§375.40 - 375.44

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.40. Pre-application Conferences.

An Applicant may make an appointment with the Board staff for a pre-application conference to discuss the eligibility of the project and of the Applicant for financial assistance; the general, engineering, environmental, fiscal, and legal requirements of an application; and to assist the Applicant in completing an application. The following individuals should attend the conference: a member of the governing body of the Applicant; the consulting engineer; and the financial advisor.

§375.41. Timeliness of Application and Required Application Information.

(a) Time to submit applications. Applications and required additional data or information shall be submitted within the timelines established in this section. The failure to timely submit the application, the information necessary to complete the application or additional requested information will result in project on the priority list being bypassed.

(1) Deadline to submit application. Applications shall be submitted no later than three months from the invitation to apply for financial assistance. The Applicant will be notified when an application is administratively complete.

(2) Incomplete applications. An Applicant shall cure any deficiency in an application upon request from the executive administrator and shall submit all requested information within fourteen days from receipt of the notice of a deficiency.

(3) Additional information. The Applicant shall submit any additional or modified information or data required by the executive administrator within fourteen days of the request for same, regardless of the expiration of other applicable deadlines in this section.

(4) Extension of time. The executive administrator may grant an extension of time to complete the application or to receive additional information and data if the Applicant can show good cause for the delay or if the delay is caused by an event of force majeure. The executive administrator exercises sole discretion in determining whether and to what extent to grant a time extension.

(b) Required Application Information. An application shall be in the form and numbers prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide at a minimum, the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive.

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issues of any kind or nature by EPA, the commission, Texas Comptroller of Public Accounts, Office of the Secretary of State, or any other federal, state or local government that would materially affect the Applicant's ability to repay its debt or identifying such judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance; and

(E) the Applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or existing contracts for financial advisory and bond counsel consulting services to be used by the Applicant in applying for financial assistance; and

(B) any draft or executed contracts for engineering services including the scope of services, level of effort, costs, project schedules, and other information sufficient to enable the executive administrator to perform an adequate review of the application. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project.

(4) a citation to the specific legal authority in the Texas Constitution and statutes pursuant to which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide wastewater service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, of the property on which proposed project shall be located, or if the property is to be acquired, certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which Applicant's gross income is expected to accrue. Before a loan is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) if financing of the project requires the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which Applicant's gross income is expected to accrue. Before a loan is closed, an Applicant shall submit executed copies of such contracts to the executive administrator; and

(11) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant.

§375.42. Review of Applications.

(a) Review of applications. The executive administrator will review the application to ensure that sufficient information has been provided to support the eligibility of the Applicant and the project. The executive administrator may request that the information or data for any portion of the application be modified or supplemented.

(b) Submittal of requested information. If the Applicant fails to submit information or data requested within the established time period, then the executive administrator may notify the Applicant that the application is incomplete and will be bypassed.

§375.43. Required Water Conservation Plan.

An Applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

§375.44. Board Approval of Funding.

(a) Presentation to Board. The Board must consider each application at a public meeting. The executive administrator will notify the Applicant when the Board's consideration of the application is scheduled for a public meeting.

(b) Action by Board. After considering the executive administrator's recommendation and comments from the Applicant and other interested persons, the Board may:

(1) resolve to approve an application only when it finds that the revenue or taxes or both revenue and taxes pledged by the Applicant will be sufficient to meet all obligations that will be assumed by the Applicant;

(2) resolve to disapprove or amend the proposed conditions for the financial assistance;

(3) request additional information related to the eligibility of the Applicant or the project or continue the application for consideration at another time; and

(4) approve an application for pre-design funding despite a negative recommendation from the executive administrator.

(c) Board's resolution. The Board's approval of an application is recorded through the issuance of a resolution. A resolution is a binding commitment by the Board to provide the financial assistance if the Applicant timely meets the conditions in the resolution.

(d) Expiration of Board commitment. The Board's commitment for financial assistance expires on the date noted in the commitment or if no date is noted then the commitment expires after:

(1) 12 months for a commitment for financial assistance that includes planning, acquisition, design and construction, including financial assistance under the pre-design funding option; and

(2) six months for a commitment for financial assistance for planning, acquisition and design.

(e) Extension of commitment. The Board is not required to approve the request for an extension of time to close the loan. The Board is released from its offer to provide financial assistance for the project when the commitment expires. However the Applicant may receive one extension of time by submitting a written request:

(1) at least 30 days prior to the expiration of the commitment, and by showing good cause for the failure to timely close the loan and with a specific date for closing; or

(2) as soon as reasonably possible after the force majeure event.

This 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS
DIVISION 1. STATE PROJECTS

31 TAC §§375.50 - 375.56

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.50. Definitions for State Funded Projects.

(a) Applicability. This Division applies to state funded financial assistance, unless otherwise stated in an IUP.

(b) Unless specifically defined differently within this subchapter, the following terms and acronyms mean:

(1) Affected community--Community wherein the proposed project is expected to result in environmental impacts or potential human health or environmental effects including minority communities, low-income communities or federally-recognized Indian tribal communities.

(2) Avoidance--Completely avoiding the environmental impact by not taking a certain action or parts of an action during project implementation.

(3) Minimization--minimizing environmental impacts by limiting the degree or magnitude of the action during project implementation.

(4) Mitigation--A sequence of measures designed to:

(A) avoid;

(B) minimize;

(C) rectify an impact by repairing, rehabilitating, or restoring the affected environment;

(D) reduce or eliminate the environmental impact over time by preservation and maintenance operations during the life of the project; and

(E) compensation for the impact by replacement or provision of substitute resources or habitats.

§375.51. Environmental Review Process.

(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the CWSRF. The Board will consider environmental, social, and economic impact as relevant in any hearing or matter in which the Board is directed by law to consider information or to determine whether and how any proposed project affects the quality of the natural and human environment. Environmental review of all proposed infrastructure projects is a condition of the use of CWSRF funds. This subchapter follows the procedures approved by EPA for implementing the state's CWSRF alternative state environmental review process set forth at 40 CFR Part 35.3140(c). The environmental review must be completed prior to the release of funds for design and construction and is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the determinations resulting from the environmental review.

(b) Types of environmental determinations. An environmental determination is issued by the executive administrator at the culmination of the process described in this subchapter. After gathering and reviewing relevant information and data, soliciting comments from state and federal agencies and receiving and analyzing public comments, the executive administrator will issue one of the following determinations:

(1) a Categorical Exclusion (CE), based on submission of information from the Applicant; or

(2) a full review.

(c) General review by Executive Administrator.

(1) The executive administrator shall conduct an inter-disciplinary, inter-agency and public review consistent with the National Environmental Policy Act. This purpose of this review is to ensure that the proposed project will comply with the applicable local, state, and federal laws and regulations relating to the identification of the environmental impacts of a proposed project and the necessary steps required to avoid, minimize and, if necessary, mitigate such impacts. The scope of the environmental review will depend upon the type of proposed action, the reasonable alternatives and the type of environmental impacts.

(2) For all environmental determinations that are five years old or older, and for which the proposed infrastructure project has not yet been implemented, the executive administrator must re-evaluate the proposed financial assistance application as well as the environmental conditions and public comment to determine whether to conduct a supplemental environmental review in compliance with the NEPA, or to reaffirm the original determination. If there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns, the executive administrator must conduct a supplemental environmental review and complete an appropriate determination in compliance with the National Environmental Policy Act. The executive administrator may consider environmental determinations issued by other entities.

§375.52. Types of Environmental Determinations: Categorical Exclusions (CE).

(a) Projects eligible for categorical exclusions. CE's are generally available for projects that will not result in significant impacts on the quality of the human environment and that do not involve circumstances preventing use of a CE. Projects that may be eligible for a CE include the following:

(1) those that include only minor upgrading or expansion of system capacity;

(2) the rehabilitation or functional replacement of existing system and system components such as collection lines, interceptor sewers, or force mains located within their existing right-of-ways and easements;

(3) the construction of new minor ancillary facilities located on the same property as existing facilities that do not affect the degree of treatment or the capacity of the works; and

(4) the construction of facilities that will provide a capacity increase to serve a population of no greater than 30% the size of the existing population.

(b) Projects not eligible for CE:

(1) Projects that would otherwise be eligible for a CE but due to circumstances detailed in subsection (c) of this section are not eligible for a CE;

(2) the construction of new collection lines, interceptor sewers, or force mains;

(3) a new discharge or relocation of an existing discharge;

(4) a substantial increase in the volume or loading of pollutants; and

(5) projects needed primarily to serve future growth by providing capacity for a population 30% greater than the existing population.

(c) Circumstances preventing use of categorical exclusion. Circumstances may become known at any time during the planning, design or construction of a project and may cause the project to be ineligible for a CE. These circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

(2) disproportionally high and adverse human health or environmental effects on any community, including minority, low-income or Indian tribes;

(3) an effect or potential taking of a federal or state-listed threatened or endangered species or critical habitat;

(4) a significant effect on national or state natural landmarks or property with national or state historic, architectural, prehistoric, archeological or cultural value;

(5) a significant effect on environmentally important natural resource areas such as wetland, floodplains, water of the United States, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;

(6) significant adverse air quality effects;

(7) significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas;

(8) significant public controversy about a potential environmental impact;

(9) the cost-effectiveness of the project; and

(10) any conflict with existing federal, state, local, or Indian tribe resources protection or land-use laws and regulations.

(d) Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.

(e) Applicant Requirements. An Applicant shall submit sufficient information to demonstrate why the project is eligible for a CE including, but not necessarily limited to the following documentation in the Engineering Feasibility report:

(1) a brief but complete description of the project;

(2) an alternatives analysis demonstrating the cost-effectiveness of the project;

(3) plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

(4) the names of widely-circulated, local newspapers serving the community affected by the project;

(5) a discussion of the project's eligibility for a CE under the criteria listed in subsection (a) of this section; and

(6) a statement explaining why no extraordinary circumstances, as listed in subsection (c) of this section, apply to the proposed action.

(f) Review of proposed project eligibility for CE. The executive administrator shall review the information submitted and may request additional information as needed to complete the determination regarding the eligibility of a proposed project.

(g) Public notice. The executive administrator's determination relating to a CE shall be subject to public notice that shall be published in a newspaper of wide circulation in the affected community.

§375.53. Types of Environmental Determinations: Full Review.

(a) Purpose and Applicability. A Full Review determination may be issued if the proposed action will not have a significant effect on the human and natural environment. The determination shall be based upon the Environmental Assessment (EA) submitted by the Applicant and a summary of the review conducted by the EA.

(b) Full Review. A full review is required when the proposed project is expected to result in environmental impacts and the significance of those impacts is not known. When the executive administrator preliminarily determines that the impacts will not be significant and may be addressed by ordinary avoidance, minimization, or mitigation measures, then a full review will be prepared. A full review is required for proposed projects involving construction of new components in areas where none are currently located.

(c) Contents of the Summary of a Full Review.

(1) A full review shall include a brief discussion of the following:

(A) the purpose and need for the proposed project and an estimate of cost of the project;

(B) a brief summary of the alternatives considered, including the no action alternative, and the reasons for the rejection or acceptance of the alternatives;

(C) a brief summary of the affected environment, including baseline conditions that may be impacted by the proposed actions and the alternatives;

(D) the environmental impacts of the proposed project and the alternatives, including any unresolved conflicts concerning alternative use of available resources; and

(E) applicable environmental laws and executive orders.

(2) It should contain a listing or summary of coordination and consultation undertaken with any federal, state, or local government regarding compliance with applicable environmental laws and executive orders;

(3) It should identify and describe the mitigation measures considered, including any avoidance, minimization, or mitigation measures that must be adopted to ensure the proposed project will not have significant impacts; and

(4) It should incorporate documents by reference, including the Environmental Assessment submitted by the Applicant.

(d) Contents of the Full Review Environmental Determination. When the full review supports a finding that the proposed project will not have a significant effect on the human environment, then the Board may issue an environmental finding based on this review. The finding must include the following components:

(1) a review summary;

(2) a brief description of the reasons why there are no significant impacts;

(3) any commitments to avoidance, minimization, or mitigation measures that are necessary to reduce the impacts of the proposed project;

(4) the executive administrator's statement that the Applicant has committed to the avoidance, minimization, or mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to mitigation; and

(5) the date of issuance and signature of the executive administrator.

§375.54. Environmental Assessment: Applicant Requirements.

(a) Applicant requirements. An Applicant shall prepare an EA in consultation with the executive administrator when a project is not eligible for a CE. The executive administrator will provide guidance on the format and contents of the EA prior to the initiation of planning for the proposed project or as soon as practicable upon receipt of an application for financial assistance.

(b) Coordination. The Applicant shall coordinate the preparation of the EA as well as consultations with appropriate federal agencies, state and local governments, and other potentially affected parties with the executive administrator. The Applicant must also notify the executive administrator regarding any non-governmental entities or organizations affected by the proposed project.

(c) Proposed project changes during review. The Applicant must notify the executive administrator if, prior to issuance of the environmental determination, the Applicant:

(1) changes its plans for the project as originally submitted; or

(2) changes its schedule for the project from the originally submitted schedule.

(d) Contents of EA. The EA shall include, but is not limited to:

(1) a description of the project;

(2) the need for the proposed project;

(3) the alternatives to the project, including the no-action alternative;

(4) the affected environment, including existing conditions that may be impacted by the proposed project and the alternatives;

(5) the environmental impacts of the proposed action and alternatives, including unsettled conflicts concerning alternative uses of available resources;

(6) potential impact on resources protected by state and federal environmental statutes or regulations;

(7) proposed mitigation measures;

(8) documentation showing that the requisite public participation requirements have been satisfied; and

(9) any other information required by the executive administrator.

§375.55. Environmental Determinations Affected by Proposed Project Alterations.

(a) Alterations of Proposed Project. If the Applicant decides to alter the proposed project after the issuance of an environmental determination, then the Applicant shall immediately notify the executive administrator in writing and shall briefly describe the reason(s) for the alterations in the proposed project.

(b) Prior to approval of the proposed alteration, the executive administrator shall examine the contract documents, loan application and other related documents to evaluate the proposed alterations to ensure consistency with the environmental determination. The executive administrator's review of proposed project alterations may result in:

(1) the reaffirmation of the original environmental determination;

(2) the issuance of a FER environmental determination when a CE has been revoked; or

(3) the issuance of a supplement to a FER environmental determination, or the revocation of the FER environmental determination and issuance a public notice that financial assistance for the proposed project will not be provided.

(c) Minor differences between the approved project and alterations that will not create previously unconsidered, adverse environmental impacts will generally not affect the ability of the proposed project alterations to proceed without additional formal environmental review.

(d) Major differences between the approved project and alterations that have the potential to generate new and previously unexamined, adverse environmental impacts may result in a decision to revoke a CE and to proceed with a more detailed level of environmental review consistent with this subchapter.

§375.56. Use of Environmental Determinations Prepared by Other Entities.

(a) Adoption of previous determination. The executive administrator may adopt previous environmental determinations issued by the EPA and other state or federal agencies whose determinations were produced through procedures in compliance with NEPA. The executive administrator must re-evaluate the proposed financial assistance application as well as environmental conditions and public comment to determine whether to conduct a supplemental environmental review of the action and complete an appropriate document in compliance with this subchapter, or to reaffirm the original determination.

(b) Previously required avoidance, minimization, or mitigation measures. Any and all avoidance, minimization, or mitigation measures specified in the previous determinations shall be applied as conditions of the loan commitment and the loan closing documents and shall be consistent with the requirements of this subchapter.

(c) Method of adoption of previous determination. The executive administrator will adopt the previous determination by means of a CE when the proposed project and its previous determination will be adopted without change. The executive administrator may also adopt the previous determination in a full review environmental determination detailing the modifications to the proposed project, the potential environmental impacts identified during an environmental review, and any avoidance, minimization, or mitigation measures proposed in addition to those included in the federal environmental determination.

(d) Validity of previous environmental determinations and reevaluation. Another entity's environmental determination shall be re-evaluated if it was issued five years or more prior to the executive administrator's environmental review and if:

(1) the proposed project has not yet been implemented;

(2) there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns; and

(3) there are significant new circumstances or information relevant to environmental impacts of the proposed action.

(e) Dissemination of information about mitigation measures. The executive administrator may issue a public notice describing the outcome of the mitigation measure proposed in an environmental determination to interested agencies and public groups.

This 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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DIVISION 2. FEDERAL PROJECTS

31 TAC §§375.60 - 375.70

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.60. Definitions for Federally Funded Projects.

(a) This section applies to federally funded financial assistance.

(b) Unless specifically defined differently within this subchapter, the following terms and acronyms, used in this subchapter, mean:

(1) Affected community--A community where the proposed project is expected to result in environmental impacts or potential human health or environmental effects including minority communities, low-income communities or federally-recognized Indian tribal communities.

(2) Avoidance--Avoiding the impact altogether by not taking a certain action or parts of an action during project implementation.

(3) NEPA--The federal National Environmental Policy Act, 42 U.S.C. 4321 et seq. as amended.

(4) Indian tribes--Federally recognized Indian tribes.

(5) Minimization--Minimizing impacts by limiting the degree or magnitude of the action during project implementation.

(6) Mitigation--

(A) avoiding;

(B) minimizing;

(C) rectifying an impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

§375.61. Environmental Review Process.

(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the CWSRF. Environmental review of all proposed infrastructure projects is a condition of the use of federal CWSRF funds. This subchapter follows the procedures established by EPA for implementing the NEPA set forth at 40 CFR Part 6. The environmental review must be completed prior to the release of federal funds for design and construction and the review is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the determinations resulting from the environmental review.

(b) Types of environmental determinations. An environmental determination is issued by the executive administrator at the culmination of the process described in this subchapter. After gathering and reviewing relevant information and data, soliciting comments from state and federal agencies and receiving and analyzing public comments, the executive administrator will issue one of the following determinations:

(1) a Categorical Exclusion, based on submission of information from the Applicant;

(2) a Finding of No Significant Impact, based on review of the Applicant's Environmental Information Document and the Board's Environmental Assessment; or

(3) a record of decision, based on an environmental impact statement.

(c) General review by executive administrator.

(1) The executive administrator shall conduct an inter-disciplinary, inter-agency and public review consistent with the NEPA. The purpose of this review is to ensure that the proposed project will comply with the applicable local, state, and federal laws and regulations relating to the identification of the environmental impacts of a proposed project and the necessary steps required to avoid, minimize and, if necessary, mitigate such impacts. The scope of the environmental review will depend upon the type of proposed action, the reasonable alternatives and the type of environmental impacts.

(2) For all environmental determinations that are five years old or older, and for which the proposed infrastructure project has not yet been implemented, the executive administrator must re-evaluate the proposed financial assistance application as well as the environmental conditions and public comment to determine whether to conduct a supplemental environmental in compliance with the NEPA, or to reaffirm the original determination. If there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns, the executive administrator must conduct a supplemental environmental review and complete an appropriate determination in compliance with the NEPA. The executive administrator may consider environmental determinations issued by other entities.

§375.62. Types of Environmental Determinations: Categorical Exclusions.

(a) Projects eligible for categorical exclusions. Categorical Exclusions are generally available for projects that will not result in significant impacts on the quality of the human environment and that do not involve extraordinary circumstances. Projects that may be eligible for a categorical exclusion (CE) include the following:

(1) those that include only minor upgrading or minor expansion of system capacity;

(2) the rehabilitation or functional replacement of existing system and system components such as distribution lines located within existing right-of-ways and easements;

(3) the construction of new minor ancillary facilities located on the same property as existing facilities that do not affect the degree of treatment or the capacity of the works; and

(4) the construction of facilities that will provide a capacity increase to serve a population of no greater than 30% the size of the existing population.

(b) Projects not eligible for CE are:

(1) Projects that would otherwise be eligible for a CE but due to extraordinary circumstances are not eligible for a CE;

(2) the construction of new distribution lines;

(3) actions not supported by the State or Regional Water Plan; and

(4) projects needed primarily to serve future growth.

(c) Extraordinary circumstances. Extraordinary circumstances become known at any time during the planning, design or construction of a project and may cause the project to be ineligible for a CE. Extraordinary circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

(2) disproportionally high and adverse human health or environmental effects on any community, including minority, low-income or Indian tribes;

(3) a significant effect on federal or state-listed threatened or endangered species or their critical habitat;

(4) a significant effect on national or state natural landmarks or property with national or state historic, architectural, prehistoric, archeological or cultural value;

(5) a significant effect on environmentally important natural resource areas such as wetland, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;

(6) significant adverse air quality effects;

(7) significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas;

(8) significant public controversy about a potential environmental impact;

(9) the cost-effectiveness of the project; and

(10) any conflict with existing federal, state, local, or Indian tribe environmental resources protection or land-use laws and regulations.

(d) Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.

(e) Applicant requirements. An Applicant shall submit sufficient information to clearly describe why the project is eligible for a CE including, but not necessarily limited to the following documentation:

(1) a brief but complete description of the project;

(2) an alternatives analysis demonstrating the cost-effectiveness of the project;

(3) plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

(4) the names of widely-circulated, local newspapers serving the community affected by the project;

(5) a discussion of the project's eligibility for a CE under the criteria listed in subsection (a) of this section; and

(6) a statement explaining why no extraordinary circumstances, as listed in subsection (c) of this section, apply to the proposed action.

(f) Review of proposed project eligibility for CE. The executive administrator shall review the information submitted and may request additional information as needed to complete the determination regarding the eligibility of a proposed project.

(g) Public notice. The executive administrator's determination relating to a CE shall be subject to public notice which shall be published in a newspaper of wide circulation in the affected community.

§375.63. Types of Environmental Determinations: Finding of No Significant Impact.

(a) Purpose and applicability. A Finding of No Significant Impact (FONSI) may be issued if the proposed action will not have a significant effect on the human environment. A FONSI determination shall be based upon the information submitted by the Applicant and upon the issuance of an environmental assessment (EA) prepared by the executive administrator.

(b) Environmental assessment. An EA is required when the proposed project is expected to result in environmental impacts and the significance of those impacts is not known. When the executive administrator preliminarily determines that the impacts will not be significant and may be addressed by ordinary avoidance, minimization, or mitigation measures, then an EA will be prepared. An EA will result in either the decision to issue a FONSI or to prepare an Environmental Impact Statement. An EA is required for proposed projects involving new construction.

(c) Contents of an EA.

(1) An EA shall include a brief discussion of the following:

(A) the purpose and need for the proposed project and an estimate of cost of the project;

(B) the alternatives considered, including the no action alternative, and the reasons for the rejection or acceptance of the alternatives;

(C) the affected environment, including baseline conditions that may be impacted by the proposed actions and the alternatives;

(D) the environmental impacts of the proposed project and the alternatives, including any unresolved conflicts concerning alternative use of available resources; and

(E) applicable environmental laws and executive orders.

(2) The form of the EA generally shall include:

(A) a listing or summary of coordination and consultation undertaken with any federal, state, local or Indian tribe government regarding compliance with applicable environmental laws and executive orders;

(B) identification and description of the mitigation measures considered, including any avoidance, minimization, or mitigation measures that must be adopted to ensure the proposed project will not have significant impacts; and

(C) incorporation of documents by reference, including the Environmental Information Document submitted by the Applicant.

(d) Contents of a FONSI. When the EA supports a finding that the proposed project will not have a significant effect on the human environment, then the Board may issue a FONSI. The FONSI must include the following components:

(1) an EA;

(2) a brief description of the reasons why there are no significant impacts;

(3) any commitments to avoidance, minimization, or mitigation measures that are essential to render the impacts of the proposed project insignificant;

(4) the date of issuance and signature of the executive administrator; and

(5) the executive administrator's statement that the Applicant has committed to the avoidance, minimization, or mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to mitigation;

(e) Public comments and the issuance of FONSI.

(1) The executive administrator shall publish the preliminary FONSI for public comment for a period of at least thirty (30) days.

(2) If no substantive comments are received, a FONSI may be issued and the Board may proceed with the proposed project subject to the avoidance, minimization or other mitigation measures identified in the FONSI. If substantive comments are received, then the execu-

tive administrator shall respond to the comments and revise the FONSI accordingly, if necessary.

(3) The executive administrator shall ensure that the avoidance, minimization, or mitigation measures necessary to the FONSI determination are enforceable and shall conduct appropriate monitoring of these measures.

(f) Dissemination of information about mitigation measures. The executive administrator may issue a statement of findings describing the outcome of the mitigation measure proposed in an environmental determination to interested agencies and public groups.

§375.64. Environmental Information Document: Applicant Requirements.

(a) Applicant requirements. An Applicant shall prepare an Environmental Information Document (EID) in consultation with the executive administrator when a project is not eligible for a CE, FONSI or when an Environmental Impact Statement (EIS) may be required. The executive administrator will provide guidance on the format and contents of the EID prior to the initiation of planning for the proposed project or as soon as practicable upon receipt of an application. An EID is not required when:

(1) the project is eligible for a CE or requires the preparation of an EIS; or

(2) the Applicant prepares and submits a draft EIS and supporting documents.

(b) Coordination. The Applicant shall coordinate the preparation of the EID as well as consultations with appropriate federal agencies, state and local governments, Indian tribes and other potentially affected parties with the executive administrator. The Applicant must also notify the executive administrator regarding any private entities or organizations affected by the proposed project.

(c) Contents of EID. The EID shall include, but is not limited to:

(1) a description of the project;

(2) the need for the proposed project;

(3) the alternatives to the project, including the no action alternative;

(4) the affected environment, including baseline conditions that may be impacted by the proposed project and the alternatives;

(5) the environmental impacts of the proposed action and alternatives, including unresolved conflicts concerning alternative uses of available resources;

(6) potential impact on resources protected by the federal environmental "cross-cutter" statutes, regulations and executive orders;

(7) proposed mitigation measures supporting the issuance of a FONSI or a Record of Decision;

(8) documentation showing that the requisite public participation requirements have been satisfied; and

(9) any other information required by the executive administrator.

§375.65. Decision to Prepare an Environmental Impact Statement: Notice of Intent.

(a) Notice of intent to prepare an EIS. When the executive administrator recommends the issuance of an EIS, a notice of intent will be published in the *Texas Register* in order to provide the public with the opportunity to participate in a scoping meeting.

(b) Contents of notice of intent. The notice of intent shall contain information about a scoping meeting which shall be held no sooner than fifteen days after the publication of the notice of intent. The public comment period for the proposed scope of the EIS shall be at least forty-five days.

§375.66. Types of Environmental Determinations: Record of Decision.

(a) General. A record of decision (ROD) results from an extensive environmental review of a proposed project's potential environmental impacts as detailed in an EIS.

(b) Contents of record of decision. A ROD records the Board's decision on the proposed project and must include the following components:

(1) a brief description of the proposed project and the alternatives considered in the EIS as well as the environmental factors considered and the project's impacts;

(2) commitments to implement avoidance, minimization, or mitigation measures;

(3) an explanation if the environmentally preferred alternative was not selected;

(4) responses to substantive comments on the final EIS;

(5) the executive administrator's statement that the Applicant has committed to the avoidance, minimization, or mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to the measures; and

(6) the date of issuance and the signature of the executive administrator.

(c) Issuance of the ROD. The issuance of a ROD allows the Applicant to proceed with the proposed action subject to avoidance, minimization, or mitigation measures described in the ROD. The ROD shall be made available to the public.

(d) Monitoring of avoidance, minimization, or mitigation measures. The executive administrator shall ensure that adequate monitoring of the avoidance, minimization, or mitigation measures occurs throughout the construction of the project. Additionally all contracts, plans, specifications and other applicable documents used during the planning, design and construction of the project shall contain reference to or descriptions of the avoidance, minimization, or mitigation measures.

(e) Dissemination of information about mitigation measures. The executive administrator issues a statement of findings describing the outcome of the mitigation measure proposed in an environmental determination to interested agencies and public groups.

§375.67. Environmental Impact Statements.

(a) Purpose and applicability. An EIS examines impacts from the proposed project that significantly affecting the human environment, requires close coordination with the TWDB and other agencies and results in the issuance of a Record of Decision.

(b) Required EIS. An EIS shall be prepared for:

(1) new regional water supply systems for a community with a population greater than 100,000;

(2) actions likely to have a significant adverse effect on:

(A) local ambient air quality;

(B) local ambient noise levels;

(C) surface water reservoirs or navigation projects;

(D) the environment due to the releases of radioactive, hazardous or toxic substances or biota;

(E) federal or state natural landmarks or any property eligible for the national or state register of historic places; or

(F) environmentally important natural resources such as wetland, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;

(3) actions inconsistent with federal, state, local or Indian tribe environmental, resources protection or land use laws or approved land use plans or regulations;

(4) actions likely to significantly affect the pattern and type of land use or growth and distribution of population including altering the character of residential areas;

(5) actions that in conjunction with federal, state, local or Indian tribe projects likely to produce significant cumulative impacts; and

(6) actions with uncertain environmental effects or highly unique environmental risks that are likely to be significant.

§375.68. Environmental Impact Statement: Applicant Requirements.

(a) Third party contractor. The Applicant shall contract with a third-party contractor at its own expense to prepare an EIS and any associated documents required for consideration by the executive administrator.

(b) Executive administrator approval. The executive administrator must participate in and approve of the Applicant's selection of the third-party contractor. The third party contractor shall be selected on the basis of its qualifications to prepare the EIS, including experience with data collection and analyses as well as with the clear presentation of information and data. The third-party contractor shall be responsible for providing technical advice to the Applicant and for receiving and incorporating technical advice from the executive administrator.

(c) The third-party contractor shall not have any financial or other interest in the proposed project and must submit a disclosure statement to the executive administrator documenting the fact that it has no financial or other interest in the project.

(d) Contract with third party. The Applicant and the executive administrator must agree to the creation and terms of a contract with the third party jointly selected by them to prepare the EIS. The contract terms must ensure that the third party does not have recourse to the TWDB or the Environmental Protection Agency for financial or other claims arising under the contract.

(e) The third-party contractor shall cooperate with the executive administrator and shall provide draft documents, analyses and conclusions that adequately assess the relevant environmental issues for review, comment and direction from the executive administrator. The executive administrator shall have sole responsibility to ensure that the EIS and any associated documents adequately address the relevant environmental issues.

§375.69. Proposed Project Alterations.

(a) Proposed project changes during review. The Applicant must notify the executive administrator if during the environmental review process, the Applicant:

(1) changes its plans for the project as originally submitted; or

(2) changes its schedule for the project from the originally submitted schedule.

(b) Alterations of proposed project. Any alteration to a project after the issuance of an environmental determination requires the Applicant to timely notify the executive administrator in writing. The Applicant shall briefly describe the reasons for the alterations in the proposed project.

(c) The executive administrator shall examine the contract documents, application and other related documents to evaluate the proposed alterations to ensure consistency with the environmental determination. The executive administrator's review of proposed project alterations may result in:

(1) the reaffirmation of the original environmental determination;

(2) the issuance of a FONSI when a CE has been revoked, or the issuance a public notice that the preparation of an EIS will be required;

(3) the issuance of an amendment to a FONSI, or the revocation of a FONSI and the issuance of a public notice that the preparation of an EIS will be required; or

(4) the issuance of a supplement to a ROD, or the revocation of the ROD and issuance a public notice that financial assistance for the proposed project will not be provided.

(d) Minor changes to the proposed or reviewed project that do not create previously unconsidered adverse environmental impacts usually will not affect the ability of the proposed project alterations to proceed without additional formal environmental review.

(e) Major changes to the proposed or reviewed project that are previously unexamined and that have the potential to create adverse environmental impacts may result in a decision to revoke a CE or a FONSI and to proceed with a more detailed level of environmental review consistent with this subchapter.

§375.70. Use of Environmental Determinations Prepared by Other Entities.

(a) Adoption of previous determination. The executive administrator may adopt previous environmental determinations issued by the EPA and other federal agencies whose determinations were produced through procedures in compliance with the NEPA. The executive administrator must re-evaluate the proposed financial assistance application as well as environmental conditions and public comment to determine whether to conduct a supplemental environmental review of the action and complete an appropriate document in compliance with the NPEA, or to reaffirm the original determination.

(b) Previously required avoidance, minimization, or mitigation measures. Any and all avoidance, minimization, or mitigation measures specified in the previous determinations shall be applied as conditions of the commitment and closing for financial assistance documents and shall be consistent with the requirements of this subchapter.

(c) Method of adoption of previous determination. The executive administrator will adopt the previous determination by means of a statement of findings when the proposed project and its previous determination will be adopted without substantial modifications. The executive administrator may also adopt the previous determination in a FONSI detailing the modifications to the proposed project, the potential environmental impacts identified during an environmental review, and any avoidance, minimization, or mitigation measures proposed in addition to those included in the federal environmental determination.

(d) Validity of previous environmental determinations and re-evaluation. Another entity's environmental determination shall be re-evaluated if it was issued five years or more prior to the executive administrator's environmental review and if:

(1) the proposed project has not yet been implemented;

(2) there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns; and

(3) there are significant new circumstances or information relevant to environmental impacts of the proposed action.

(e) Dissemination of information about mitigation measures. The executive administrator issues a statement of findings describing the outcome of the mitigation measure proposed in an environmental determination to interested agencies and public groups.

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

Filed with the Office of the Secretary of State on June 21, 2010.

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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SUBCHAPTER F. ENGINEERING REVIEW AND APPROVAL

31 TAC §§375.80 - 375.83

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.80. Applicability.

This subchapter applies to financial assistance for state funded and federally funded loans.

§375.81. Engineering Feasibility Report.

(a) The Applicant shall submit an engineering feasibility report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, shall provide:

(1) a description and purpose of the project;

(2) the names of the entities to be served, current population and projections of future population;

(3) the cost of the project;

(4) a description of the alternatives considered and reasons for selecting the proposed project;

(5) sufficient information to evaluate the engineering feasibility and biddability and constructability;

(6) maps and drawings as necessary to locate and describe the project area;

(7) sufficient detail to document that the project will remedy the issues and problems that were evaluated for rating on the IUP;

(8) documentation of the project's cost effectiveness; projects implementing new systems or significantly altering current systems may require a detailed cost-effective analysis, including detailed operation and maintenance costs, to document program eligibility;

(9) a discussion of any known permitting, social, economic and cultural impacts that could result from project construction and implementation; and

(10) any other information or data necessary to evaluate the proposed project. The Applicant must submit any additional information requested by the executive administrator to document the project's eligibility for funding by the program.

(b) Approval of Engineering Feasibility Report. The executive administrator will approve the engineering feasibility report when:

(1) the items listed in subsection (a) of this section have been completed, including any submission of documents in response to requests for additional information or data;

(2) the appropriate environmental determinations have been completed in accordance with Subchapter E of this chapter and the Applicant has agreed to incorporate into project documents, including contracts, and all mitigation measures as a result of the environmental review;

(3) the project and alternatives to the project have been analyzed and the proposed project is cost effective.

(c) Request for project change. A request for a change, after the approval of the engineering feasibility report, to a project shall be granted only if the project remains consistent with the original project and if it will remedy the problems and issues identified in the project information form. Significant changes in a project require previous approval by the executive administrator and the Applicant shall:

(1) provide a description of and the need for changes;

(2) submit additional engineering or environmental information as requested by the executive administrator;

(3) provide an estimate of any increase or decrease in total project costs resulting from the proposed change; and

(4) certify that the proposed changes will not significantly alter the purpose of the project.

§375.82. Contract Documents: Review and Approval.

(a) Contract documents mean the documents that form the construction contracts and for alternative methods of project delivery, the documents that include construction and that may include other phases of the project.

(b) An Applicant shall submit three copies of proposed contract documents, including the engineering plans and specifications, which shall be as detailed as would be required for submission to contractors bidding on the work. The Applicant shall provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator shall review contract documents:

(1) to ensure consistency with the approved engineering feasibility report and with approved environmental planning documents;

(2) to ensure the Applicant meets the requirements of biddability, operability and constructability;

(3) to ensure consistency with state and federal law;

(4) to ensure the contract documents notify the contractor about the Board's authority to audit and inspect during construction; and

(5) to ensure compliance with other requirements as provided in guidance forms and documents.

(c) Other approvals. The Applicant shall obtain the approval of the plans and specifications from any other local, state and federal agencies having jurisdiction over the project. The executive administrator's approval is not an assumption of the Applicants' liability or responsibility to conform to all requirements of applicable laws relating to design, construction, operation or performance of the project.

§375.83. Advertising and Awarding Construction Contracts.

(a) Applicable laws and rules. The Applicant shall comply with State procurement laws and rules and with applicable federal procurement rules depending on the source of the funds for the financial assistance.

(b) Executive administrator approval required. The Applicant shall not proceed to advertising for bids on the project until express written approval of the solicitation documents has been received from the executive administrator.

(c) Changes prior to award. If the Applicant needs to alter the plans and specifications or the contract documents after the executive administrator's approval, then the Applicant shall provide the information relating to the change and the reasons therefore. The executive administrator must affirmatively approve the changes. This subsection does not apply to addenda issued in the ordinary course of the solicitation.

(d) Contract award. The text of a construction contract or a contract containing construction phase work submitted for approval prior to advertising shall contain the same language and provisions as the contingently executed contract.

(e) Pre-construction conference. The Applicant shall conduct a preconstruction conference on significant construction contracts to address the contents of the executed contract documents with the project owner, the project engineer, the prime contractor, and other appropriate parties in attendance. The Applicant shall provide the executive administrator with at least five days advance notice of the date, time and location of the conference.

(f) Notice to proceed. The executive administrator shall review the executed contract documents and upon acceptance of same shall advise the Applicant that a notice to proceed may issue to the contractor.

(g) No liability. The executive administrator and the Board shall have no liability for any event arising out of or in any way related to the contracts for or construction of the project.

This 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS

31 TAC §§375.90 - 375.93

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.90. Applicability.

This subchapter applies to state funded financial assistance and to federally funded financial assistance.

§375.91. Loans Secured by Bonds or other Authorized Securities.

(a) Disbursement required. No loan shall close unless the Applicant provides an outlay report requesting a disbursement at least seven days prior to the loan closing date.

(b) Instruments needed for closing. The documents that shall be required at the time of closing shall include the following:

(1) evidence that applications have been filed for all licenses, permits, registrations, and other authorizations required by local, state and federal laws and rules that are necessary for planning, design, acquisition and construction of the authorized project;

(2) a certified copy of the ordinances or resolutions adopted by the governing body authorizing the issuance of debt sold to the Board that has received prior approval by the executive administrator and that shall have sections providing as follows:

(A) that an escrow or trust account shall be created that shall be separate from all other funds and as follows:

(i) the account shall be maintained at a designated state depository institution or a properly chartered and licensed trust institution approved by the executive administrator;

(ii) funds shall not be released from the escrow or trust account without approval of the executive administrator who shall issue written authorization for the release of the funds;

(iii) escrow and trust account statements shall be provided on a monthly basis to the executive administrator;

(iv) the investment of any loan or grant proceeds deposited into an approved escrow or trust account, including any proceeds invested with an investment pool, shall be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code, Chapter 2256 as amended; and

(v) the escrow or trust account shall be adequately collateralized in a manner sufficient to protect the Board's interest in the Project in a manner that complies with the Public Funds Collateral Act; Texas Government Code, Chapter 2257, as amended.

(B) that a home rule municipality with a population of more than 1,000,000 persons whose charter provides for an elected comptroller, auditor or treasurer may execute a Trust and Agency Certificate in lieu of establishing an escrow account or trust account in accordance with the Local Government Code, Chapter 104, as amended; and

(C) that a construction fund shall be created at a designated state depository institution that shall be kept separate from all other funds of the Applicant.

(D) that the Applicant fix and maintain rates, in accordance with state law, and to collect charges to provide adequate operation and maintenance of the project;

(E) the use of a book-entry-only system;

(F) the use of a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(G) the payment all DTC closing fees assessed by the Board's custodian bank be directed to the Board's custodian bank by the Applicant;

(H) evidence that one fully registered bond has been sent to the DTC or to the Applicant's paying agent/registrar prior to closing;

(I) the initial payment made to the Board be paid via wire transfer at no cost to the Board;

(J) the partial redemption of bonds or other authorized securities be made in inverse order of maturity;

(K) that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(L) that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating arbitrage, private activity bonds or other relevant requirements regarding the securities held by the Board.

(M) the maintenance of current, accurate and complete records and accounts in accordance with generally accepted accounting standards to demonstrate compliance with requirements in the loan documents;

(N) the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

(O) the Applicant shall submit a final accounting at the final release of retainage;

(P) the Applicant shall document the adoption of a water conservation program and the implementation of an approved water conservation program for the duration of the loan;

(Q) the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental determination as well as with any applicable Board laws or rules relating to use of the loan funds;

(R) that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(S) that interest payments shall commence no later than 1 year after the date of closing and annual principal payments will commence either one year after completion of project construction; and

(T) any other recitals mandated by the executive administrator.

(3) unqualified approving opinions of the attorney general of Texas and, if bonds or other authorized securities are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(4) an unqualified approving opinion by a recognized bond attorney;

(5) assurances that the Applicant will comply with any special conditions specified by the Board's environmental determination until all financial obligations to the state have been discharged;

(6) a private placement memorandum containing a detailed description of the issuance of debt to be sold to the Board. The Applicant shall submit a draft private placement memorandum at least 30 days prior to loan closing; a final electronic version of the memorandum shall be submitted no later than seven days before closing; and

(7) any additional information specified in writing by the executive administrator.

(c) Certified transcript. Within sixty (60) days of closing the loan, the Applicant shall submit a transcript of proceedings relating to the debt purchased by the Board that shall contain those instruments normally furnished by a purchaser of debt.

(d) Phased closing. The executive administrator may determine that closing a loan in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition and for construction or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

§375.92. Disbursement of Funds.

(a) Method of accessing funds. Applicants shall submit an outlay report supported by detailed invoices of expenditures for reimbursement of past costs or for releases from an escrow or trust account, as applicable. The outlays and the releases from escrow or trust account shall be consistent with the approved project schedule

(b) Sequence of availability of funds. Financial assistance shall be available for disbursement in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan and a project schedule;

(2) for design costs, after receipt of executed contracts for the design phase, after approval of an engineering feasibility report, a project schedule and the Board's approval of the environmental review; and

(3) for construction costs, after issuance of any applicable permits, and after contract documents, including plans and specifica-

tions and a project schedule are approved and executed construction documents are contingently awarded.

(c) Outlay reports. Applicants shall submit outlay reports, in a form determined by the executive administrator, as follows:

(1) at loan closing for incurred costs;

(2) for financial assistance for planning, acquisition and design, quarterly; and

(3) for financial assistance for construction, monthly.

(d) Environmental affirmation. The release of federal funds for design, acquisition, and construction or for a pre-design funding option project shall not occur until the executive administrator summarizes the project's environmental review and informs the Board about recommended mitigation measures. The Board may affirm or alter the conditions of the original commitment or withdraw the commitment based upon the environmental review and mitigation measures.

(e) Escrow of funds. The executive administrator may release funds to an escrow or trust account at the time of closing of the loan or closing of a portion of the loan. Releases from escrow shall occur sequentially as described in subsection (b) of this section. The Applicant shall submit outlays for all expenses incurred for the prior sequence of work prior to the release of funds for the next sequence of work.

(f) Consistency for project schedules and outlays. The executive administrator shall ensure that projects proceed in accordance with approved project schedules as closely as possible, and that outlays are submitted as required in subsection (c) of this section

§375.93. Surplus Funds.

(a) Surplus funds means those funds remaining after the approved project is completed.

(b) After the final accounting, the executive administrator shall notify the Applicant if surplus funds exist and advise the Applicant that the surplus funds may be used only for:

(1) payment of bonds in inverse order of maturity;

(2) deposit into the interest and sinking fund; or

(3) enhancements to the project that are explicitly approved by the executive administrator, including green components.

(c) Determination of the use of any surplus funds is within the sole discretion of the executive administrator.

This 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. CONSTRUCTION AND POST CONSTRUCTION REQUIREMENTS

31 TAC §§375.100 - 375.110

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.100. Applicability.

This subchapter applies to state funded and to federally funded projects.

§375.101. Inspection During Construction.

(a) Applicant's inspection. The Applicant shall provide for the adequate qualified inspection of the project under the supervision of a registered engineer and shall require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications and other engineering design or permit documents, approved alterations or changes, and in accordance with the requirements in the environmental determination applicable to the project and to the sound engineering principles and construction practices.

(b) Board's inspection. The executive administrator may, at his discretion, inspect the construction and materials of any project at any time. The purpose of the inspection is to determine whether the contractor is substantially complying with the approved engineering plans of the project and is constructing the project in accordance with sound engineering principles and the approved project schedule. The inspection by the Board does not subject the state to any civil liability.

(c) Scope of inspections. Inspections may include, but are not limited to:

(1) review of the physical conditions at the construction sites, including compliance with environmental mitigation measures;

(2) review of documents related to the construction projects, including but not limited to:

(A) payroll, daily attendance, and any other records relating to person employed during the construction, and records relating to the Davis Bacon Act and related federal laws and regulations relating to prevailing wage rates;

(B) invoices, receipts for materials, accounting ledgers and any other documents related to expenditure of funds to facilitate tracking project's progress;

(C) evidence of testing of installed materials and equipment;

(D) deviations from approved plans and specifications;

(E) change orders and supporting documents; and

(F) review of any other documents to ensure compliance with the terms of the approved contract documents and the Board's rules.

(d) Inspectors may document issues to ensure compliance with applicable laws, rules and contract documents, and may recommend to the owner that certain corrective actions occur to ensure compliance with laws, rules and approved plans and specifications.

(e) The Applicant shall provide the inspectors with a response to the issues relating to compliance.

§375.102. Alterations During Construction.

(a) Changes after approval of engineering feasibility report. The Applicant shall notify the executive administrator of any changes

to the project that occur after the approval of the report but prior to the start of construction. The executive administrator shall review the proposed changes and notify the Applicant if additional engineering or other information is required. No changes may be implemented without the express written approval of the executive administrator.

(b) Changes during construction. Any proposed change to the construction contract must be submitted to the executive administrator in the form of a formal change order; the change order will be reviewed for compliance with program requirements. Depending upon the scope and complexity of the proposed change, approval by the executive administrator also may require amendments to other engineering and environmental documents.

§375.103. Force Account.

Force Account Policy. The executive administrator expects that all significant elements of a project shall be constructed with skilled laborers and mechanics obtained through the competitive bidding process. Notwithstanding that expectation, the Applicant, with the prior approval of the executive administrator, may utilize its own employees and equipment for inspection or minor construction upon a showing that it possesses the necessary competence required to accomplish such work and that the work can be accomplished more economically by the use of the force account method.

§375.104. As Built Plans.

After a project is completed, the Applicant shall notify the executive administrator that of the receipt of a complete set of as-built drawings of the project from the project construction engineer.

§375.105. Certificate of Approval and Project Completion.

(a) Purpose. A Certificate of Approval (certificate) shall be issued by the executive administrator upon the completion of all work under each prime construction contract.

(b) Final prime construction contract. A certificate shall be issued at the completion of all work under the final prime construction contract. This certificate will be transmitted to the Applicant as well as a statement that the project is complete and that the Board's inspection process is complete.

§375.106. Final Accounting.

Within sixty days of Applicant's receipt of the certificate of approval for the final prime construction contract and the final inspection report, the Applicant shall submit a final accounting and a final funds requisition form.

§375.107. Records Retention.

The Applicant shall retain all documents, records, invoice, and records whether in electronic form or otherwise relating to the expenditure of all financial assistance from the CWSRF for a period of three full state fiscal years after the completion of the project and the final certificate of approval.

§375.108. Release of Retainage.

(a) Retainage. The Applicant will withhold a minimum of five percent of each progress payment throughout the course of the construction contract.

(b) Full release of retainage. The executive administrator will approve the full release of retainage on a contract when:

(1) the Applicant's engineer approves the contractor's request for release of retainage; and

(2) the Applicant's governing body approves the release of retainage.

(c) Partial release of retainage. If a project is substantially complete, the executive administrator may approve a partial release of retainage.

§375.109. Responsibilities of Applicant.

After the satisfactory completion of the project, the Applicant remains responsible for compliance with applicable laws and rules relating to the project and to the financial assistance documents required by the Board resolution or the bond ordinance or resolution including but not limited to submission of an annual audit, implementation and enforcement of the approved water conservation program and other assurances made to the Board. The Board has a continuing interest in the state's investment; therefore, the Applicant shall be subject to the continuing authority of the Board and the executive administrator through final payment of the financial assistance.

§375.110. Authority of the Executive Administrator.

(a) The financial assistance provided by the Board is based on the project's economic feasibility, and the Board shares the Applicant's desire to maintain this feasibility in the project's operation and maintenance at all times. The executive administrator shall periodically inspect, analyze, and monitor the project's revenues, operation, and any other information the Board requires in order to perform its duties and to protect the public interest.

(b) After construction is complete, the executive administrator is authorized:

(1) to inspect the project at any time. If the executive administrator determines that the project is being improperly or inadequately operated and maintained to the extent that the project purposes are not being properly fulfilled or that integrity of the state's investment is being endangered, the executive administrator may require the Applicant to take corrective action;

(2) to inspect certified copies of all minutes, operating budgets, monthly operating statements, contracts, leases, deeds, audit reports, and other documents concerning the operation and maintenance of the project;

(3) to inspect and review the project and to obtain information through documents or interviews with appropriate personnel to ensure the Applicant is complying with the requirements of the covenants of the bond indenture and/or the master agreement;

(4) to inspect accounting and financial records to ensure that the Applicant maintains debt service fund accounts and all other fund accounts related to the CWSRF debt in accordance with standards set forth by the Governmental Accounting Standards Board; and

(5) to request the Applicant to determine the status of compliance with mitigation measures as required in the final environmental determination.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003507
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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SUBCHAPTER I. NONPOINT SOURCE POLLUTION LINKED DEPOSITS PROGRAM

31 TAC §§375.200 - 375.214

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.200. Applicability.

This subchapter applies to a program for linked deposits to eligible lending institutions to allow the lending institutions to provide loans for nonpoint source pollution control projects.

§375.201. Definitions.

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

(1) Eligible lending institution--A financial institution that makes commercial loans, is either a designated as a official state depository by the Texas comptroller of public accounts, herein referred to as a state depository, or an institution of the Farm Credit System headquartered in this state, agrees to participate in a linked deposit program established under §15.611 of the Water Code, and is willing to agree to provide collateral equal to the amount of linked deposits placed with it.

(2) Individual water quality management plan--An approved land management plan that considers site-specific characteristics (such as soil types, slope, climate, vegetation and land usage) to improve or conserve water resources.

(3) Linked deposit--A deposit governed by a linked deposit agreement between the Board and an eligible lending institution that requires that:

(A) the eligible lending institution pay interest to the Board on the deposit at a rate equal to the asking yield for a U.S. Treasury note with a twelve-month maturity as of the date five days preceding the submission of all the documents required of the eligible lending institution requesting a linked deposit agreement;

(B) the state not withdraw any part of the deposit except as according to the terms of the linked deposit agreement and the terms of this division; and

(C) the eligible lending institution agree to lend the value of the deposit to a person at a rate not to exceed the interest paid by the eligible lending institution to the Board plus four percent.

(4) Linked deposit agreement--A written agreement between the Board, acting through the executive administrator, and an eligible lending institution providing for the deposit by the Board of an amount of funds from the CWSRF program account with the eligible lending institution executed pursuant to the authority and according to the conditions of this subchapter.

(5) Pledged security--Means the securities authorized by these rules and the linked deposit agreement negotiated to secure the Board's deposit of funds with the eligible lending institution.

§375.202. Authorization to Execute Agreements.

The executive administrator is authorized to execute a linked deposit agreement with an eligible lending institution to provide funds from the CWSRF program account according to and in compliance with this division.

§375.203. Conditions Prior to Execution.

(a) Before the executive administrator may execute a linked deposit agreement, a lending institution shall submit to the executive administrator:

(1) the application of a person determined by the eligible lending institution to be eligible and creditworthy to receive a loan according the criteria of the institution;

(2) a draft loan agreement with such person that:

(A) identifies the principal amount of the loan that shall not exceed $250,000;

(B) identifies the interest rate to be paid by the borrower that shall not exceed the interest rate paid by the eligible lending institution to the Board plus four percent;

(C) includes a repayment schedule that identifies the dates on which payments are due from the loan recipient to the lending institution;

(D) limits the use of the loan funds to the project which is certified pursuant to this subchapter; and

(E) contains all such other terms and conditions determined by the eligible lending institution in its sole discretion to be reasonable for the purposes of a private loan agreement;

(3) a certification:

(A) from the eligible lending institution of the interest rate applicable to the proposed loan;

(B) for proposed project as identified under this subchapter; and

(4) such other information or documentation as determined by the executive administrator to be reasonable and necessary to fulfill the objectives of this division.

(b) Before the executive administrator executes a linked deposit agreement, the executive administrator shall review the information submitted in this section to determine if:

(1) the lending institution is an eligible lending institution as defined §375.302 of this subchapter;

(2) the documents submitted by the lending institution comply with the requirements of this division; and

(3) execution of the linked deposit agreement fulfills the purposes and intent of this subchapter, the Clean Water Act, and the public interest.

§375.204. Project Certifications.

(a) If the proposed project is an agricultural or silvicultural nonpoint source pollution control project, in order to be eligible to receive a linked deposit a director of a soil and water conservation district for the district in which the project is located must certify that:

(1) the loan recipient has a water quality management plan certified by the State Soil and Water Conservation Board; and

(2) the project furthers or implements such plan.

(b) For all projects that are not an agricultural or silvicultural nonpoint source pollution control project, in order to be eligible to receive a linked deposit the executive director must certify that the loan recipient's proposed project implements the NPS Management Report.

§375.205. Board Obligations in Linked Deposits.

(a) Upon execution of a linked deposit agreement by the executive administrator and an eligible lending institution, the Board, acting through its executive administrator, shall:

(1) deposit with the lending institution the amount of funds identified in the linked deposit agreement from the CWSRF program account; and

(2) perform such other terms and conditions as specified in the linked deposit agreement.

(b) The Board or the executive administrator may withdraw linked deposits and accrued interest from the lending institution without penalty according to the terms of the linked deposit agreement or if the institution ceases to be either a state depository or a Farm Credit System institution headquartered in Texas.

§375.206. Lending Institutions Obligations in Linked Deposits.

(a) Upon execution of a linked deposit agreement and receipt of funds from the Board, the lending institution shall:

(1) provide collateral as required in this subchapter;

(2) lend the value of the deposit being provided by the Board substantially according to the terms and conditions of the draft loan agreement submitted by the lending institution to the executive administrator;

(3) pay to the Board interest on the deposit at a rate equal to the asking yield for a U.S. Treasury note with a twelve-month maturity as of the date five days preceding the submission of all the documents required of the eligible lending institution to the executive administrator requesting a linked deposit agreement;

(4) submit compliance reports to the executive administrator annually providing information on loans made, the performance of the terms of the loan by the person receiving the loan from the lending institution and such other information or documents as specified in the linked deposit agreement;

(5) return the amount of funds provided as a linked deposit as specified in the linked deposit agreement; and

(6) perform such other terms and conditions as specified in the linked deposit agreement, this subchapter, the rules of the Board, and applicable federal and state law.

(b) A delay in payment or a default on a loan by the recipient of the loan from the lending institution does not affect the validity of the deposit agreement or the repayment of the deposit in accordance with the terms of the deposit agreement.

§375.207. Requirements after Execution.

After the executive administrator has executed a linked deposit agreement, the executive administrator shall:

(1) at the next available Board meeting and each month thereafter, provide a report to the Board that:

(A) identifies all linked deposit agreements; and

(B) the status of the loans made by lending institutions; and

(2) in the event of noncompliance on the part of an eligible lending institution, inform the Texas comptroller of public accounts of the noncompliance and include information regarding the noncompliance in the monthly report to the Board.

§375.208. No State Liability.

The state is not liable to an eligible lending institution for payment of the principal, interest, or any late charges on a loan made to an approved Applicant. A linked deposit is not an extension of the state's credit within the meaning of any state constitutional prohibition.

§375.209. Collateral for Linked Deposits.

(a) Eligible lending institutions shall secure funds that the Board deposits pursuant to a linked deposit agreement in an amount not less than the amount of the deposit under the linked deposit agreement:

(1) increased by the amount of any accrued interest; and

(2) reduced to the extent that the United States or an instrumentality of the United States insures the deposit.

(b) For the purposes of this subchapter, the value of securities shall be the market value obtained from a nationally-recognized, financial information service based upon the previous day's closing market quotations.

(c) If the market value of the securities pledged by the eligible lending institution becomes less than the amount of funds on deposit in the depository by the Board, the executive administrator shall require that additional collateral be pledged immediately, or that the amounts of Board funds on deposit be reduced. If the collateral pledged by an eligible lending institution is in excess of that required by the market value of funds on deposit by the Board, the executive administrator may allow the release of the excess collateral.

(d) Eligible lending institutions shall secure funds that the Board deposits pursuant to a linked deposit agreement using only the following as pledged securities except as further limited by subsection (e) of this section:

(1) obligations, including letters of credit, of the United States or its agencies and instrumentalities;

(2) direct obligations of this state or its agencies and instrumentalities;

(3) other obligations, the principal and interest of which are unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States or their respective agencies and instrumentalities; and

(4) obligations of states, agencies, counties, cities, and other political subdivisions of any state rated as to investment quality by a nationally recognized investment rating firm not less than A or its equivalent.

(e) The following may not be used to secure funds that the Board deposits pursuant to a linked deposit agreement:

(1) obligations whose payment represents the coupon payments on the outstanding principal balance of the underlying mortgage-backed security collateral and pays no principal;

(2) obligations whose payment represents the principal stream of cash flow from the underlying mortgage-backed security collateral and bears no interest;

(3) collateralized mortgage obligations that have a stated final maturity date of greater than 10 years; and

(4) collateralized mortgage obligations the interest rate of which is determined by an index that adjusts opposite to the changes in a market index.

(f) An eligible lending institution may substitute one group of securities eligible under this section and the linked deposit agreement for another group of securities eligible under this section and the linked deposit agreement.

(g) Within the limits of this section, the executive administrator may limit the selection of eligible investment securities for linked deposits in the linked deposit agreement.

§375.210. Records of Depository.

(a) Eligible lending institutions shall maintain a separate, accurate, and complete record relating to the pledged securities, the deposit of the Board's funds, and all transactions related to the pledged securities.

(b) The comptroller or the executive administrator may examine and verify at any reasonable time the pledged securities or a record an eligible lending institution maintains under this section.

§375.211. Deposit of Pledged Security with Custodian.

(a) An eligible lending institution shall deposit with a custodian a pledged security. The custodian and the executive administrator shall agree in writing on the terms and conditions for securing a linked deposit.

(b) A custodian must be approved by the executive administrator, either in the linked deposit agreement or separately, and be:

(1) a state or national bank that:

(A) is designated by the comptroller as an official state depository institution;

(B) has its main office or a branch office in this state; and

(C) has a capital stock and permanent surplus of $5 million or more;

(2) the Texas Treasury Safekeeping Trust Company;

(3) a Federal Reserve Bank or a branch of a Federal Reserve Bank; or

(4) a federal home loan bank.

(c) A custodian holds in trust the pledged securities used to secure the Board's deposit in the eligible lending institution.

(d) A custodian, whether acting alone or through a permitted institution under §375.212 of this subchapter (relating to Custodian's Deposit of Pledged Security with Another Institution), is for all purposes the bailee or agent of the Board.

(e) On receipt of a pledged security, a custodian shall:

(1) immediately identify on its books and records, by book entry or another method, the pledge of the security to the Board; and

(2) promptly issue and deliver to the executive administrator a trust receipt for the pledged security. If the custodian deposits the pledged security pursuant to this subchapter, the trust receipt shall so indicate.

(f) An eligible lending institution may not itself be the custodian of securities it pledges for the linked deposit, nor may it deposit the securities with an entity of which the eligible lending institution is a branch.

(g) The eligible lending institution shall pay any charges of the custodian bank for accepting and holding the securities.

§375.212. Custodian's Deposit of Pledged Security with Another Institution.

(a) The custodian may deposit a pledged security with one of the following institutions:

(1) a Federal Reserve Bank;

(2) a clearing corporation as defined by §8.102, Texas Business and Commerce Code;

(3) a bank eligible to be a custodian; or

(4) a state or nationally chartered bank that is controlled by a bank holding company that controls a bank eligible to be a custodian.

(b) The custodian may not deposit a pledged security with an eligible lending institution or an entity of which the eligible lending institution is a branch.

(c) If a deposit is made under subsection (a) of this section, the institution to which the deposit is made shall:

(1) hold the pledged security to secure funds the Board deposits with the eligible lending institution; and

(2) on receipt of deposit, immediately issue to the custodian an advice of transaction or other document that is evidence of the deposit of the pledged security.

(d) An institution may apply book entry procedures when an investment security held by a custodian is deposited under this section. The records must at all times state the name of the custodian that deposits an investment security in the institution.

§375.213. Records of Custodian.

(a) The custodian shall maintain a separate, accurate, and complete record relating to each pledged security and each transaction relating to a pledged security.

(b) The comptroller or the executive administrator may examine and verify at any reasonable time a pledged security or a record a custodian maintains under this section. The Board or its agent may inspect at any time a pledged security evidenced by a trust receipt.

(c) The custodian shall file a collateral report with the comptroller in the manner and on the dates prescribed by the comptroller.

§375.214. Audit and Examinations.

As part of an audit or regulatory examination of an eligible lending institution or custodian, the auditor or examiner shall examine and verify pledged securities and records maintained under this subchapter, and shall report any significant or material noncompliance with this subchapter to the comptroller and the Board.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003508
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.369

The Comptroller of Public Accounts proposes new §3.369, concerning sales tax holiday--certain Energy Star products. The new section implements House Bill 3693, 80th Legislature, 2007, which adds Tax Code, §151.333 regarding exemption for certain Energy Star qualified products sold during a three-day period in May. The new section also implements certain existing sections of the Tax Code to provide policy for tax treatment of items set out in §151.333.

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 clarifying the procedures for obtaining a sales and use tax exemption on the purchase of certain Energy Star appliances. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The new section is proposed under Tax Code, §111.002 which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §§151.0047, 151.0048, 151.005, 151.007, 151.009, 151.010, 151.0101, 151.051, 151.056, 151.101 and 151.333.

§3.369. Sales Tax Holiday--Certain Energy Star Products.

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

(1) Energy-efficient product--A product that has been designated as an Energy Star qualified product under the Energy Star program jointly operated by the United States Environmental Protection Agency and the United States Department of Energy.

(2) Exchange--The act of giving or taking one thing in return for another.

(3) Exemption period--The period beginning at 12:01 a.m. on the Saturday preceding the last Monday in May (Memorial Day) and ending at 11:59 p.m. on the last Monday in May.

(4) Layaway sales--A transaction in which merchandise is set aside for future delivery to a person who makes a deposit, agrees to pay the balance of the purchase price over a period of time, and, at the end of the payment period, receives the merchandise. An order is accepted for layaway by the retailer when the retailer removes the items from normal inventory or clearly identifies the items as sold to the person.

(5) Qualifying products--Energy-efficient products eligible for exemption from sales and use tax if purchased, leased or rented during the period described in paragraph (3) of this subsection as established under Tax Code, §151.333. Qualifying products are limited to the following energy-efficient products:

(A) air conditioners priced at $6,000 or less (room and central units);

(B) clothes washers;

(C) ceiling fans;

(D) dehumidifiers;

(E) dishwashers;

(F) incandescent or fluorescent light bulbs;

(G) programmable thermostats; and

(H) refrigerators (including mini-fridges) priced at $2,000 or less.

(6) Rain check--A document assuring that a person can take advantage of a sale or special offer made by a seller at a later time if the item offered is not available.

(b) Exempt sales.

(1) Sales or use tax is not due on the sale of a qualifying product if the sale takes place during the exemption period.

(2) There is no limit to the number of qualifying products one can purchase exempt from sales tax during the exemption period.

(3) The exemption applies to each qualifying product sold during the exemption period, regardless of how many qualifying products are sold on the same invoice to a person. For example, if a person purchases two refrigerators for $1,800 each, then both refrigerators qualify for the exemption, even though the person's total purchase price ($3,600) exceeds $2,000.

(4) Rentals and leases of qualifying products, including "rent to own" contracts, qualify for exemption when the contract for the rental or lease is entered into during the exemption period. The exemption applies only to the specified rental or lease period designated by the contract. Extensions or renewals of rental or lease contracts do not qualify for the exemption unless the contract is renewed or extended during the exemption period.

(c) Taxable sales. The exemption under this section does not apply to:

(1) items not specifically identified in subsection (a)(5) of this section, including other types of energy-efficient products such as home insulation materials, water heaters, clothes dryers, attic fans, heat pumps, wine refrigerators, kegerators, freezers, or residential beverage chillers;

(2) repair or replacement parts for Energy Star qualified products that are used to repair or remodel products already owned by a person and that do not otherwise qualify for exemption. For example, an individual may own a central air conditioner with a faulty compressor. The individual cannot obtain the exemption on the purchase of a new Energy Star qualified compressor;

(3) the first $6,000 of an Energy Star qualified air conditioner that sells for more than $6,000. For example, if a person purchases an Energy Star qualified air conditioner that costs $6,055, then sales tax is due on the entire $6,055;

(4) the first $2,000 of an Energy Star qualified refrigerator that sells for more than $2,000. For example, if a customer purchases an Energy Star qualified refrigerator that costs $2,055, then sales tax is due on the entire $2,055;

(5) system components sold individually. Qualifying products must be sold as a unit in order to qualify for the exemption. The components cannot be priced separately and sold as individual items in order to obtain the exemption. For example, central air conditioners priced at $6,000 or less must be sold as a unit in order to qualify for the exemption. If an Energy Star qualified central air conditioner sells for $7,000, the entire $7,000 charge is subject to tax and cannot be split into separate charges for a compressor, metering device, evaporator coil and blower in order to qualify for the exemption; and

(6) disposal fees charged for the removal of old appliances. Disposal or "haul away" fees charged for the removal of an old appliance are taxable as a waste removal service.

(d) Sales of pre-packaged combinations containing both exempt and taxable items.

(1) When a qualifying product is sold together with taxable merchandise in a pre-packaged combination or single unit, the full price is subject to sales tax unless the price of the qualifying product is separately stated. For example, a clothes washer and clothes dryer sold as a "set" for a single price is taxable if the washer and dryer are separate appliances. A separately stated charge for the Energy Star rated washing machine is eligible for the sales tax exemption during the holiday period. Tax is due on the dryer. An Energy Star rated combination washer and dryer unit that is designed to be sold as a single unit and that cannot be sold separately will, however, qualify for the exemption.

(2) When a qualifying product is sold in a pre-packaged combination that also contains a taxable item as a free gift, and no additional charge is made for the gift, the qualifying product may qualify for the exemption under this section. For example, the sale of a dishwasher may include a free bottle of rinse aid. If the price of the set is the same as the price of the dishwasher sold separately, the product that is being sold is the dishwasher, which is exempt from tax if sold during the exemption period. Note: When a retailer gives a taxable item away free of charge, the retailer owes sales or use tax on the purchase price that the retailer paid for the item. See §3.301 of this title (relating to Promotional Plans, Coupons, Retailer Reimbursement).

(e) Delivery charges.

(1) Air conditioners and refrigerators. Delivery charges that are billed by the seller to the purchaser are included as part of the total sales price of a qualifying product, regardless of whether the charges are separately stated, and as such must be considered when determining whether air conditioners and refrigerators qualify for the exemption. The addition of delivery charges to the retail price of a refrigerator or air conditioner will cause the loss of the exemption if the total price exceeds the applicable cap. For example, assume a person purchases an Energy Star qualified refrigerator priced at $1,985. The charge to deliver the refrigerator is $25, causing the total sales price to be $2,010. Since the total sales price of the refrigerator exceeds $2,000, the refrigerator does not qualify for the exemption, and tax is due on the total sales price of $2,010.

(2) Items other than air conditioners and refrigerators. Delivery charges that are billed by the seller to the purchaser are exempt if the product sold is exempt. For example, delivery fees billed in connection with the sale of a qualifying energy-efficient dishwasher during the exemption period are exempt.

(3) "Per item" delivery fees. Delivery charges billed on a "per item" basis must be properly allocated when a delivery to the same person contains both exempt and taxable items. Except as provided in paragraph (4) of this subsection, if multiple items are shipped on a single invoice, the delivery charges must be allocated to each item ordered and separately identified on the invoice. For example, assume that a person purchases a qualifying clothes washer tax-free during the exemption period. The same person also purchases a clothes dryer, which does not qualify for the exemption. The retailer charges the person an additional fee of $25 per appliance for delivery. The $25 delivery fee connected to the delivery of the qualifying clothes washer is exempt from sales tax, but the $25 fee connected to the delivery of the clothes dryer is subject to tax.

(4) "Flat rate" delivery fees. If the delivery charge is a flat rate per delivery address, and the amount charged is the same regardless of how many items are included in the delivery, for purposes of the exemption, the total charge may be attributed to one of the items in the delivery rather than proportionately allocated between the items. The delivery fee can be allocated to either an exempt qualifying product or a taxable product. The following examples illustrate the way these charges should be handled.

(A) Delivery fee allocated to exempt item. Assume a seller charges a flat fee of $50 per customer address for delivery regardless of the number of items delivered to that address and during the exemption period, a person purchases an Energy Star qualified refrigerator priced at $1,900, a taxable stove and a taxable microwave. The seller may attribute the $50 delivery charge to the sale of the refrigerator bringing the sales price of the refrigerator to $1,950. The refrigerator sales price does not exceed $2,000, so it still qualifies for the exemption. The seller does not have to allocate the delivery charge between the refrigerator, stove and microwave. The sales invoice must clearly identify that the delivery charge was attributed to the exempt item and must separately state the tax due on the taxable items.

(B) Delivery fee allocated to taxable item. Assume a seller charges a flat fee of $50 per customer address for delivery regardless of the number of items delivered to that address and during the exemption period, a person purchases an Energy Star qualified refrigerator priced at $1,975 and a taxable stove. The seller may attribute the entire $50 delivery charge to the sale of the stove, thus allowing the total sales price of the refrigerator to remain $1,975. Since the refrigerator sales price does not exceed $2,000 it still qualifies for the exemption. The seller does not have to allocate the delivery charge between the refrigerator and stove. The sales invoice must clearly identify that the delivery charge was attributed to the taxable stove and must separately state the tax due on the taxable item.

(f) Installation charges. A charge for the installation of a qualifying product purchased during the exemption period qualifies for exemption only if the item remains tangible personal property after installation. If the product becomes real property after installation, the charge for installation labor may be taxable or nontaxable depending on whether the product is installed in residential or nonresidential property or as part of a new construction contract.

(1) Tangible personal property. Products that are free-standing or mobile, such as clothes washers, dehumidifiers, refrigerators, portable dishwashers and window or room air conditioning units are tangible personal property. If qualifying tangible personal property retains its identity as tangible personal property after installation, the installation charge billed by the seller of the item becomes part of the sales price of the item. As part of the sales price, an installation charge billed by the seller qualifies for the exemption, even if the installation is performed after the exemption period. If however, the charge for installation of an Energy Star qualified refrigerator, which remains tangible personal property after installation, causes the total sales price to exceed $2,000, the entire charge of the refrigerator, delivery and installation, is taxable.

(2) Improvements to real property. Items such as programmable thermostats, central air conditioning units, ceiling fans

and built-in refrigerators and dishwashers that are plumbed, wired or otherwise permanently attached to a building structure are improvements to real property. For items that become improvements to real property, the taxability of the installation labor is determined by the type of jobsite: residential, new construction or nonresidential repair or remodeling.

(A) Residential and new construction. No tax is due on charges for labor to install items such as ceiling fans, programmable thermostats or central air conditioning units in residential property or during a new construction project. See §3.291 of this title (relating to Contractors).

(B) Nonresidential repair and remodeling. Nonresidential repair and remodeling is a taxable service. Therefore, tax is due on charges for labor to install ceiling fans, built-in appliances, programmable thermostats and central air conditioning units in existing nonresidential real property, regardless of when the installation is performed. Charges for installation labor performed on existing nonresidential real property should be separately stated on the invoice from the sales price of the qualifying product. A lump sum charge for the purchase of a qualifying product and installation labor is subject to tax as the purchase of nonresidential repair and remodeling. See §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(g) Purchases by real estate developers, dealers, service providers and contractors. Real estate developers, dealers, service providers and contractors may purchase qualifying products tax-free during the sales tax holiday.

(1) An exemption or resale certificate is not required, and there is no limit to the number of qualifying products such persons may purchase tax-free during the exemption period.

(2) Held in inventory. Qualifying products purchased tax-free during the exemption period may be held in inventory until ready for use.

(A) No use tax is due if a qualifying product purchased tax free during the exemption period by a contractor, developer, etc., is subsequently incorporated into the realty of a contractor's customer under a lump sum contract for new construction or residential repair and remodeling. See §3.291 of this title.

(B) Sales tax is due on sales of qualifying products transferred to customers as part of a nonresidential repair and remodeling contract preformed after the exemption period. Nonresidential repair and remodeling service providers are responsible for collecting sales tax from customers on sales of qualifying products under a separated contract or under a lump sum contract for nonresidential repair and remodeling, unless the transaction (the sale of the qualifying product) between the customer and service provider, dealer or contractor occurs during the exemption period under a separated contract. See §3.357 of this title.

(h) Discounts and coupons. An Energy Star qualified air conditioner must be priced at $6,000 or less in order to qualify for the exemption. An Energy Star qualified refrigerator must be priced at $2,000 or less to qualify for the exemption. A seller may offer a discount or a coupon that reduces the sales price of an Energy Star qualified air conditioner or refrigerator. A discount or a coupon affects the application of the exemption as explained in paragraphs (1) and (2) of this subsection. The total sales price of the product includes delivery and installation charges as explained in subsections (e) and (f) of this section. See §3.301 of this title.

(1) Discounts. If a discount reduces the sales price of an Energy Star qualified air conditioner to $6,000 or less, or reduces the sales price of an Energy Star qualified refrigerator to $2,000 or less, the air conditioner or refrigerator qualifies for the exemption under this section. For example, a person buys an Energy Star qualified free-standing refrigerator that has a sales price of $2,050, including shipping, handling and installation of tangible personal property, from a seller who offers a 10% discount. After application of the 10% discount, the final sales price of the refrigerator is $1,845. The refrigerator is exempt because its sales price does not exceed $2,000.

(2) Coupons. When sellers accept a manufacture's or other coupon as a part of the sales price of any taxable item, the value of the coupon reduces the sales price, the same as a cash discount, regardless of whether the retailer is reimbursed for the amount that the coupon represents. Therefore, a coupon can be used to reduce the sales price of an Energy Star qualified air conditioner to $6,000 or less, or to reduce the sales price of an Energy Star qualified refrigerator to $2,000 or less. The item then qualifies for exemption under this section. For example, a person buys an Energy Star qualified free-standing refrigerator that has a sales price of $2,050, including shipping, handling and installation of tangible personal property, with a coupon worth $100. After application of the $100 coupon, the sales price of the refrigerator is $1,950. The refrigerator is exempt because its sales price does not exceed $2,000.

(i) Rebates.

(1) Retailer rebates. Rebates provided by a seller are cash discounts when given at the time of sale and as such are excludable from the tax base. The discount, like a discount when taken at the time of the sale, is a reduction in the amount subject to tax.

(2) Third party and manufacturer rebates. Third party and manufacturer rebates occur after the sale and do not change the sales price of an item and therefore, do not affect whether the exemption provided by this section applies. The full amount of the sales price, before the rebate, is used to determine whether the exemption applies. For example, if a person purchases an Energy Star qualified air conditioner for $6,050 and receives a $300 rebate from the manufacturer, the seller must collect tax on the $6,050 sales price of the air conditioner.

(j) Layaway sales. The sale of a qualifying product under a layaway plan qualifies for exemption when either:

(1) final payment is made by, and the merchandise is transferred to, the purchaser during the exemption period; or

(2) the purchaser selects the qualifying product and the seller accepts the order for the item during the exemption period, for immediate delivery upon full payment, even if delivery is made after the exemption period.

(k) Rain checks. Qualifying products that are purchased during the exemption period with use of a rain check qualify for the exemption regardless of when the rain check was issued. However, issuance of a rain check during the exemption period will not cause the purchase of a qualifying product to be exempt if the item is actually purchased after the exemption period.

(l) Exchanges.

(1) If a person purchases a qualifying product during the exemption period, and, after the exemption period has ended, exchanges the item for the same type of qualifying product of equal or lesser value, no additional tax is due. For example, a person purchases a $60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for a $60 qualifying dehumidifier of a different brand. Tax is not due on the $60 sales price of the new dehumidifier.

(2) If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the product for the same type of qualifying product of greater value, tax is due on the difference between the prices of the two products. For example, assume a person purchases a $60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for a $70 qualifying dehumidifier. Tax is due on the $10 difference between the two sales prices.

(3) If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the product for a different type of qualifying product, tax is due on the original sales price of the qualifying product the person obtained in the exchange. For example, assume a person purchases a $60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for $60 in qualifying light bulbs. Tax is due on the $60 sales price of the qualifying light bulbs.

(4) If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the products for a nonqualifying item, tax is due on the original sales price of the nonqualifying item. For example, assume a person purchases a $60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for a $60 nonqualifying microwave. Tax is due on the $60 sales price of the nonqualifying microwave.

(5) If a person purchases a qualifying product before the exemption period, but, during the exemption period, returns the product and receives credit on the purchase of a different qualifying product, no sales tax is due on the sale of the new product if the new item is purchased during the exemption period. For example, assume a person purchases a $60 qualifying dehumidifier before the exemption period. During the exemption period, the person returns the dehumidifier and receives credit on the purchase of a $70 qualifying ceiling fan. No tax is due on the sale of the ceiling fan if it is purchased during the exemption period.

(m) Returned merchandise. For a 30-day period after the exemption period, when a person returns an item that would qualify for the exemption, no credit for or refund of sales tax shall be given unless the person provides a receipt or invoice that shows tax was paid, or the retailer has sufficient documentation to show that tax was paid on the specific item.

(1) This 30-day period begins the Tuesday after the last Monday in May and ends 30 calendar days later with no exclusions for weekend days or holidays.

(2) This 30-day period is set solely for the purpose of designating a time period during which the purchaser must provide documentation that shows that sales tax was paid on returned merchandise. The 30-day period is not intended to change a retailer's policy on the time period during which the retailer will accept returns.

(n) Purchases by means other than in person. A qualifying product purchased by mail, telephone, email, Internet or custom order qualifies for the exemption if:

(1) the item is both transferred to and paid for by the person during the exemption period; or

(2) the person orders and pays for the item and the seller accepts the order during the exemption period for immediate shipment, even if delivery is made after the exemption period. The seller accepts an order when the seller has taken action to fill the order for immediate shipment. Actions to fill an order include placement of an "in date" stamp on a mail order, or assignment of an "order number" to a telephone order. An order is for immediate shipment when the purchaser does not request delayed shipment. An order is for immediate shipment notwithstanding that the shipment may be delayed because of a backlog of orders or because stock is currently unavailable to, or on back order by the seller.

(o) Documenting exempt sales. A seller is not required to obtain an exemption certificate on sales of qualifying products during the exemption period; however, the retailer's records should clearly identify the type of item sold, the date on which the item was sold, and the sales price of the item.

This 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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Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM
SUBCHAPTER L. PREPAID TUITION UNIT UNDERGRADUATE EDUCATION PROGRAM: TEXAS TOMORROW FUND II

34 TAC §§7.122, 7.125, 7.136, 7.141

The Comptroller of Public Accounts (comptroller) proposes to amend §7.122, concerning definitions, §7.125, concerning redemption of tuition units, §7.136, concerning transfers to institutions on redemptions of tuition units, and §7.141, concerning effect of program termination on contract. These sections are amended to implement amendments to the Education Code by Senate Bill 1941, 81st Legislature, 2009 by adding career schools to the program and conforming calculation of the transfer value of tuition units to the year units are transferred or redeemed. The prepaid tuition unit undergraduate education program was created in the 80th Legislature by House Bill 3900 which allows a person to prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education.

Senate Bill 1941 enables beneficiaries of Texas Tuition Promise Fund contracts to use tuition units towards the cost of tuition and required fees at career schools. Previously, tuition units could only be used towards the cost of tuition and required fees at general academic teaching institutions, two-year institutions of higher education, private or independent institutions of higher education, or accredited out-of-state institutions of higher education.

Senate Bill 1941 also clarifies that the calculation of the transfer value of tuition units is determined by data from the year in which the units are transferred or redeemed rather than data from the year in which the units were purchased.

Section 7.122, new paragraph (4) is added to define 'career school' and paragraphs (4) through (29) are renumbered. Paragraphs (2), (5), (15), and (27) are amended to add 'career school' to the list of educational institutions. Paragraph (26) is amended to clarify that the calculation of Transfer Value is determined by data from the year in which tuition units are transferred or redeemed rather than from the year in which tuition units are purchased.

Section 7.125, subsections (a) and (e) are amended to include 'career school' in the list of educational institutions.

Section 7.136, subsection (b) is amended to include 'career school' in the list of educational institutions eligible to receive payment.

Section 7.141, subsection (a) is amended to include 'career school' in the list of educational institutions.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rules 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 rules are in effect, the public benefit anticipated as a result of enforcing the rules will be by facilitating the broader use of the Texas Tomorrow Fund II program. The proposed amendment 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 rules.

Comments on the proposed rules may be submitted to Linda Fernandez, Manager, Educational Opportunities and Investment Division, Post Office Box 13407, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us.

The amendments are proposed under Texas Education Code, §54.752(b)(1) which authorizes the Board to adopt rules to implement the Program.

The proposed amendments implement Texas Education Code, §§54.751, 54.753, 54.754, 54.765, 54.767, 54.7671, 54.769, 54.774, and 54.775.

§7.122. Definitions.

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

(1) "Accredited out-of-state institution of higher education" means a public or private institution of higher education that:

(A) is located outside this state; and

(B) is accredited by a recognized accrediting agency.

(2) "Beneficiary" means the person designated under a prepaid tuition contract as the person entitled to apply one or more tuition units purchased under the contract to the payment of the person's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education.

(3) "Board" means the Prepaid Higher Education Tuition Board.

(4) "Career school" means a career school or college as defined by Education Code, §132.001 that offers a two-year associate degree as approved by the Texas Higher Education Coordinating Board.

(5) [~~(4)~~] "Eligible educational institution" means a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education, that qualify as eligible educational institutions under Internal Revenue Code, §529.

(6) [~~(5)~~] "Enrollment period" means the period established by the board during which a purchaser may enter into a contract with the board to purchase tuition units. The initial enrollment period is September 1 through the end of February. For beneficiaries who are newborn infants under one year of age at the time of enrollment, the initial enrollment period will be extended to cover the period of September 1 through July 31. These enrollment periods will apply annually thereafter subject to change by the board. The executive director may establish a provisional enrollment process to allow potential applicants to begin the enrollment process outside of the enrollment period with pricing to be established in the next enrollment period.

(7) [~~(6)~~] "First payment due date" means the date the first payment is due after enrolling in the program and establishing a new prepaid tuition contract. The first payment due date will be specified in the prepaid tuition contract, and shall initially be established as May 1st. The first payment due date serves as the anniversary date for establishing the three-year holding period. The first payment due date may be changed subsequently by the board for future enrollment periods.

(8) [~~(7)~~] "Fund" means the Texas Tomorrow Fund II.

(9) [~~(8)~~] "General academic teaching institution" has the meaning assigned by Education Code, §61.003, except that the term does not include a public state college.

(10) [~~(9)~~] "Market value" means an amount equal to the total purchase price of any unused tuition units, plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns).

(11) [~~(10)~~] "Matriculation" means enrollment as a member of the student body at an eligible educational institution.

(12) [~~(11)~~] "Paid in full" means that all the required payments for the tuition units and any assessed fees under the prepaid tuition contract have been received and credited to the account.

(13) [~~(12)~~] "Pay-As-You-Go" means purchasing tuition units at the price in effect for that type of tuition unit on the day payment is received for the tuition unit. Pay-As-You-Go includes paying for tuition units with a lump sum payment or multiple lump sum payments, without being obligated to pay for any additional tuition units.

(14) [~~(13)~~] "Plan manager" means a professional investment manager that is under contract with the board to serve as a plan administrator and to invest the assets of the fund on behalf of the board.

(15) [~~(14)~~] "Prepaid tuition contract" means a contract under which a person purchases from the board on behalf of a beneficiary one or more tuition units that the beneficiary is entitled to apply to the payment of the beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education.

(16) [~~(15)~~] "Prepayment" means payment of the balance due or a portion of the balance due under a prepaid tuition contract, ahead of the schedule provided in the contract.

(17) [~~(16)~~] "Private or independent institution of higher education," "public junior college," "public state college," "public technical institute," and "recognized accrediting agency" have the meanings assigned by Education Code, §61.003.

(18) [~~(17)~~] "Program" or "Plan" means the prepaid tuition unit undergraduate education program. The board may select a different name for the program for marketing purposes.

(19) [~~(18)~~] "Purchaser" means a person who enters into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of one or more tuition units.

(20) [~~(19)~~] "Redemption" means the exchange of one or more tuition units to pay costs of tuition and required fees at an eligible educational institution.

(21) [~~(20)~~] "Reduced Refund Value" means the lesser of:

(A) the amount paid by the purchaser or other contributor to purchase any unused tuition units under the contract on behalf of the beneficiary; or

(B) the current market value of the invested payments or contributions for any unused tuition units, as determined by the plan manager. Reduced Refund Value does not include any state provided or procured matching contributions or any earnings on state provided or procured matching contributions.

(22) [~~(21)~~] "Refund Value" means an amount equal to the total purchase price of the unused tuition units to be refunded from the account, plus annual net earnings on the contributions made to the account to purchase the tuition units that are being refunded (including any negative returns), with the earnings rate to be set by the board at a rate that is up to two percent less than the actual investment return for the fund for each of the years the contract is in effect, provided that in no event shall the annual net earnings on the contributions ever exceed five percent annually, and provided further that for any year in which the investment return does not support payment of any earnings, the board may elect not to credit and pay any earnings on the contributions, to preserve the actuarial soundness of the fund. Refund Value does not include any state provided or procured matching contributions or any earnings on State provided or procured matching contributions.

(23) [~~(22)~~] "Required fee" means a fee, other than a laboratory fee for a specific course, that is charged by a public or private institution of higher education to all students at the institution who are not exempt from the fee. For purposes of this subdivision, a fee is a required fee only to the extent that the fee is considered a qualified higher education expense under Internal Revenue Code, §529. Required fees are generally those fees imposed on all students as a condition of enrollment. Required fees do not include fees such as equipment usage fees required for particular courses, charges for room and board, book costs, or any optional fees.

(24) [~~(23)~~] "Sales period" means the year long period from September 1 through August 31 during which a purchaser who has established a prepaid tuition contract may make purchases under the contract at the price(s) established under the contract, or at the price established for tuition units applicable to the sales period if additional tuition units are purchased during the sales period.

(25) [~~(24)~~] "Three-year holding period" means the period of time that must transpire before a beneficiary or purchaser may redeem a tuition unit to pay for qualified higher education expenses, as provided under §7.125(g) of this title (relating to Redemption of Tuition Units).

(26) [~~(25)~~] "Transfer value" means the value of the prepaid tuition contract at the time of transfer, that is the lesser of:

(A) an amount equal to the cost, at the time of the transfer, of the tuition and required fees that would be covered by redemption of the number and type of tuition units to be transferred from the account (but not including any units resulting from any State provided or procured matching funds) if the beneficiary were redeeming the units at a general academic teaching institution or two-year institution of higher education as follows:

(i) for a Type I unit, at the general academic teaching institution that[~~, in the sales year in which the unit was purchased,~~] had the highest tuition and required fee cost;

(ii) for a Type II unit, at a general academic teaching institution that[~~, in the sales year in which the unit was purchased,~~] had tuition and required fee cost at the weighted average; and

(iii) for a Type III unit, at a two-year institution of higher education that[~~, in the sales year in which the unit was purchased,~~] had tuition and required fee cost at the weighted average; or

(B) an amount equal to the current market value of the unused tuition units to be transferred from the account, which is an amount equal to the total purchase price of the unused tuition units to be transferred from the account (but not including any state provided or procured matching contributions), plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns), but not including any earnings on state provided or procured matching contributions, as determined by the plan manager.

(27) [~~(26)~~] "Tuition" means the charges imposed by a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education, on undergraduates as a condition of enrollment, which are identified by such institution as tuition.

(28) [~~(27)~~] "Tuition unit" means a portion of the cost of undergraduate resident tuition and required fees that may be prepaid, whose assigned value, when used to pay the cost of tuition and required fees at an eligible educational institution, is equal to:

(A) for a Type I tuition unit, one percent of the cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by the general academic teaching institution with the highest such tuition and fee costs for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(d);

(B) for a Type II tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by general academic teaching institutions for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(e); or

(C) for a Type III tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by two-year institutions of higher education for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(f).

(29) [~~(28)~~] "Two-year institution of higher education" means a public junior college, a public state college, and a public technical institute, as those terms are defined in Education Code, §61.003.

(30) [~~(29)~~] "Weighted average" with respect to tuition and required fees means:

(A) for Type II tuition units, a weighted average cost for undergraduate resident tuition and required fees of general academic teaching institutions for the applicable academic year, computed by the method specified in Education Code, §54.753(e); and

(B) for Type III tuition units, a weighted average cost for undergraduate resident tuition and required fees of two-year institutions of higher education for the applicable academic year, computed by the method specified in Education Code, §54.753(f).

§7.125. Redemption of Tuition Units.

(a) In accordance with this subchapter, when a beneficiary under a prepaid tuition contract redeems tuition units to pay costs of tuition and required fees, the board shall apply money in the Fund, in the amount provided by Education Code, §54.765, to pay all or the applicable portion of the costs of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education in which the beneficiary enrolls.

(1) Subject to subsection (c)(2) of this section, and the other provisions of this section, a beneficiary may redeem any type of tuition unit or partial tuition unit for attendance at an institution described by this section.

(2) A general academic teaching institution or two-year institution of higher education shall accept the amount transferred to the institution under Education Code, §54.765(c), when the unit or units are redeemed as payment for all or the applicable portion of the beneficiary's tuition and required fees.

(b) To pay for the entire cost of undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours:

(1) redemption of 100 Type I tuition units (or an approximate equivalent amount of Type II or III units) is required at the general academic teaching institution with the highest tuition and fee cost as described by Education Code, §54.753(d);

(2) redemption of 100 Type II tuition units (or an approximate equivalent amount of Type I or III units) is required at a general academic teaching institution with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(e); and

(3) redemption of 100 Type III units (or an approximate equivalent amount of Type I or II units) is required at a two-year institution of higher education with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(f).

(c) The number of tuition units that must be redeemed to pay for the entire cost of tuition and required fees for an academic year at another general academic teaching institution or two-year institution of higher education may be higher or lower:

(1) in proportion to the amount that the cost of tuition and required fees at that institution is higher or lower than the amount determined for the institution with the highest cost or Weighted Average cost, as applicable; or

(2) if a more or less valuable type of tuition unit is redeemed.

(d) To assist purchasers in determining the number of tuition units a beneficiary must redeem to cover the costs of tuition and required fees at general academic teaching institutions and two-year institutions of higher education, each year the board shall prepare a tuition unit redemption chart and will post the chart on the board's Internet website. The chart will show for each general academic teaching institution and for each two-year institution of higher education the number of each type of units purchased that year that would be required to cover the cost of tuition and required fees, based on an academic year consisting of 30 semester credit hours.

(1) The exact amount of tuition units that will be required to attend a particular institution will depend upon the cost of tuition and required fees at the institution in the year of redemption.

(2) For Type I tuition units, the number of units required to attend a particular institution may be less than anticipated when purchased if that institution's costs are less than the general academic teaching institution with the highest tuition and fee cost in the year of redemption.

(3) For Type II and III tuition units, the number of units required to attend a particular institution may be more or less than anticipated when purchased, and will depend on whether that institution's costs are higher or lower than the Weighted Average cost in the year of redemption. To the extent the cost of a particular institution is higher than the Weighted Average cost, the beneficiary will have to redeem additional tuition units to cover the higher cost, or pay the amount of the difference as provided in subsection (e) of this section.

(e) If a beneficiary redeems fewer tuition units of the type or combination of types necessary to pay the total cost of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education at which the beneficiary enrolls, the beneficiary is responsible for paying the amount of the difference between the amount of tuition and required fees for which the beneficiary pays through the redemption of one or more tuition units and the total cost of the beneficiary's tuition and required fees at the institution.

(f) A beneficiary who redeems Type III tuition units (or an approximate equivalent amount of Type I or II units) to attend a public junior college and who does not reside within the taxing jurisdiction of the junior college is responsible for paying any portion of the tuition charged by the junior college to persons who do not reside within that taxing jurisdiction.

(g) A beneficiary or purchaser may not redeem a tuition unit earlier than the third anniversary of the date the unit was purchased.

(1) For the purpose of calculating the three-year holding period for an initial Pay-As-You-Go purchase, the first payment due date after initially enrolling in the program is considered the date the initial units were purchased. These units may not be redeemed to pay for tuition and required fees until the third anniversary after the payment due date.

(2) For installment plan payments, the three-year holding period is considered met if the purchaser enrolls in the program and the first payment due date is at least three years prior to any redemption of tuition units, and the installment plan is paid in full before redemption of any of the tuition units.

(3) Additional Pay-As-You-Go purchases start a new three-year holding period as of the date payment is received for the additional tuition units.

(4) Under the three-year holding period, the latest date that a purchaser could purchase tuition units to pay for a semester of undergraduate education using Pay-As-You-Go purchases is three years prior to the date of expected redemption of the tuition units, subject to the requirement that all tuition units under the contract must be used not later than the 10th anniversary of the date the beneficiary is projected to

graduate from high school, not counting time spent by the beneficiary as an active duty member of the United States armed services.

(5) If all of the tuition units in an account do not meet the three-year holding period, the purchaser may redeem those units or fractional units that meet the three-year holding period, and redeem the remaining tuition units in the account when the three-year holding period is met.

(h) A beneficiary may redeem more than 100 tuition units in one academic year of the type or combination of types as needed to pay the total cost of the beneficiary's tuition and required fees at an eligible educational institution.

(i) To accommodate part-time attendance or the enrollment in more or less semester hours than the contemplated 30 credit hours in an academic year, the board may calculate a per credit hour tuition unit cost for the eligible educational institution applicable to the year of redemption, whereby the number of tuition units required to be redeemed shall be in proportion to the amount that tuition and required fees to be charged to the beneficiary by the eligible educational institution are more or less costly than the cost for attending two semesters of 15 credit hours each or 30 total credit hours in an academic year.

(j) A beneficiary may redeem fractional tuition units as needed to pay the cost of the beneficiary's tuition and required fees at an eligible educational institution.

§7.136. Transfer to Institutions on Redemptions of Tuition Units.

(a) When a beneficiary enrolls at a general academic teaching institution or two-year institution of higher education and notifies the institution that payment will be made by redeemed tuition units, the comptroller will arrange for the transfer to the institution of the appropriate amount specified under Education Code, §54.765(c), (d) and (e).

(b) When a beneficiary enrolls at a private or independent institution of higher education, career school, or accredited out-of-state institution of higher education, upon request the comptroller will arrange for the transfer to the institution of the amount specified under Education Code, §54.765(f).

§7.141. Effect of Program Termination on Contract.

(a) A prepaid tuition contract remains in effect after the program is terminated if, when the program is terminated, the beneficiary:

(1) has been accepted by or is enrolled at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education; or

(2) is projected to graduate from high school not later than the third anniversary of the date the program is terminated.

(b) A prepaid tuition contract terminates when the program is terminated if the contract does not remain in effect under subsection (a) of this section.

(c) For contracts that are terminated pursuant to subsection (b) of this section, the purchaser is entitled to a refund of the Refund Value, less any fees that are past due and payable to the program under the board's fee schedule.

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

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003384

Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 3. TEXAS HIGHWAY PATROL

SUBCHAPTER A. CRASH INVESTIGATIONS

37 TAC §3.1, §3.4

The Texas Department of Public Safety (the department) proposes amendments to §3.1 and §3.4, concerning Crash Investigations.

The department has limited commissioned resources in the Texas Highway Patrol (THP) to use in responding to a wide span of duties. THP allocates resources and assigns duties with priorities to criminal and traffic enforcement responsibilities. In certain high density population regions of the state, growth has extended into unincorporated areas in which large shopping center complexes have become a major part of the commercial landscape. Those shopping centers are a prolific source of minor crashes between motor vehicles. Even in rural and less densely populated counties, the use of resources to investigate a crash on private property should be a decision of that area's management, to include consideration of the available resources. Each parking lot crash reduces department resources for patrol in criminal and highway traffic enforcement.

The department has always and will continue to pursue Driving While Intoxicated (DWI) violators in any public place (including parking lots) and will certainly respond to assist or address matters involving serious bodily injury or deaths in unincorporated areas, including major shopping complex parking lots and as authorized by Texas law. Many of these same areas experience extraordinarily high levels of traffic on highways and are growth areas that require increased levels of criminal enforcement responsibility. The department's regional commanders need the ability to deploy resources to address criminal and traffic enforcement in these unincorporated areas without the burden of responding to every traffic crash in parking lots. These amendments are sought to provide guidance to THP and regional commanders for using limited resources in public places outside highways (such as parking lots).

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no significant 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 amendments as proposed. There are no anticipated economic costs to individuals who are required to comply with the amendments as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five-year period the amendments are in effect the public benefit anticipated as a result of enforcing the 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 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 rule. Accordingly, the department is not required to complete a takings impact assessment regarding the amendments.

Comments on the proposal may be submitted to Major Ron Joy, Texas Department of Public Safety, 5805 North Lamar Boulevard, Austin, Texas 78752, (512) 424-2115.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

Texas Government Code, §411.004(3) is affected by this proposal.

§3.1. Responsibility and Reporting.

(a) Officers of the department are charged with the responsibility of investigation and properly reporting rural motor vehicle crashes occurring upon public highways [~~or other ways or places open to the use of the public~~] without regard as to severity of the crash [~~accident~~]. Officers of the department will investigate and properly report motor vehicles crashes occurring on other places open to the use of the public only when serious bodily injury or death has occurred.

(b) (No change.)

§3.4. Crashes and Violations--Private Ways and Places.

(a) Department interpretations. Department interpretations of territorial applicability of the Texas Transportation Code [~~this Act~~] are as follows.

(1) - (4) (No change.)

(b) Guide. If the owner or person in control of the way or area does not intend to be open for public use, then the Texas Transportation Code [~~this Act~~] has no application.

(c) Investigation. In investigating crashes coming within the provisions of the Texas Transportation Code [~~this Act~~], the investigating officer may [~~will~~] follow regular crash investigation procedure as though the crash occurred on a rural highway.

(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 June 21, 2010.

TRD-201003481

Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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CHAPTER 27. CRIME RECORDS
SUBCHAPTER L. DNA SUPPORTED SUSPECTED OFFENDER FILE

37 TAC §§27.161 - 27.164

The Texas Department of Public Safety (the department) proposes new §§27.161 - 27.164, concerning DNA Supported Suspected Offender File. This new subchapter is necessary to clarify the methods by which a criminal justice agency must report information entered into the DNA Supported Suspected Offender File and the methods by which the designated offender may access the information and request the department review information and correct inaccuracies.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the new rules are 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 new rules are in effect, the public benefit anticipated as a result of enforcing the new rules will be publication of the method available to a person to review information in the DNA Supported Suspected Offender File relating to that person and publication of the method to request the department correct inaccurate information.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the new rules 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 the new rules.

Comments on the proposal may be submitted to Louis Beaty, Manager, Crime Records Service, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0230, (512) 424-5836.

The new rules are proposed pursuant to Texas Government Code, §411.0604, which authorizes the director to adopt rules

to implement and enforce Texas Government Code, Chapter 411, Subchapter D-1.

Texas Government Code, Chapter 411, Subchapter D-1 is affected by this proposal.

§27.161. Entry of Information.

(a) The department maintains a DNA Supported Suspected Offender File to collect and disseminate information regarding additional offenses that forensic DNA test results indicate may have been committed by a person who has been arrested for or charged with any felony or misdemeanor offense, other than a misdemeanor offense punishable by fine only.

(b) Information may only be entered into the DNA Supported Suspected Offender File if based on forensic DNA test results indicating the DNA profile of the person cannot be excluded as a donor to the DNA profile of a person suspected to have committed an offense.

(c) To be entered into the DNA Supported Suspected Offender File, the information must meet the following criteria:

(1) submitted in the form of an affidavit signed by an investigating criminal justice agency;

(2) approved by a district judge;

(3) accompanied by the submission of the subject's fingerprints; and

(4) accompanied by a completed DNA Supported Suspected Offender File (CR-40).

§27.162. Confidentiality and Dissemination.

(a) Information entered into the DNA Supported Suspected Offender File is confidential and may not be disseminated except as provided by Texas Government Code, Chapter 411, Subchapter D-1.

(b) The department will disseminate the information contained in the DNA Supported Suspected Offender File to a criminal justice agency upon inquiry. A criminal justice agency may disseminate the information to any other criminal justice agency for a criminal justice purpose.

§27.163. Notice of Entry.

(a) A person may request to determine whether the department has entered information relating to that person in the DNA Supported Suspected Offender File as follows:

(1) The person must be fingerprinted by a criminal justice agency or other entity on a department approved fingerprint card, or by the department approved electronic fingerprint submission vendor. The criminal justice agency, other entity or the department approved vendor for the electronic submission of fingerprints must establish the person's identity by requiring the person to produce a government issued photo identification document.

(2) The criminal justice agency or other entity must include the following identifying information of the person on the fingerprint card:

(A) the person's complete name (LAST, FIRST, MIDDLE), including any other names used by the person;

(B) the person's sex, race, and date of birth (MONTH, DAY, YEAR); and

(C) a complete, legible set of ten rolled fingerprints and simultaneous impressions taken from the person.

(3) The person must mail the completed fingerprint card and a signed, written request that the department search the DNA Supported Suspected Offender File for information relating to the person to Crime Records Service, Attn: DNA Supported Suspected Offender File, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-4143. The written request must include the printed name, phone number, and return mailing address of the person designated to receive the result of the search.

(4) Fingerprint cards with illegible prints or incomplete information will be returned to the address provided in the written request for proper re-submission.

(b) Upon receipt of a request described by this section, the department will conduct a fingerprint based search of the DNA Supported Suspected Offender File. If an entry relating to the person is located, a printout of the information and the requesting letter will be returned to the designee. If information relating to the person is not located, a certified letter will be returned to the designee stating, "No entry on file." and the requesting letter will be returned to the person. The department will respond within ten (10) business days of the receipt of the request.

§27.164. Review of Entry.

(a) If a person believes an entry or information maintained by the department relating to the person in the DNA Supported Suspected Offender File is inaccurate, the person may return a copy of the department's correspondence and a written request that the department review the information to DNA Supported Suspected Offender File, P.O. Box 4143, Austin, Texas 78765-4143. The request to review entry must allege the department may have entered inaccurate information relating to the person.

(b) Upon receipt of a request to review entry, the department shall review the information to determine whether there is a high likelihood that the information is accurate.

(c) If the department determines there is not a high likelihood the information relating to the person is accurate, the department will:

(1) promptly remove the information from the DNA Supported Suspected Offender File; and

(2) notify appropriate divisions of the department, the investigating criminal justice agency, and the subject of the determination and removal of the information.

(d) If the department determines there is a high likelihood that information relating to the defendant is accurate, the department shall notify the subject of the determination.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003486
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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CHAPTER 35. PRIVATE SECURITY
SUBCHAPTER F. ADMINISTRATIVE HEARINGS

37 TAC §35.93

The Texas Department of Public Safety (the department) proposes amendments to §35.93, concerning Administrative Hearings, in order to comply with the statutory mandate provided through the 81st Legislature's amendment of Texas Occupations Code, §1702.402, requiring a rule-based standardized penalty schedule. *See* HB 2730, §4.100. This rule will provide guidance to the Private Security Bureau staff and the regulated industry regarding the fines associated with various rule and statutory violations by the regulated community.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments. There are no economic costs to individuals who are required to comply with the amendments. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be more transparency and greater consistency relating to the manner in which the department administers the statute. There should be no economic costs resulting from the amendments of this rule.

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 the risks to human health from environmental exposure.

The department has determined that Texas Government Code, Chapter 2007, does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding the amendments.

Written comments on the proposed amendments may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter, and Texas Occupations Code, §1702.402(c), which requires the adoption of this rule.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b) and §1702.402(c).

§35.93. Penalty Range.

The board hereby adopts the following as [~~shall develop, utilize, and publish~~] guidelines for administrative penalties to be used in proceedings under Subchapter Q of the Act (§1702.401 et seq.) for violations of the Act and this chapter [~~these rules~~]. The following fines are to be construed as maximum penalties only. In assessing fines, department personnel are encouraged to consider the factors provided in §1702.402 of the Act.

Figure: 37 TAC §35.93

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003425
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER L. GENERAL REGISTRATION REQUIREMENTS

37 TAC §35.181

The Texas Department of Public Safety (the department) proposes amendments to §35.181, concerning Employment Requirements, in order to clarify the nature of the employer/employee relationship required in order to satisfy the statutory requirement of insurance coverage for regulated services. This rule provides guidance to the Private Security Bureau staff and the regulated industry regarding appropriate employment arrangements.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments. There are no economic costs to individuals who are required to comply with the amendments. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be greater assurance that regulated service providers are properly insured against claims arising from the provision of such services. There should be no economic costs resulting from the amendments of this rule.

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 the risks to human health from environmental exposure.

The department has determined that Texas Government Code, Chapter 2007, does not apply to this rule. Accordingly, the de-

partment is not required to complete a takings impact assessment regarding the amendments.

Written comments on the proposed amendments may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b).

§35.181. Employment Requirements.

(a) The employment relationship between a licensed company and its registrants or commissioned guards must be such that the licensee's commercial liability insurance policy provides coverage for claims arising from the regulated services provided on behalf of the licensee by its registrants or commissioned guards. The failure to obtain and maintain such coverage is a violation of §1702.123 of the Act. [~~A registrant or commissioned security officer of a licensed company must meet the specifications defined by the Internal Revenue Service as an "employee" or "contract laborer."~~]

(b) - (d) (No change.)

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003426
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER S. CONTINUING EDUCATION

37 TAC §35.292

The Texas Department of Public Safety (the department) proposes amendments to §35.292, concerning Requirements for Continuing Education Courses, in order to render the rule consistent with the proposed amendments to §35.70, regarding Fees published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3962). These amendments address the specific fee for continuing education schools. Its adoption provides guidance to the Private Security Bureau staff and the regulated industry regarding the fines associated with various rule and statutory violations by the regulated community.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments. There are no economic costs to individuals who are required to comply with the amendments. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be consistency in the Private Security Board's approved fee schedule. There should be no economic costs resulting from the amendments of this rule.

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 the risks to human health from environmental exposure.

The department has determined that Texas Government Code, Chapter 2007, does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding the amendments.

Written comments on the proposed amendments may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b).

§35.292. Requirements for Continuing Education Courses.

(a) All recognized continuing education schools shall be licensed by the Private Security Bureau (the bureau).

(b) All continuing education schools shall comply with the following:

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

(6) Schools shall teach all continuing education courses in the state of Texas, unless the course has a Texas-licensed continuing education school sponsor approved by the bureau [~~Bureau~~]. A Texas school must make a written request to sponsor an out of state course of instruction to the bureau [~~Bureau~~] at least sixty (60) days prior to the course presentation. The Texas school shall maintain records of instructors, courses taught, number of hours presented, and any Texas licensed or registered attendees of the sponsored school for a period of five (5) years.

(c) School directors of licensed continuing education schools shall comply with the following:

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

(6) The school director shall pay an annual licensing fee of $350.00 [~~$300.00~~].

(d) (No change.)

(e) Attendees of courses of continuing education shall maintain certificates of completion furnished by the school director in their files for a period of three (3) years. Attendees shall furnish the bureau [~~Bureau~~] with copies of all certificates of completion upon request.

(f) The bureau [~~Bureau~~] may recognize courses of instruction received through any state-recognized university, college, or community college upon proof of attendance and completion of the course with a passing grade.

(g) Companies licensed by the bureau [~~Bureau~~] with ten (10) or more registered employees may make a written request for a letter of exemption allowing them to provide continuing education to those employees registered under the requesting company's license. Such requests shall be addressed to the bureau manager [~~Bureau Manager~~]. A letter of exemption granted under this section shall be valid for two (2) years. To qualify for a letter of exemption, the company must appoint a training director, assure that all training is in compliance with all related administrative rules, maintain proof of all training, and provide each employee with a certificate of training as required by this section. There is no annual fee associated with a letter of exemption issued under this subsection.

(h) The bureau [~~Bureau~~] shall inspect the continuing education records of 10% of licensees and registrants annually to assure compliance with these requirements and to maintain the integrity of the continuing education 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 June 18, 2010.

TRD-201003427
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 159. SPECIAL PROGRAMS

37 TAC §159.17

The Texas Board of Criminal Justice (TBCJ) proposes amendments to §159.17, Employment Referral Services for Offenders--Memorandum of Understanding, which authorizes the Texas Department of Criminal Justice (TDCJ) to adopt a memorandum of understanding between the TDCJ, the Texas Workforce Commission, and the Texas Youth Commission. The proposed amendments are necessary to remove the Windham School District and substitute the TDCJ Reentry and Integration Division as the TDCJ division responsible for coordinating the Project for Reintegration of Offenders (Project RIO) within the TDCJ.

Jerry McGinty, Chief Financial Officer for the TDCJ, has determined that for the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that, for the first five year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, will be to provide employment referral services for offenders for their successful reentry into the community.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of these amendments.

The amendments are proposed under Texas Government Code §501.095 and Texas Labor Code §306.004 and §306.005.

Cross Reference to Statutes: Texas Government Code §492.001 and §§771.001 - 771.010.

§159.17. Employment Referral Services for Offenders--Memorandum of Understanding.

(a) The Texas Department of Criminal Justice (TDCJ) adopts the following memorandum of understanding (MOU) with the Texas Workforce Commission and [~~,~~] the Texas Youth Commission (TYC) [~~and the Windham School District (WSD)~~].

(b) This MOU is required by the Texas Government Code[~~,~~] §501.095 and Texas Labor Code[~~,~~] §306.004 and §306.005.

(c) Copies of the MOU are filed in the TDCJ Reentry and Integration [~~Parole~~] Division, 8610 Shoal Creek Blvd., Austin, Texas 78758 and may be reviewed during regular business hours.
Figure: 37 TAC §159.17(c)

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

Filed with the Office of the Secretary of State on June 17, 2010.

TRD-201003415
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: August 1, 2010
For further information, please call: (936) 437-6003

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TITLE 43. TRANSPORTATION

PART 3. AUTOMOBILE BURGLARY AND THEFT PREVENTION AUTHORITY

CHAPTER 57. AUTOMOBILE BURGLARY AND THEFT PREVENTION AUTHORITY

43 TAC §57.23

The Automobile Burglary and Theft Prevention Authority (ABTPA) proposes amendments to Chapter 57, §57.23, relating to the ABTPA financial, progress, and inventory reports. The proposed amendments change the reporting requirements for financial, progress and inventory reports from grantees to the ABTPA. The proposed amendments to §57.23 define the reporting period to be on a fiscal year basis, instead of calendar year, beginning September 1 and ending August 31 of each year. Currently, grantee reporting is on a calendar year basis for

required reports. The proposed change to a fiscal year reporting period is consistent with the State of Texas' budgeting and reporting schedules. The amendments also set out deadlines for submission of the required reports and require monthly progress reports instead of the current quarterly reports. Other conforming changes are made to the section for consistency and clarity.

Charles Caldwell, Director of the ABTPA, has determined that for the first five year period the amendments are in effect, there will be no additional fiscal implications for state and local governments as a result of enforcing or administering the proposed amendments.

Mr. Caldwell has also determined that, for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated will be better interface with the State of Texas' budgeting and reporting schedules and requirements, which will facilitate the agency's budget planning and grant monitoring, particularly as the ABTPA converts to an on-line reporting system.

Mr. Caldwell has also determined that, for each year of the first five years the proposed amendments will be in effect, there is no anticipated economic costs to persons required to comply with the rule as proposed for amendment. There is no effect on a local economy. There is no anticipated adverse economic effect on micro or small businesses as a result of the proposed amendments.

Comments on the proposed amendments may be submitted to Charles Caldwell, Director, Automobile Burglary and Theft Prevention Authority, 4000 Jackson Avenue, Austin, Texas 78731, for a period of 30 days from the date that the proposed action is published in the *Texas Register.*

The amendments are proposed under Texas Civil Statutes, Article 4413(37), §6(a), which the Authority interprets as authorizing it to adopt rules implementing its statutory powers and duties.

The following are the statutes, articles, or codes affected by the amendments: Texas Civil Statutes, Article 4413(37), §6(a).

§57.23. Financial, Progress, and Inventory Reports.

(a) Each grantee shall submit financial, monthly progress[~~,~~] and inventory reports in accordance with the instructions provided by the ABTPA on forms prescribed by the ABTPA. [~~All reports shall be submitted in accordance with the prescribed ABTPA forms for such reports.~~] Financial and inventory reports must be signed by the financial officer. Progress reports must be signed by the project director. [~~Inventory reports are to accompany the final financial report.~~]

(b) Monthly progress reports are due by the 5th business day of the following month.

(c) Financial reports are due quarterly and are due on the 5th business day of following month after the end of each quarter.

(d) A complete inventory report is due once a year and is to be included with the fourth quarter report.

(e) For purposes of this section, reporting is on a fiscal year basis, beginning September 1 through August 31.

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

Filed with the Office of the Secretary of State on June 19, 2010.

TRD-201003468
Charles Caldwell
Director
Automobile Burglary and Theft Prevention Authority
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 374-5101

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 12. SWORN COMPLAINTS
SUBCHAPTER C. INVESTIGATION AND PRELIMINARY REVIEW

1 TAC §12.81

The Texas Ethics Commission withdraws the proposed new §12.81 which appeared in the May 7, 2010, issue of the *Texas Register* (35 TexReg 3561).

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003403
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: June 16, 2010
For further information, please call: (512) 463-5800

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 3. CRIMINAL JUSTICE DIVISION

SUBCHAPTER H. CRIME STOPPERS PROGRAM CERTIFICATION

DIVISION 1. CRIME STOPPERS PROGRAM CERTIFICATION

1 TAC §§3.9000, 3.9005, 3.9007, 3.9010, 3.9011, 3.9013, 3.9015, 3.9017, 3.9019, 3.9021

The Office of the Governor, Criminal Justice Division (CJD), adopts amendments to Chapter 3, Subchapter H, §§3.9000, 3.9005, 3.9007, 3.9010, 3.9011, 3.9013, 3.9015, 3.9017, 3.9019, and 3.9021 without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1841).

The purpose of the adopted amendments is to ensure compliance with HB 590 (81 R-2009).

The adopted amendments to §§3.9000, 3.9005, 3.9007, 3.9010, 3.9011, 3.9013, and 3.9015 change the Crime Stoppers Advisory Council to Texas Crime Stoppers Council, as per HB 590 (81 R-2009).

The adopted amendments to §§3.9017, 3.9019, and 3.9021 change the Crime Stoppers Advisory Council to Texas Crime Stoppers Council, as per HB 590 (81 R-2009), and correct grammatical errors.

No comments were received regarding adoption of these rules.

These rules are adopted under §772.006(a)(10), Texas Government Code, which authorizes CJD to adopt rules and procedures as necessary.

These rules implement §772.006(a), Texas Government Code, which requires CJD to administer state and federal grant programs, and to assist the Governor in developing policies, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the adoption of these 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 June 21, 2010.

TRD-201003542

David Zimmerman
Assistant General Counsel
Office of the Governor
Effective date: July 11, 2010
Proposal publication date: March 5, 2010
For further information, please call: (512) 463-1919

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER A. CONTRACT FORMS

7 TAC §25.3

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to §25.3, concerning requirements for non-model contracts, without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3363).

The amendment to §25.3(g)(4) clarifies a disclosure of Guaranty Fund coverage in the context of a designated, third-party funeral provider that is not also the licensed seller of the prepaid funeral contract. Previously, subsection (g)(4) simply required a disclosure that the Guaranty Fund guarantees contract performance, which could be misleading. If failure to deliver the contracted funeral is not caused by a seller's breach of its obligations, the Guaranty Fund will not guarantee performance of the contract, as provided by Finance Code §154.351. This can occur, for example, when a third-party funeral provider fails or otherwise ceases business before performance is required. The disclosure is therefore modified to indicate, in the stated context, that the Guaranty Fund only guarantees the licensed seller's obligations under a prepaid funeral contract and does not guarantee performance of a third-party funeral provider.

The amendment to §25.3(a)(9) corrects an erroneous cross-reference to another subsection, and the amendment to figure 7 TAC §25.3(k)(1) corrects the department's zip code on that form.

Comments opposing the proposed amendments were received from Funeral Agency, Inc. and Lifetime Services, Inc.

A summary of the comments and the commission responses follow:

COMMENT: With respect to the proposed changes to subsection (g)(4), the commenters disagree with the department's interpre-

tation of Finance Code §154.351, that the Guaranty Fund addresses default by the licensed seller and does not cover default by the funeral provider if not also the seller (a third party funeral provider). Commenters contend that the department's narrow and technical interpretation is at odds with legislative intent. The commenters observe that Guaranty Fund assessments under Finance Code §§154.352, 154.3525, 154.356, and 154.3565 apply to all prepaid funeral contracts, not just those contracts sold by a permit holder that also serves as the funeral provider, thus indicating that the legislature intended to guarantee performance of all preneed contracts equally. One commenter also cites Finance Code §154.359(a)(1-5), which lists the types of claims the fund is authorized to pay, as evidence of legislative intent to cover all preneed contracts equally, including those with third party funeral providers. The commenters suggest that existing subsection (g)(4) should remain unchanged while an opinion is sought from the attorney general and/or a legislative clarification is pursued. If modification of subsection (g)(4) is necessary, one commenter suggests that the revision be modified to either limit coverage to default in those seller's obligations that are separate and distinct from the obligations of the funeral provider, or else expand coverage to both seller and the funeral provider obligations, without regard to whether these roles are assumed by separate parties.

RESPONSE: The Commission disagrees.

Finance Code §154.351(a) clearly requires the Guaranty Fund "to guarantee performance *by sellers...of their obligations* to the purchasers." The extent of the seller's obligations is a fact question. When the seller is also the funeral provider, the seller's obligations include providing the funeral services as specified in the prepaid funeral contract. Finance Code §154.151(c) provides that a funeral provider that *is not also the seller* must agree to the responsibilities of the funeral provider set out in Finance Code §154.161 by signing the prepaid funeral contract. Because a seller that also serves as the funeral provider is not required to separately acknowledge its funeral provider responsibilities, it follows that the seller's obligations already include providing the funeral services specified in the prepaid funeral contract.

The commission disagrees that Finance Code §154.359(a)(1-5) provides any clarity or is relevant to the question of whether the failure of a third-party funeral provider is covered by the Guaranty Fund.

The commission agrees that each prepaid funeral contract is subject to uniform Guaranty Fund assessments, but also observes that Guaranty Fund coverage applies equally to each prepaid funeral contract as well, guaranteeing performance by the seller of its obligations to the purchaser.

Because the disclosure in existing subsection (g)(4) could mislead a purchaser to believe that the failure of a third-party funeral provider would be covered by the Guaranty Fund, the commission disagrees with the suggestion that the provision does not need to be revised. In addition, because the language of the statute is unambiguous regarding coverage of only the seller's obligations, the commission does not believe a basis exists to seek an attorney general opinion on this issue.

COMMENT: Commenters object to the department's suggestions for implementation of the change to subsection (g)(4) and suggest alternatives. One commenter proposes that permit holders be allowed to use up existing inventory and stock of approved contracts without modifications until December 31, 2010. The other commenter suggests that an implementation date be agreed upon with permit holders and that a standard addendum or amendment form be used.

RESPONSE: The commission disagrees that permit holders should be allowed to continue using non-conforming disclosures in prepaid funeral contracts. It is important for the disclosures to be as accurate and informative as possible. The commission has no objection to the use of an addendum or amendment form added to the contract and signed by the purchaser. Therefore, permit holders will be allowed to change the printed contract form to add the new disclosure, hand write the new disclosure on the form, or add an addendum or amendment page signed by the purchaser to the contract that explains the Guaranty Fund coverage until the permit holder's current inventory of printed forms is depleted or until December 31, 2010, whichever comes first.

The amendments are adopted pursuant to Finance Code, §154.051, which authorizes the commission to adopt reasonable rules concerning the filing of prepaid funeral benefits contracts and the enforcement and administration of Chapter 154; Finance Code §154.151, which requires the department to approve a sales contract form for prepaid funeral benefits before the form is used and to provide model contracts that are easily read and written in plain language.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003450
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 8, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 475-1300

SUBCHAPTER B. REGULATION OF LICENSES

7 TAC §25.10

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to §25.10, concerning recordkeeping requirements for insurance-funded prepaid funeral contracts without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3364).

Amendments to subsection (a) clarify various general requirements of insurance-funded prepaid funeral contract permit holders (permit holders). Subsection (a)(1) clarifies that records can be made available for examination at a location outside of Texas if approved by the Commissioner of Banking (commissioner). This is the current practice and the amendment would clarify this in the rule. Subsection (a)(2) clarifies that additional records requested by the Department during an examination will be related to the information already requested. The change of the word "conduct" to "completion" in subsection (a)(2) and (3) more accurately describes the action referenced.

New subsection (b) contains language that has been moved from another place in the rule for better organization and clarity.

Amendments to subsection (c) generally clarify the requirements for maintaining and producing for examination the general files of the permit holder's operations. Subsection (c)(1), (c)(2), and (c)(6) are deleted because this information is available to the department through its own imaged records or is already required to be maintained in another section of Chapter 25.

Subsection (c)(2) eliminates the requirement to maintain a copy of the examination report acknowledgements for permit holders with uniform risk ratings of 1 or 2.

Subsection (c)(3) clarifies that only insurance policy forms and approval letters for policies currently being used need to be maintained in the permit holder's records.

Subsection (c)(4) provides specific descriptions of the types of documents that a permit holder must maintain in its general files.

New subsections (c)(8) and (c)(9) add to the rule the requirement to maintain a list of funeral home providers with outstanding contracts and a list of insurance agents currently selling for the permit holder. These lists are currently requested by Department examiners as part of the examination materials. The amendment simply includes this requirement in the rule.

New subsection (c)(10) requires permit holders to provide a list of funeral home providers that are known to the permit holder to have ceased business since the last examination. This new requirement will aid the department in ensuring that successor funeral providers are found to service the prepaid funeral contracts.

Subsection (d) includes clarifications and simplification of language, deletes information no longer needed, and includes new statutory requirements. Adopted subsection (d)(1) clarifies that files for each prepaid funeral contract rather than each purchaser must be maintained. Subsection (d)(2) adds a requirement that the executed policy application be maintained in the contract file. It is necessary for examiners to review this document to ensure the prepaid funeral contract is properly filled out. Language was deleted from subsection (d)(3) because it is no longer necessary for insurance-funded contract review due to statutory changes or has been moved within the subsection for better organization. Amendments to subsection (d)(3)(A) clarify and reorganize the language for better understanding. The requirements to maintain a certificate of performance of contract services executed by the decedent's personal representative and to maintain documentation of premium payment history in a matured-contract file were deleted from subsection (d)(3)(A)(iv) and (vi) because this information is no longer statutorily required or was modified by statutory changes. The requirement to maintain a pre-need to at-need reconciliation signed by the funeral provider was added as subsection (d)(3)(A)(vii) to comply with provisions of new Finance Code §154.161.

Amendments to subsection (d)(3)(B)(iii) clarify that either a copy of a Texas certified death certificate or a death certificate from the state in which death occurred can meet the requirements of this section and language in subsection (d)(3)(B)(iv) and (d)(4) was deleted because proof of payment history is no longer necessary. See the following discussion of Finance Code §154.203. Amendments to subsection (d)(5) make the subsection easier to read.

The title of subsection (e) (formerly subsection (d)) was changed to "Reports" to more accurately reflect its content. Previous subsection (e)(1) was deleted because the report it described was not necessary to determine compliance with statutory requirements for insurance-funded contracts. It was replaced with new subsection (e)(1) which requires the maintenance of a report detailing new business issued during the reporting period. This is not a new requirement, but was not previously detailed in the rule.

As a result of changes to Finance Code §154.203, which provide that receipt of premiums by an agent of the insurance company is considered receipt by the insurance company, previous subsection (d)(2) was deleted. Payment records are no longer necessary for examination of the permit holder.

New subsection (e)(2) contains language that was moved from other portions of the rule for better organization. Amendments to subsection (e)(3) reorganize and clarify the requirements for in-force policy reports. Cumulative growth totals for outstanding policies were deleted from this report as unnecessary.

Subsection (e)(4) clarifies the requirements for a reconciliation report related to newly issued policies. New subsection (e)(5) adds the requirement to maintain a suspense report of premiums for certain policies. This new requirement will aid the department in ensuring premiums paid to fund prepaid funeral contracts are properly reported.

Previous subsection (e) regarding conversions was deleted because this requirement is now contained in §25.25 of this chapter.

Previous subsection (f) was deleted because its content was moved to subsection (b).

Subsection (h) (formerly subsection (i)) removed language no longer necessary due to amendments to Finance Code §154.203 as explained previously.

Subsection (i) adds language to require documentation of testing of the permit holder's disaster recovery plan to support the effectiveness of the plan.

The Department received no comments regarding the proposed amendments.

The amendment is adopted pursuant to Finance Code §154.051, which authorizes the commission to adopt reasonable rules regarding the keeping and inspection of records relating to the sale of prepaid funeral benefits and filing of contracts and reports.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003451
A. Kaylene Ray
General Counsel
Texas Department of Banking
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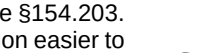
For further information, please call: (512) 475-1300



CHAPTER 33. MONEY SERVICES BUSINESSES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to §33.3, concerning the exclusion from licensing

for bank agents; §33.13, concerning new license applications; §33.21, concerning license renewals; §33.23, concerning permissible investments; §33.31, concerning currency exchange recordkeeping; §33.33, concerning currency exchange receipts; §33.35, concerning money transmission recordkeeping; §33.37, concerning money transmission receipts; and §33.51, concerning the provision of information to customers regarding complaint filing; and the repeal of §33.61, concerning the applicability of sale of checks and currency exchange rules. The amendments and repeal are adopted without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3369).

Amendments to §33.3 reorganize and clarify assertions that must be made by a financial institution or foreign bank branch to establish that money transmission is excluded from licensing under the agent exclusion.

Section 33.13 sets out the application requirements for a money transmission license. The amended language lessens the burden on applicants regarding background investigations for publically traded companies by specifying that a principal must have a 25% ownership interest to trigger an investigation of that person. Previously, principals with ownership interests as low as 10% were investigated if that person was the largest single shareholder of the company.

In §§33.21(a), 33.31(a), 33.33(a), 33.35(a), 33.37(a), and 33.51(a) transition language that is no longer needed due to the passing of time has been deleted.

Amendments to §33.23(b)(2)(A) add language to allow the department to request money transmission obligations for dates other than the specified calendar quarters.

Section 33.35(e) was reorganized and renumbered to clarify that none of the provisions of subsection (e) apply to a transmission governed by the federal Electronic Fund Transfer Act of 1978. Previously the subsection was not clear on that point.

Certain requirements for transactions over $3,000 were deleted from §33.35(e) to reduce the requirements on licensees where possible. The amendments removed the requirement that a licensee ask each customer whether the transaction is on the customer's behalf or for another person and record the other person's information and the requirement to keep a record of the customer's telephone number or the fact that they have no telephone. The words, "unless cash is the only method of payment" have been added to §33.35(e)(5)(A)(v) to eliminate the necessity for the licensee to record the method of payment when cash only is used.

Section 33.51(d) now requires that the license holder's telephone number be stated in the consumer complaint notice and clarifies that a customer with a complaint must first contact the license holder to attempt to resolve the complaint. The license holder's name and telephone number must be in a bold font so that it is easily read. These requirements become effective September 1, 2010, to provide licensees with time to amend their current notices.

Section 33.61 was repealed. This section was adopted in 2005 to provide transitional instructions regarding the regulations that should be followed until the Commission adopted regulations to implement the Money Services Act. The rules in Chapter 33 were adopted to implement this Act and therefore the transitional instructions are no longer needed.

The Department received no comments regarding the proposed amendments and repeal.

7 TAC §§33.3, 33.13, 33.21, 33.23, 33.31, 33.33, 33.35, 33.37, 33.51

The amendments are adopted pursuant to Finance Code §151.102, which authorizes the commission to adopt rules to administer and enforce Finance Code Chapter 151.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003452
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: July 8, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 475-1300

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7 TAC §33.61

The repeal is adopted pursuant to Finance Code, §151.102, which authorizes the commission to adopt rules to administer and enforce Finance Code Chapter 151.

This agency 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-201003453
A. Kaylene Ray
General Counsel
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Effective date: July 8, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 475-1300

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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 87. TAX REFUND ANTICIPATION LOANS

SUBCHAPTER A. REGISTRATION PROCEDURES

7 TAC §87.105

The Finance Commission of Texas (commission) adopts amendments to §87.105, concerning Fees, with regard to tax refund anticipation loans. The commission adopts the amendments without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3372).

The purpose of the amendments to §87.105 is to implement technical corrections. Section 87.105 sets out the fees for registered locations, registration amendments, and annual assess-

ments for the facilitators of tax refund anticipation loans. The amendments remove the parenthetical language from subsection (a) concerning TexasOnline and the last sentence of subsection (c), as that language is unnecessary. Revisions have been made to both §87.105(a) and (b) to improve grammar and readability. In addition, many of these changes provide better consistency with the language found in the agency's other fee rules.

The commission received no comments on the proposal.

The amendments are adopted under Texas Finance Code, §352.003, Registration of Facilitators, which authorizes the Finance Commission to adopt rules to prescribe procedures for the registration of and collection of processing fees from facilitators of tax refund anticipation loans.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 352, Tax Refund Anticipation Loans.

This agency 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-201003459
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: July 8, 2010
Proposal publication date: April 30, 2010
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PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER B. ORGANIZATION PROCEDURES

7 TAC §91.209

The Credit Union Commission (Commission) adopts amendments to §91.209, Reports and Charges for Late Filing, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1898). The amendments change the name of the rule to Call Reports and Other Information Requests, reorganize the rule for clarity, update the rule to reflect the new on-line call report process, and confirm that the call report filed with NCUA satisfies the quarterly financial reporting requirement. The amendments also notify credit unions of the consequences of filing false or misleading reports, decrease the charge for failing to submit a supplemental report or requested document from $100 to $50 per day, and establish deadlines for the payment of any fee or penalty assessed under the rule.

The amendments are adopted as a result of the Credit Union Department's (Department) general rule review. The Department received comments from fifty-three credit unions and one trade association. The comments uniformly objected to the commissioner being able to charge a penalty for a late call report. Most credit unions felt there should be provision for exceptions, such as when not all information was available when the report was due. Several comments objected to the short period of time allowed to file the call reports. Credit unions also object to the addition of subsection (b) concerning enforcement for filing false or misleading financial information and urged the Commission to change the wording to "fraudulent" to avoid penalizing credit unions for innocent false or misleading reports.

Initially, the Commission notes that it is not adding or amending the provision concerning the charge for filing a late call report. Finance Code §122.101 provides that a credit union is subject to sanctions for failing to file a timely call report. Since 1998 this rule has permitted the commissioner to assess $100 per day for late call reports. Subsection (c), which contains this provision, is being moved to subsection (a) in the amended rule, but remains substantially the same. Consequently, comments concerning the amount of the penalty or requesting exceptions are not germane to the current amendments. Similarly, comments addressing the period of time to file call reports do not address any current or amended language in the rule.

The Commission believes that the language concerning false or misleading reports is appropriate given the potential consequences of inaccurate financial statements. The Department relies on call reports to assess a credit union's financial condition and identify adverse trends between on-site examinations. Inaccurate call reports can disguise problems and prevent the Department from taking timely and proper action to address suspected deficiencies. The amendment does not increase the authority of the commissioner to take enforcement action. Rather, it makes credit unions aware of the importance of accurate and complete call reports and alerts them to potential consequences of false or misleading reports.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §122.101, which directs credit unions to submit call reports to the Commissioner and permits the Commissioner to charge a fee for late reports and under §122.255, Determination of Misconduct.

The specific sections affected by the amended rule are Texas Finance Code, §122.101 and §122.255.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003487
Harold E. Feeney
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Credit Union Department
Effective date: July 11, 2010
Proposal publication date: March 5, 2010
For further information, please call: (512) 837-9236

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SUBCHAPTER G. LENDING POWERS

7 TAC §91.720

The Credit Union Commission (Commission) adopts new §91.720, Small-Dollar, Short-Term Credit, with non-substantive changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1899). The new rule establishes parameters for making small-dollar, short-term loans. In addition to encouraging credit unions to help their members avoid reliance on high-cost debt, the rule addresses the fees that credit unions can charge for these loans. In response to comments received, the Commission has modified subsection (c) to clarify that the net worth limitation is applicable only to those loans with less restrictive approval requirements and subsection (d) to establish a presumption that a fee of $20 or less is reasonable.

The new rule is adopted because the Texas Credit Union Department (Department) continues to receive inquiries and requests to review and approve various payday alternative lending programs, including some with participation fees of $59 per month. Based on the growing interest, and on the fact that some Texas-based credit unions currently offer these loans through the e-access loan website (https://www.e-accessloan.com/newlayout/)--loans that include fees the Department believes are not consistent with Texas laws--the Commission determined it would be appropriate to issue guidance on what constitutes reasonable fees for small-dollar, short-term lending.

The Department received sixty-eight comments on the proposed rule. Fifty-nine credit unions and two trade associations opposed the rule. Four consumer groups supported the rule. At its meeting on June 18, 2010, the Commission received public comments both in support of and in opposition to the rule.

Overall, those opposed to the rule felt that it was unnecessary, arguing that credit unions are not charging excessive fees on small-dollar short-term loans and arguing that credit union boards of directors are in the best position to determine the level of fees. Similarly, a trade association objected to the rule as unnecessary micromanagement of the credit union by the regulator and agreed that the credit union's management and board are in the best position to determine the appropriate fees and loan mix for the credit union.

The Commission believes this rule is necessary because, despite the generally good reputation of credit unions, some are offering--or would like to offer--small-dollar, short-term loans, with monthly participation fees of $59 for loans as small as $300. The Commission believes that a fee of $59 per month for a small loan exceeds the amount that would be considered reasonable under Finance Code §124.101. The fee dwarfs the amount of interest earned on the loan; this lack of proportionality could cause the fees to be considered a finance charge, subjecting a credit union to usury penalties. Although a board of directors is charged with making loan pricing decisions, credit unions may not manipulate the structure of a loan in order to avoid the usury cap or to minimize Annual Percentage Rate (APR) disclosure. If the Legislature had been content to let credit unions determine the fees authorized under Finance Code §124.101, they could have simply noted that credit unions could require members to pay all "expenses and fees" incurred in making, closing, disbursing, extending, readjusting, or renewing a loan. The very inclusion of the word "reasonable" indicates that the Legislature wished to ensure that excessive fees were not charged. The Legislature has delegated the power to enforce the Finance Code to the commissioner and the power to adopt rules to the Commission. Therefore the commissioner may enforce the statutory standard of reasonableness, and the Commission may set conditions and procedures involved in the determination of whether a fee is reasonable.

Commenters also argued that the Legislature recognized credit unions' lack of consumer abuse and the ability of credit unions to exercise their business judgment as to what constitutes reasonable fees. Two commenters stated that the Legislature recognized the uniqueness of credit unions and gave credit unions more leeway in loan rates and fees than other lenders and see no reason for the Commission to change that.

While the Legislature has provided credit unions with some latitude on the issue of fees (Finance Code §124.101 permits a credit union to charge a reasonable fee for making, closing, disbursing, extending, readjusting, or renewing a loan), the statutory standard of reasonable is not unique to credit unions. The Legislature has routinely used this standard throughout the Texas statutes and there is no legislative history to indicate that such a standard was ever intended to grant unbridled authority to charge any amount a credit union desires. The Commission considers the reasonableness standard to be applicable to the borrowers, not the credit union, and it was not intended to provide a new revenue stream for credit unions. Accordingly, the Commission believes fees that exceed the cost of credit and are intended to substitute for and cover the cost of credit or to avoid usury limitations, are finance charges that should be included within the APR calculations. Moreover, other lenders in the state subject to Title 4 of the Finance Code are limited to a $20 administrative fee for cash advances of $1000 or less. The Commission believes that the discrepancy between a $59 per month fee and a one-time fee of $20 is far greater than any leeway the Legislature intended to give credit unions.

Many commenters suggested that the Department issue an advisory opinion or interpretive ruling rather than imposing more regulations.

The Commission declines to follow the suggestion that the Department issue an advisory opinion or interpretive statement. The commissioner has on several occasions issued interpretive letters relating to this matter; they have not stopped the questions or resolved the issue. Under Finance Code §15.4043, an interpretive statement or opinion is not enforceable and, given the significant compliance, reputation, and other risks associated with this type of lending, the Commission feels that enactment of a rule is the best course of action.

Commenters state that the rule does not permit credit unions to develop products that can compete with payday lenders without excessive losses, causing safety and soundness issues. Most of these commenters felt the $20 fee was not reasonable because it did not cover the costs of making these loans. One commenter did not believe that it was appropriate for a regulator to establish a fee, since every credit union is different. The commenter believes the $20 fee is not sufficient to cover the costs of these loans and reiterates that the proposed rule is a solution in search of a problem.

Arguments that the $20 is not cost effective, or that credit unions will lose money on these loans, ignore the language of Finance Code §124.101. Nothing in that provision links the reasonableness of a fee to whether it will cover potential losses on a loan. Fees cannot be set based on loss exposure. If they are, they become a cost of credit, subject to being included in the APR under federal law. Further, arguments that the credit union cannot compete with payday lenders without excessive losses overlook the fact that this loan program is not mandated. Credit unions

are not required to offer these loans if they are not cost effective for the credit union or if they believe the loans will cause them safety and soundness issues. Just as member business lending is not appropriate for all credit unions, these loans may not be suitable for some credit unions. Other credit unions, however, have found this fee to be sufficient for this type of loan. The Texas Credit Union League, who is also opposing the rule, has recently begun promoting REAL Solutions, a payday alternative loan program that has a $20 application fee. In addition, a growing number of credit unions across the country have similar programs that charge fees of $20 or less. The Commission believes that a payday day loan alternative is not a true alternative merely because it is a minimal improvement over a traditional high cost payday loan.

Credit unions also argued that they have the authority to lend and the proposed rule does not further that authority. They believe the rule was written to benefit the borrower, rather than addressing credit worthiness and pricing strategies, and feel that credit unions will be discouraged from offering payday lending alternatives if they cannot determine the reasonableness of their fees. The commenter suggests that rules imposing restrictions solely for the benefit of consumers pose safety and soundness issues and run the risk of restricting access to programs the rules claim to encourage.

The Commission disagrees: the credit unions' authority to lend is not without limit. Moreover, credit unions that charge excessive fees or that argue that loan programs should not benefit consumers risk harming the reputation of all credit unions. The Department's mission statement requires it to safeguard the public interest, protect the interests of credit union members, and promote public confidence in credit unions. The involvement of credit unions in false payday loan "alternatives" has the potential to tarnish the accomplishments of individual credit unions and the reputation of the industry. In addition, it invites the risk of adverse legislative consequences and could undermine public confidence in credit unions. Public confidence in credit unions is a safety and soundness consideration, well within the purview of the Commission.

Two commenters argued that the Credit Union Department is not authorized to define "reasonable" as used in Finance Code §124.101. One of these commenters believes that to define reasonable in this case is to define interest, solely within the purview of the Texas Legislature.

The Commission disagrees that it is without authority to define the term "reasonable". Several statutes support the Commission's authority to regulate this area. Finance Code §15.402 grants the Commission authority to adopt rules necessary to administer Title 2, Chapter 15 and to accomplish the purposes of Subtitle D, Title 3. The statute goes on to require the Commission to consider, among other factors, the need to provide credit union members with convenient, safe, and competitive services. The statute also provides that the presence or absence of a specific reference to rules regarding a particular subject does not enlarge or diminish the Commission's rulemaking authority. Finance Code §15.102 charges the Department (which by definition includes the Commission) with supervising and regulating credit unions. Defining the parameters of §124.101 is within this grant of authority. Finally, Finance Code §124.001 permits credit unions to make loans to a member "in accordance with rules adopted by the Commission". While the Commission agrees that the Legislature sets interest rates, the Commission can prevent credit unions from skirting those interest rate limits by charging excessive fees. Finance Code §124.103 provides that a fee authorized by §124.101 is not interest. A fee that is in excess of that authorized by §124.101 could be considered interest, subjecting the credit union to usury penalties. The Commission clearly has an interest in preventing credit unions from making usurious loans.

One credit union states that capping aggregate small dollar and short term credit as a percent of net worth and dictating fee amounts is regulatory micro management. Another argues that other service providers regulated by other state agencies are permitted to set rates and fees in accordance with risk and profit motives.

Small-dollar, short-term lending differs from auto loans and mortgages. Not only are these loans uncollateralized, but, typically, requirements for approval are minimal or substantially less than more traditional credit union loans. The resulting convenience and flexibility for borrowers adds considerable risk for the credit union. Setting fee amounts and capping certain activities as a percent of net worth is a vital part of regulation of financial institutions and not without precedent. The Commission believes it prudent to establish a limit for loans with less restrictive approval requirements; however, it agrees that subsection (c) should be clarified to eliminate any confusion.

Two commenters urge the Commission to appoint a committee under Finance Code §15.407 to make recommendations to the Commission for possible action.

The National Credit Union Foundation issued a white paper on the subject in 2008 and developed a 121-page toolkit to help credit unions build sustainable payday loans as a low-cost option for consumers. The Texas Credit Union League began studying the issue in February 2009 with 50 credit unions and as a result of their work launched its Real Solutions program in March 2010. Other state Leagues and credit union affiliated organizations have also studied the issue. The Commission feels that little can be gained from further study. Forming a committee, which must include parties representing all sides of the issue, would unnecessarily delay action on a matter that is timely.

One credit union expressed concern that existing data processing would not be able to track the limits, and the costs of the program would reduce the availability of this type of credit. The commenter suggests instead that the Department use examiners to take exception to unreasonable fees on a case by case basis. Another credit union stated that while they are part of the Real Solutions payday lending program, this rule is restrictive and not needed.

The Commission acknowledges that, as with any new program, the credit union must weigh the costs of implementing it. Costs to update data processing, if necessary, may outweigh the benefits of the program. The purpose of this rule is to set parameters for this type of loan; it is not intended to force any credit union to make this type of loan. Having examiners look at fees on a case-by-case basis is impractical and could result in inconsistent enforcement; an industry-wide standard avoids this problem. Credit unions that are part of the Real Solutions payday lending program are in compliance with this rule and it should not have any effect on their operations.

One commenter, addressing subsection (c), believes that it precludes credit unions from helping members who deal with payday lenders, since those members do not have a very good ability to pay. The commenter continues by questioning the basis for the limit on the $20 fee in subsection (d), suggesting that the

Commission imposed the limit without the aid of any empirical data or other research. The commenter also suggests that the Department has not adequately researched whether the savings component of subsection (f) could trigger usury issues.

Subsection (c) recognizes that the primary criteria in making these loans--and assessing a member's ability to pay--is whether a member has regular income. It permits the credit union to streamline the approval process, which also has the benefit of reducing the program costs. The basis for the limit is, as stated before, the similar limit in Finance Code Title 4 for other lenders. In addition, as noted, this is the limit for the Real Solutions payday loan alternative program implemented by the Texas Credit Union League. Whether the savings component of the rule triggers usury issues will depend on how the credit union administers the program. The savings program is not required, nor does the rule prescribe how it would work if it is included in the program. As with any new program, credit unions are encouraged to consult with their legal counsel to be sure the program in practice does not violate any applicable laws or regulations.

Four consumer groups supported the rule, stating that the fee limit is essential to ensure fair pricing. The commenters note that while most credit unions are examples of fair lending, some are abusing their positions as non-profits, offering payday loans at 18% but with a $59 monthly participation fee, resulting in an effective APR in excess of 200 percent. The commenters expressed concern that allowing such rogue practices would undermine the nonprofit mission and reputation of credit unions that are setting a good example in the marketplace. The commenters point out that the rule protects well-intentioned Texas credit unions from the reputational risk of having bad players in the market place. Finally, the commenters state that the rule is compatible with the REAL Solutions payday alternative program offered by Texas credit unions.

After reviewing the comments received and weighing the issues presented, the Commission has determined to modify subsection (d) to simply provide a safe harbor for those credit unions that choose to charge a fee of $20 or less. The Commission continues to believe that a $20 fee is an appropriate limit for these loans, but the rule no longer prohibits a higher fee provided it is reasonable. Credit unions that charge higher fees, however, must be prepared to support the reasonableness of the greater amount.

The new rule is adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules for loans to members and §124.101, which allows a credit union to charge reasonable fees when making a loan.

The specific section affected by the new rule are Texas Finance Code, §124.001 and §124.101.

§91.720. Small-Dollar, Short-Term Credit.

(a) General. Credit unions are encouraged to offer small-dollar credit products that are affordable, yet safe and sound, and consistent with applicable laws. The goal in offering these small-dollar credit products should be to help members avoid, or transition away from, reliance on high-cost debt. To accomplish this goal, credit unions should offer products with reasonable interest rates, low fees, and payments that reduce the principal balance of the loan or extension of credit.

(b) Definition. For purposes of this section, small-dollar, short term credit product is defined as a low denomination loan or extension of credit having a term of 6 months or less, where the amount financed does not exceed $1,100. Each credit union is responsible for establishing appropriate dollar limits and terms based upon its size and sophistication of operations, and its net worth.

(c) Limitation. Accessibility and expediency are important factors for many members with emergency or other short-term needs. Therefore, small-dollar credit products must balance the need for quick availability of funds with the fundamentals of responsible lending. Sound underwriting criteria should focus on a member's history with the credit union and ability to repay a loan within an acceptable timeframe. Given the small dollar amounts of each individual credit request, documenting the member's ability to repay can be streamlined and may need to include only basic information, such as proof of recurring income. The aggregate total of streamlined underwritten small-dollar credit products outstanding, however, shall not exceed 20% of the credit union's net worth.

(d) Fees. A credit union may require a member to pay reasonable expenses and fees incurred in connection with making or closing a loan. With respect to expenses and fees being assessed on small-dollar, short-term credit products, the expenses and fees are presumed to be reasonable if the aggregate total is $20 or less. In addition, if the credit union refinances a small-dollar, short-term credit product, it may charge such expenses and fees only once in a 180-day period. Credit unions may also charge a late fee as permitted by Finance Code §124.153.

(e) Payments. Credit unions should structure payment programs in a manner that reduces the principal owed. For closed-end products, loans should be structured to provide for affordable and amortizing payments. Lines of credit should require minimum payments that pay off principal. Excessive renewals or the prolonged failure to reduce the outstanding balance are signs that the product is not meeting the member's credit needs and will be considered an unsound practice.

(f) Required Savings. Credit unions may structure small-dollar credit programs to include a savings component. The funds in this account may also serve as a pledge against the loan or extension of credit.

This agency 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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Harold E. Feeney
Commissioner
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CHAPTER 93. ADMINISTRATIVE PROCEEDINGS

SUBCHAPTER A. COMMON TERMS

7 TAC §93.101

The Credit Union Commission (Commission) adopts amendments to §93.101, Scope, Definitions, Severability, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1900). The

amendments add definitions for the term application and for the acronym TAC.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which authorizes the Commission to adopt rules of procedure for a hearing under Subtitle D and under §15.4031, which permits the Commissioner to hold a hearing regarding any matter under Chapter 15 or Title 3, Subtitle D.

The specific sections affected by the amended rule are Texas Finance Code, §121.005 and §15.4031.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. GENERAL RULES

7 TAC §93.202

The Credit Union Commission (Commission) adopts an amendment to §93.202, Computation of Time, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1900). The amendment specifies that time limits are counted in calendar, rather than business, days.

The amendment is adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on this amendment.

The amendment is adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005 which permits the Commission to adopt rules of procedure for a hearing held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.204

The Credit Union Commission (Commission) adopts amendments to §93.204, Presiding Officer or Body, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1901). The amendments rename the rule Contested Case Hearing; Informal Disposition, and incorporate SOAH's rules by reference.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission has received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for a hearing held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.205

The Credit Union Commission (Commission) adopts amendments to §93.205, Notice of Hearing, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1901). The amendments incorporate language required by SOAH and the Administrative Procedure Act, reorder the rule, and revise the Notice of Hearing language and format to comply with SOAH requirements.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code

§121.005, which permits the Commission to adopt rules of procedure for a hearing held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.206

The Credit Union Commission (Commission) adopts amendments to §93.206, Default, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1902). The amendments rewrite and reformat the rule to clarify procedures for issuing a default order and the procedures and time frames for filing and ruling on a motion to set aside a default order.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.207

The Credit Union Commission (Commission) adopts amendments to §93.207, Service, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1903). The amendments rename the rule Service of Documents on Parties, and update and clarify the permissible methods for serving pleadings.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.209

The Credit Union Commission (Commission) adopts amendments to §93.209, Subpoenas, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1903). The amendments modify the procedure for issuing subpoenas to conform to SOAH's rules and the APA, delete unnecessary language, and clarify procedures for resolving objections.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.210

The Credit Union Commission (Commission) adopts amendments to §93.210, Protective Orders; Motions to Compel, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1904). The amendments rename the rule Discovery; Protective Orders; Motions to Compel, and clarify that unless modified by SOAH, discovery follows the APA and Texas Rules of Civil Procedure.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.211

The Credit Union Commission (Commission) adopts amendments to §93.211, Administrative Record, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1904). The amendments update the procedures for making a record of a contested case and for assessing costs against the parties.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.212

The Credit Union Commission (Commission) adopts amendments to §93.212, Proposal for Decision, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1905). The amendments reformat the rule for clarity and to conform to SOAH's rules.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.213

The Credit Union Commission (Commission) adopts amendments to §93.213, Appearances and Representation, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1906). The amendments simplify terms and language for greater clarity.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. APPEALS OF PRELIMINARY DETERMINATIONS ON APPLICATIONS

7 TAC §93.301

The Credit Union Commission (Commission) adopts amendments to §93.301, Finality and Request for SOAH Hearing, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1906). The proposed amendments rename the rule Finality of Decision; Request for SOAH Hearing; Waiver of Appeal, and revise the rule to incorporate time limits set out in the Texas Finance Code.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.303

The Credit Union Commission (Commission) adopts amendments to §93.303, Hearings of Applications to Incorporate, Amend Bylaws, or Merge or Consolidate, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1907). The amendments rename the rule Hearings on Applications, and include regulatory requirements as part of the evidence a party must establish to prove its case.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.304

The Credit Union Commission (Commission) adopts the repeal of §93.304, Appeals of Applications for Certificates of Authority, without changes to the proposal as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1907). The rule is no longer necessary since these appeals are covered by the more general §93.303 as amended.

The repeal is adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on the repeal.

The repeal is adopted pursuant to Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the repeal is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.305

The Credit Union Commission (Commission) adopts amendments to §93.305, Appeals of All Other Applications for Which No Specific Procedure is Provided by this Title, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1908). The amendments reword the rule for clarity and include regulatory requirements in the evidence a party must establish to prove its case.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. APPEALS OF CEASE AND DESIST ORDERS AND ORDERS OF REMOVAL

7 TAC §93.401

The Credit Union Commission (Commission) adopts amendments to §93.401, Appeals of Cease and Desist Orders and Orders of Removal, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1908). The amendments align the appeal deadlines with the Texas Finance Code, provide for confidentiality agreements if confidential information is involved, and clarify the commissioner's burden of proof in these cases.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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7 TAC §93.402

The Credit Union Commission (Commission) adopts amendments to §93.402, Stays, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1909). The amendments substitute the term "final" for "effective" to conform to the applicable Texas Finance Code provision and make other, non-substantive changes to the text.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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-201003536
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2010
Proposal publication date: March 5, 2010
For further information, please call: (512) 837-9236

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SUBCHAPTER E. APPEALS OF ORDERS OF CONSERVATION

7 TAC §93.501

The Credit Union Commission (Commission) adopts amendments to §93.501, Request for Hearing to Appeal an Order of Conservation, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1909). The amendments rename the rule Appeals of Orders of Conservation, align the hearing dates with the applicable statutory language, and provide for confidentiality agreements when confidential information is involved.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. APPEAL OF COMMISSIONER'S FINAL DETERMINATION TO THE COMMISSION

7 TAC §93.601

The Credit Union Commission (Commission) adopts amendments to §93.601, Motion for Appeal to the Commission, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1910). The amendments rename the rule Appeal to the Commission, align the appeal deadlines with the statutory language, and make other, non-substantive changes.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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Harold E. Feeney
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For further information, please call: (512) 837-9236

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7 TAC §93.602

The Credit Union Commission (Commission) adopts amendments to §93.602, Decision by the Commission, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1911). The amendments make technical, non-substantive changes to conform to the other rules.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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7 TAC §93.603

The Credit Union Commission (Commission) adopts amendments to §93.603, Oral Arguments Before the Commission, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1911). The amendments make technical, non-substantive changes to the

title and to the rule for clarity and to conform the language to the other rules.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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7 TAC §93.604

The Credit Union Commission (Commission) adopts amendments to §93.604, Motion for Reconsideration, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1912). The amendments rename the rule "Motion for Rehearing", revise the rule to adopt the procedures set out in the applicable section of the APA, and make other, non-substantive changes to the text.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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Harold E. Feeney
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Credit Union Department
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7 TAC §93.605

The Credit Union Commission (Commission) adopts amendments to §93.605, Final Decisions and Appeals, without changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1912). The amendments revise the language for clarity and to conform to the APA.

The amendments are adopted as a result of the Credit Union Department's general rule review.

The Commission received no comments on these amendments.

The amendments are adopted under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §121.005, which permits the Commission to adopt rules of procedure for hearings held under Subtitle D.

The specific section affected by the amended rule is Texas Finance Code, §121.005.

This agency 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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Credit Union Department
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TITLE 13. CULTURAL RESOURCES

PART 5. TEXAS STATE CEMETERY COMMITTEE

CHAPTER 71. TEXAS STATE CEMETERY

Introduction and Background.

The Texas State Cemetery Committee (the "Committee") adopts amendments to §§71.3, 71.11, 71.13 - 71.15, 71.21, and 71.23, concerning definitions, monuments, vaults and graveliners, cenotaphs, landscaping, burial reservations, and cancellation of burial reservations. In addition, the Committee adopts the repeal of §§71.1, 71.17, and 71.19, concerning organization, designation of special burial areas, and cemetery annex as these rules provide the public no additional guidance or direction than that reflected in the governing statutes. The amendments and repeal are adopted without changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2443).

These amendments and repeal are adopted pursuant to the Committee's rulemaking authority found in Texas Government Code, §2165.256(i) and §2165.2561(m) (Vernon 2008 & Supp. 2009).

Justification for the Adoption.

The adopted amendments and repeal reflect updates to agency references and definitions, ensure consistency with governing statutes and clarify current business practices, correct typographical errors, and delete language that provides no additional guidance or direction than that contained in the governing statutes.

Summary of Comments.

The comment period ended April 26, 2010. No comments were received.

13 TAC §§71.1, 71.17, 71.19

Statutory Authority.

The repeal is adopted 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 adopted repeal are those set forth in §2165.256 and §2165.2561 of the Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003439
Kay Molina
General Counsel
Texas State Cemetery Committee
Effective date: July 8, 2010
Proposal publication date: March 26, 2010
For further information, please call: (512) 463-4257

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13 TAC §§71.3, 71.11, 71.13 - 71.15, 71.21, 71.23

Statutory Authority.

The amendments are adopted 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 amendments are those set forth in §2165.256 and §2165.2561 of the Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201003440
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Effective date: July 8, 2010
Proposal publication date: March 26, 2010
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TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER A. ADMINISTRATION

16 TAC §402.101

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §402.101 (relating to Advisory Opinions), without changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2471). The purpose of the 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.

A public comment hearing was held on April 14, 2010 at 10:00 a.m. One individual representing the State VFW and the Bingo Interest Group was present at the hearing and commented against the amendments as proposed. The Commission received no written comments on the amendments during the public comment period.

Comment: The process as it's worked today has been helpful to the industry. And so changing the rule as has been published for public comment seems to be looking for a problem to solve when there's no problem that's there. Other agencies have advisory opinion provisions that permit reliance by others when "a fact situation that is substantially similar to the fact situation in which the person is involved." Texas Occupations Code §1001.604 and §1002.353 apply to engineers and geoscientists, allowing persons to rely on an advisory opinion issued by that agency. In addition, the Texas Ethics Commission regularly issues advisory opinions either at the request of an individual or the Ethics Commission on its own and no one has ever suggested that if it's an identical fact situation, that one elected official only can rely on it. The way the draft rule is published, charities would not be able to rely upon an opinion and would incur additional cost and expense to draft their own requests. Since there are well over a thousand licensed authorized organizations, I think it's in the agency's best interest to allow regulated licensed authorized organizations or commercial lessors or distributors or manufacturers to rely upon published advisory opinions.

Agency Response: The Commission disagrees. The rule should reflect the language of the Bingo Enabling Act (BEA) concerning reliance on bingo advisory opinions. Section 2001.059(c) of the BEA differs from the statutes cited by the commenter in that it limits reliance on an opinion to a "person who requests an advisory opinion." The statutes suggested by the commenter, Occu-

pations Code §1001.604 and §1002.353 and Government Code §571.097, do not modify "person" with the descriptive phrase "who requests an advisory opinion."

The amendments are adopted under 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-201003362
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: July 5, 2010
Proposal publication date: March 26, 2010
For further information, please call: (512) 344-5012

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SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.450

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.450 (relating to Request for Waiver), with changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2472). The purpose of the 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. No. 1474 effective October 1, 2009. Specifically, the new rule provides a definition for the term "waiver." The proposed definition for "force majeure" was not adopted in this rule because it is included in newly adopted 16 TAC §402.453 (relating to Request for Operating Capital Increase). 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.

A public comment hearing was held on April 14, 2010 at 10:00 a.m. One individual representing the State VFW and the Bingo Interest Group was present at the hearing and commented generally in favor of the rule, but made suggested changes to the new rule as proposed. The Commission received no written comments on the new rule during the public comment period.

Comment: In subparagraph (b)(3)(G) regarding the market analysis, there's still a lot of concern in the industry about the type of data that would be required.

Agency Response: A market analysis is not a required item in a credible business plan. A licensed authorized organization has great latitude to determine how they would conduct a market analysis if it chose to incorporate it into their credible business plan.

Comment: In subsection (e), "The Commission may consider the following in the approval of waiver applications." We would hope that it would be either "approval or modification" to give the staff more flexibility.

Agency Response: The Commission disagrees. A waiver application is submitted by a licensed authorized organization to be exempt from the requirements that its bingo operations must result in net proceeds over the organization's license period or that the organization must disburse the required amount of net proceeds for charitable purposes for a specific calendar quarter. Therefore, there is no monetary amount approved by the Commission.

The new rule is adopted under 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.

§402.450. Request for Waiver.

(a) Definition. The following word or term, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise: 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.

(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:

(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 as defined in §402.453 of this subchapter, 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 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-201003358
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

16 TAC §402.451

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.451 (relating to Operating Capital), with changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2473). The purpose of the new rule is to facilitate implementation of revisions to §2001.451 of the Bingo Enabling Act resulting from recent legislation H.B. No. 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 units calculations, retained operating capital limits, disbursement time frames, recalculation of operating capital, application for increase in capital limit, and compliance requirements.

A public comment hearing was held on April 14, 2010 at 10:00 a.m. One individual representing the State VFW and the Bingo Interest Group was present at the hearing and commented generally in favor of the rule, but made some suggested changes to the new rule as proposed. The Commission received written comments against the proposed new rule during the public comment period from St. Rose of Lima Catholic Church Bingo. The Commission also received written comments against the new rule as proposed from Clark, Thomas & Winters, on behalf of the Texas Association for the Advancement of Charitable Bingo and the various commercial lessor licensee subsidiaries of Littlefield Corporation.

Comment: In subsection (b), it states that the "bingo account balance of a licensed authorized organization on the last day of each calendar quarter may not exceed . . . ." We're suggesting that just one particular day is arbitrary. Picking one specific day and saying, "That's the day" might invite arbitrary numbers as opposed to perhaps an average number of a particular quarter or a particular month.

Agency Response: The Commission disagrees. The Commission selected the last day of the quarter because this is the due date for disbursement of the previous quarter's net proceeds and the last day in the reporting period. The Commission must have some mechanism in place, which currently is the quarterly report, to report and monitor an organization's compliance. Absent using the quarterly report for this purpose, the Commission would need to require each organization and unit to submit its average daily bank balance to meet this requirement. This would be overly burdensome to the regulated community.

Comment: Subsection (a)(2) as proposed reads: "Bingo account--The bingo checking account, bingo savings account, and petty cash if bingo funds, of a licensed authorized organization or unit." Does the Commission propose some other source for bingo petty cash? If so, what is the proposed source?

Agency Response: The Commission does not take a position on the other possible sources of petty cash.

Comment: Section 402.451(a)(4) as proposed reads: "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." Exactly how are prizes supposed to be paid--is there some secret non-bingo fund that is supposed to be used to pay prizes?

Agency Response: Texas Occupations Code §2001.451(h) sets forth the requirements for retained operating capital limit that are included in proposed §402.451(a)(4).

Comment: Does the Commission intend to set up a system of payment priorities so that in a quarter in which expenses are above average, vendors can be told "You will just have to wait for your money, the state will not let me pay you until next quarter"?

Agency Response: The Commission does not intend to set up a system of payment priorities. The timing and recipients of payments is an organization's business decision.

Comment: It would appear that the Commission is confusing the word "capital" with the word "cash," since capital includes among other things, the value of supplies and equipment on hand, as well as cash on hand.

Agency Response: "Capital" is a term provided by the Legislature in the Bingo Enabling Act.

Comment: At subsection (b) petty cash has disappeared from the bingo account, at least on the last day of the quarter.

Agency Response: Petty cash is included in the definition of "bingo account."

Comment: If this regulation is implemented, there will be an exemption from limits required for each and every bingo in Texas, making the whole regulation meaningless.

Agency Response: The Commission does not understand the commenter's conclusion.

Comment: The amendments seem to contemplate that all industry participants are on a cash basis for accounting purposes. In fact, this is not the case. Many industry participants adhere to Generally Accepted Accounting Principles (GAAP) and keep their books on an accrual basis.

Agency Response: The Commission disagrees. This rule, in totality, provides the requirement for documenting and justifying a bingo expense. Bingo is a fund raising activity for licensed authorized organizations. Licensed organizations themselves may and possibly should keep their organization books according to GAAP; however, the bingo activity should be reported to the Texas Lottery Commission using the cash basis accounting method, where the receipts are reported on the date of the sale and the expenses on the date the check or withdrawal is written. Cash basis accounting is simpler for organizations as related to bingo as a fund raising activity.

Comment: Even if the Commission is not willing to mandate the use of GAAP in an effort to improve financial reporting, we believe that it should at least foster and encourage those in the industry to use commercially available accounting software in order to improve the quality of participants' financial records. Therefore, many of the comments simply allow for the use of GAAP and widely used commercially available accounting software by industry participants.

Agency Response: The Commission does not require, limit, or designate specific accounting software. However, quarterly reporting is done on a cash accounting basis and records should be maintained in a manner that documents the figures contained on the report.

Comment: At subsection (a)(2), the phrase "balance, reconciled to include outstanding checks, deposits in transit and outstanding bingo expenses" should be added to the rule. Also the word "balance" should be added after "bingo savings account".

Agency Response: The Commission agrees in part. Rather than add the language to subsection (a)(2) which is a definition of what constitutes a "bingo account" for purposes of this rule, the Commission has added "reconciled to include outstanding checks and deposits in transit" to subsection (b).

Comment: In subsection (e)(1), the phrase, "or the fiscal year of the bingo unit." should be added to the end of the rule.

Agency Response: The Commission disagrees. Unit accounting can have dramatic changes in the unit membership and thus would make it virtually impossible to track. Establishing a consistent four quarter period for calculating the operating capital of units enhances efficient use of limited resources.

Comment: At subsection (g)(3), the phrase "that is equal to the average unit member operating capital" should be deleted.

Agency Response: The Commission does not agree that the phrase should be deleted because it provides clarity as to how the amount is determined.

The new rule is adopted under 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.

§402.451. Operating Capital.

(a) Definitions. The following words or terms, when used in this chapter, shall have the following 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, reconciled to include outstanding checks and deposits in transit, 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 its 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 by 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 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
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

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16 TAC §402.452

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.452 (relating to Net Proceeds), without changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2475). The purpose of the new rule is to facilitate implementation of revisions to §2001.451 of the Bingo Enabling Act resulting from recent legislation H.B. No. 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.

A public comment hearing was held on April 14, 2010 at 10:00 a.m. One individual representing the State VFW and the Bingo

Interest Group was present at the hearing and commented in favor of the new rule as proposed. The Commission received written comments against the new rule as proposed from Clark, Thomas & Winters, on behalf of the Texas Association for the Advancement of Charitable Bingo and the various commercial lessor licensee subsidiaries of Littlefield Corporation.

Comment: The new rule seems to contemplate that all industry participants are on a cash basis for accounting purposes. In fact, this is not the case. Many industry participants adhere to Generally Accepted Accounting Principles (GAAP) and keep their books on an accrual basis.

Agency Response: The Commission disagrees. This rule, in totality, provides the requirement for documenting and justifying a bingo expense. Bingo is a fund raising activity for licensed authorized organizations. Licensed authorized organizations themselves may keep their organization books according to GAAP; however, the bingo activity should be reported to the Texas Lottery Commission using the cash basis accounting method, where the receipts are reported on the date of the sale and the expenses on the date the check or withdrawal is written. Cash basis accounting is simpler for organizations as related to bingo as a fund raising activity.

Comment: Even if the Commission is not willing to mandate the use of GAAP in an effort to improve financial reporting, we believe that it should at least foster and encourage those in the industry to use commercially available accounting software in order to improve the quality of participants' financial records. Therefore, many of the comments simply allow for the use of GAAP and widely used commercially available accounting software by industry participants.

Agency Response: The Commission does not require, limit, or designate specific accounting software. However, quarterly reporting is done on a cash accounting basis and records should be maintained in a manner that documents the figures contained on the report.

The new rule is adopted under 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 344-5012

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16 TAC §402.453

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.453 (relating to Request for Operating Capital Increase), without changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2476). The purpose of the new rule is to facilitate implementation of revisions to §2001.451 of the Bingo Enabling Act resulting from recent legislation H.B. No. 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.

A public comment hearing was held on April 14, 2010 at 10:00 a.m. One individual representing the State VFW and the Bingo Interest Group was present at the hearing and commented in favor of the new rule as proposed. The Commission received no written comments on the proposed new rule during the public comment period.

The new rule is adopted under 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 344-5012

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SUBCHAPTER E. BOOKS AND RECORDS

16 TAC §402.506

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §402.506 (relating to Disbursement Records Requirements), with changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2477). The purpose of the 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) delete subsection (b)(7) and renumber accordingly; (2) add "Actual or imaged bank" to newly renumbered subsection (b)(7); (3) add new subsections (b)(9) and (10); (4) add "operations of the organization and the allocation of the expenditure" to subsection (d); and (5) add new subsections (e), (f), and (g). As a result of public comments, "by occasion" has been deleted from subsection (b)(2) and "will" has been changed to "may" in subsection (f) of the adopted rule.

A public comment hearing was held on April 14, 2010 at 10:00 a.m. One individual representing the State VFW and the Bingo Interest Group was present at the hearing and commented generally in favor of the amendments, but suggested some changes to the amendments as proposed. During the public comment period, the Commission received written comments against the amendments as proposed from an individual representing the Texas Association for the Advancement of Charitable Bingo and

the various commercial lessor licensee subsidiaries of Littlefield Corporation.

One commenter submitted a draft rule showing changes to portions of subsections (a), (b), and (c) for which the Commission did not propose any amendments. In addition, the commenter did not clearly state the reason for the specific changes. The Commission disagrees with and declines to make the changes because they were not published for public comment.

Comment: Regarding subparagraph (b)(10), requiring the charity or unit to "maintain records to document any expenses for promotions or door prizes." The rule should not foreclose an organization from utilizing non-bingo funds to pay for some of those promotion type expenses.

Agency Response: The agency agrees. Promotional expenses may be paid from bingo or non-bingo funds source. However, supporting documentation must be maintained for all bingo promotion or door prizes.

Comment: In subsection (e)(1), if the cash disbursements journal is nothing more than a check register, that's easy for any organization. But if the cash disbursements journal is something other than a check register, and the rule is requiring organizations to convert records from an accrual basis to a cash basis, it will create a hardship and an expense.

Agency Response: The cash disbursement journal would be maintained in a similar manner to a check register. Quarterly Reporting is done on a cash accounting basis, not an accrual basis. Therefore, records should be maintained in that manner.

Comment: In subsection (f), the rule as drafted says, "Bank fees incurred because the organization fails to maintain sufficient funds. . . to cover expenditures. . . will not be considered a reasonable or necessary expense." That's contrary to the IRS practice, which generally allows those types of expenses. My suggestion is "may," and the agency could look at the circumstances and make a determination on a case-by-case basis.

Agency Response: The agency agrees with the change from "will" to "may" to allow the agency latitude.

Comment: The amendments seem to contemplate that all industry participants are on a cash basis for accounting purposes. In fact, this is not the case. Many industry participants adhere to Generally Accepted Accounting Principles (GAAP) and keep their books on an accrual basis.

Agency Response: The Commission disagrees. This rule, in totality, provides the requirement for documenting and justifying a bingo expense. Bingo is a fund raising activity for licensed authorized organizations. Licensed organizations themselves may and possibly should keep their organization books according to GAAP; however, the bingo activity should be reported to the Texas Lottery Commission using the cash basis accounting method, where the receipts are reported on the date of the sale and the expenses on the date the check or withdrawal is written. Cash basis accounting is simpler for organizations as related to bingo as a fund raising activity.

Comment: Even if the Commission is not willing to mandate the use of GAAP in an effort to improve financial reporting, we believe that it should at least foster and encourage those in the industry to use commercially available accounting software in order to improve the quality of participants' financial records. Therefore, many of the comments simply allow for the use of GAAP and widely used commercially available accounting software by industry participants.

Agency Response: The Commission does not require or limit specific accounting software. However, quarterly reporting is done on a cash accounting basis and records should be maintained in a manner that documents the figures contained on the report.

Comment: At subsection (b)(1)(A), the phrase "including the address and telephone number" should be deleted.

Agency Response: The agency agrees and has deleted "including the address and telephone number: from subsection (b)(1)(A).

Comment: At subsection (b)(7), the phrase" to the extent available from financial institution." should be added.

Agency Response: The agency agrees and at subsection (b)(7) has added the phrase "to the extent available from the financial institution."

Comment: Subsection (b)(10) should read, "A licensed authorized organization or unit shall maintain records to document any expenses, including incidental expenses, for promotions or door prizes, including any advertisements, flyers, game schedules, or documents reflecting any special pricing structures.

Agency Response: The agency agrees and has added the suggested language to subsection (b)(10).

Comment: At subsection (d), the language "and the allocation of the expenditure between bingo expense and charitable distribution" should be deleted.

Agency Response: The agency disagrees. The commenter did not provide a reason for deleting the language, and the Commission believes the additional language further clarifies that certain expenses are required to be allocated by expense or charitable distribution.

Comment: At subsection (e) in the first sentence, "Cash Disbursement Journal" should be changed to "transaction journal".

Agency Response: The agency disagrees because the term "transaction" is too broad.

Comment: At subsection (e), the second sentence should be deleted.

Agency Response: The agency agrees because the requirement is contained in (e)(2)(H).

Comment: A third sentence should be added to the subsection (e) that reads, "Any licensed authorized organization that maintains its records on a commercially available accounting software package (e.g. Quicken) then use of the standard accounting features of the package shall meet the requirements of this rule."

Agency Response: The agency agrees and has added to subsection (e), "If any licensed authorized organized organization maintains its records on a commercially available accounting software package (e.g. Quicken), use of the standard accounting features of the package shall meet the requirements of this section."

Comment: Subsection (e)(2) should refer to the "transactions journal" rather than the "Cash Disbursement Journal."

Agency Response: The agency disagrees because the term "transaction" is overly broad.

Comment: Subsections (e)(2)(B), (C), and (I) should be deleted.

Agency Response: The agency disagrees. The information is necessary for the agency to perform adequate oversight of the disbursements of an organization.

Comment: Subsection (e)(2)(D) should read, "Date of transaction;"

Agency Response: The agency disagrees because the term "transaction" is overly broad.

Comment: Subsection (e)(2)(E) should read, "Check number, if appropriate;".

Agency Response: The agency disagrees because the suggested change would not clearly state the requirement.

Comment: Subsection (e)(2)(H) should omit the requirement that "each expense item shall correspond to the category on the Texas Bingo Quarterly Report."

Agency Response: The agency disagrees. The Quarterly Report requires expense items to be categorized. Maintaining records in a manner consistent with the Quarterly Report will help reduce reporting errors.

Comment: Subsection (f) should substitute "transactions" for "checks written." The second sentence should be deleted.

Agency Response: The agency disagrees because "transactions" is overly broad. The second sentence is necessary to advise organizations that bank fees incurred because of failing to maintain sufficient funds in its account to cover expenditures will not be considered a reasonable or necessary expense.

Comment: At subsection (g), "transactions journal" should be added, and "disbursement" should be deleted.

Agency Response: The agency disagrees because the term "transactions" is overly broad. "Disbursement" will not be deleted because the agency needs to know when funds are disbursed.

The amendments are adopted under 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.

§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:

(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;

(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) Actual or imaged bank statements, deposit slips and cancelled checks or cancelled check images, to the extent available from the financial institution.

(8) Debit card transactions reports.

(9) The purpose, amount and payee for each electronic transfer from the organization's bingo checking account.

(10) A licensed authorized organization or unit shall maintain records to document any expenses, including incidental expenses, for promotions or door prizes, including any advertisements, flyers, game schedules, or documents reflecting any special pricing structures.

(c) 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.

(d) 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 between bingo expense and charitable distribution.

(e) 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. If any licensed authorized organized organization maintains its

records on a commercially available accounting software package (e.g. Quicken), use of the standard accounting features of the package shall meet the requirements of this section.

(1) 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.

(2) Cash Disbursement Journal Required Information:

(A) organization or unit name;

(B) taxpayer or unit number;

(C) calendar quarter;

(D) date of check, withdrawal or electronic funds transfer transaction;

(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 expenditures from the bingo account may not be considered a reasonable or necessary expense.

(g) All disbursement records must be complete, accurate, legible, and maintained for four (4) years by the licensed authorized organization.

This agency 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
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5012

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16 TAC §402.514

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.514 (relating to Electronic Fund Transfers), with changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2479). The purpose of the new rule is to facilitate implementation of §2001.452 of the Bingo Enabling Act resulting from recent legislation H.B. No. 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.

A public comment hearing was held on April 14, 2010 at 10:00 a.m. One individual representing the State VFW and the Bingo Interest Group was present at the hearing and commented generally in favor of the rule but made suggested changes to the new rule as proposed. During the public comment period the Commission received written comments against the new rule as proposed from Clark, Thomas & Winters, on behalf of the Texas Association for the Advancement of Charitable Bingo and the various commercial lessor licensee subsidiaries of Littlefield Corporation.

Comment: Subsection (b)(2)(B) states, "The licensed authorized organization or unit shall maintain documentation of board approval of changes in the person(s) authorized to execute electronic funds transfers." It is not the case that every organization will actually have board approval for electronic fund transfers. In the case of a number of non-profit organizations I regularly represent, they don't have board approval for people to write checks, make deposits, et cetera, absent extraordinary circumstances. We believe it is over-reaching to mandate always board approval for that.

Agency Response: Although the agency does not disagree with the comments, we do not feel it is unreasonable to require that documentation be maintained showing authorization to perform EFTs by the licensed organization or unit. The agency has modified the language in subsection (b)(2)(B) to create greater latitude for what documentation must be maintained by the organization or unit.

Comment: In subsection (c)(2)(F) concerning recordkeeping for electronic funds transfers, "the name of the person executing the EFT transaction on behalf of the organization or unit" means that the organization would have to always keep that information available. It's unreasonable to have readily available exactly who authorized an electronic funds transfer. For the ordinary run of things, they're not going to know that.

Agency Response: Because multiple persons may have access to on-line banking under one account and one login, the Commission feels it is not unreasonable to maintain documentation as to who executed the transaction.

Comment: The amendments seem to contemplate that all industry participants are on a cash basis for accounting purposes. In fact, this is not the case. Many industry participants adhere to Generally Accepted Accounting Principles (GAAP) and keep their books on an accrual basis.

Agency Response: The Commission disagrees. This rule, in totality, provides the requirement for documenting and justifying a bingo expense. Bingo is a fund raising activity for licensed authorized organizations. Licensed organizations themselves may and possibly should keep their organization books according to GAAP; however, the bingo activity should be reported to the Texas Lottery Commission using the cash basis accounting method, where the receipts are reported on the date of the sale and the expenses on the date the check or withdrawal is written. Cash basis accounting is simpler for organizations as related to bingo as a fund raising activity.

Comment: Even if the Commission is not willing to mandate the use of GAAP in an effort to improve financial reporting, we believe that it should at least foster and encourage those in the

industry to use commercially available accounting software in order to improve the quality of participants' financial records. Therefore, many of the comments simply allow for the use of GAAP and widely used commercially available accounting software by industry participants.

Agency Response: The Commission does not require, limit, or designate specific accounting software; however, quarterly reporting is done on a cash accounting basis and records should be maintained in a manner that documents the figures contained on the report.

Comment: At subsection (b), we suggest capitalizing the word "over".

Agency Response: The Commission agrees and has capitalized the word "over" at subsection (b).

Comment: Delete subparagraph (E) at subsection (c)(1) and subparagraph (G) at subsection (c)(2) concerning EFT confirmation receipt.

Agency Response: The agency disagrees. This information is only necessary if provided by the payee.

Comment: At subsection (d), we suggest "or administer" be added.

Agency Response: The Commission disagrees. Requiring additional individuals to be responsible for notifying the organization's financial institution to report problems or suspected unauthorized access to the bingo account could be overly burdensome on the organization.

The new rule is adopted under 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.

§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. Documentation may include but is not limited to: meeting minutes, bank account signature cards, or copies of applications to the financial institution to authorize individuals access to perform on-line banking in association with the bingo bank account or unit bank account.

(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) payer 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 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
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) adopts amendments to 16 TAC §402.600 (relating to Bingo Reports), with

changes to the proposed text as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2480). The purpose of the 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 section (e)(1), "The report shall also include information regarding taxes, insurance premiums, and utility expenses, that are paid by the lessor, and reimbursed by an authorized organization or unit to the lessor"; (5) delete existing subsections (g) and (h) 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).

A public comment hearing was held on April 14, 2010 at 10:00 a.m. One individual representing the State VFW and the Bingo Interest Group was present at the hearing and commented generally in favor of the amendments, but suggested changes to the amendments as proposed. During the public comment period the Commission received written comments against the amendments as proposed from Clark, Thomas & Winters, on behalf of the Texas Association for the Advancement of Charitable Bingo and the various commercial lessor licensee subsidiaries of Littlefield Corporation.

One commenter submitted a draft rule showing changes to subsections (f)(1) and (l)(3) for which the Commission did not propose any amendments. In addition, the commenter did not clearly state the reason for the specific changes. The Commission disagrees with and declines to make the changes because they were not published for public comment.

Comment: The amendments seem to contemplate that all industry participants are on a cash basis for accounting purposes. In fact, this is not the case. Many industry participants adhere to Generally Accepted Accounting Principles (GAAP) and keep their books on an accrual basis.

Agency Response: The Commission disagrees. This rule, in totality, provides the requirement for documenting and justifying a bingo expense. Bingo is a fund raising activity for licensed authorized organizations. Licensed organizations themselves may and possibly should keep their organization books according to GAAP; however, the bingo activity should be reported to the Texas Lottery Commission using the cash basis accounting method, where the receipts are reported on the date of the sale and the expenses on the date the check or withdrawal is written. Cash basis accounting is simpler for organizations as related to bingo as a fund raising activity.

Comment: Even if the Commission is not willing to mandate the use of GAAP in effort to improve financial reporting, we believe that it should at least foster and encourage those in the industry to use commercially available accounting software in order to improve the quality of participants' financial records. Therefore, many of the comments simply allow for the use of GAAP and widely used commercially available accounting software by industry participants.

Agency Response: The Commission does not require or limit specific accounting software; however, quarterly reporting is done on a cash accounting basis and records should be maintained in a manner that documents the figures contained on the report.

Comment: Subsection (e)(1) should be re-written by replacing "income" with "revenue" at the end of the first sentence and at the end of the last sentence.

Agency Response: The agency disagrees. Use of "income" is consistent with other rules.

Comment: Delete the following words from the second sentence in subsection (e)(1): "property", "on the facility, water, electric, . . . gas", "property and casualty", and "for the facility".

Agency Response: The agency agrees and has deleted the words.

Comment: The phrase "as defined in rule section 402.515(a)" should be added in the second sentence in subsection (e)(1).

Agency Response: The agency disagrees. Because there is no bingo rule §402.515(a), the comment is unclear.

Comment: The phrase "or to be reimbursed" should be added after "reimbursed" in the second sentence of subsection (e)(1).

Agency Response: The agency disagrees. Anticipated reimbursements are not part of cash basis method of accounting.

The amendments are adopted under 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.

§402.600. Bingo Reports.

(a) On or before the 25th 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 email address of the person sending the quarterly report.

(d) 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) 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 stating the rental income received. The report shall also include information regarding taxes, insurance premiums, and utility expenses, that are paid by the lessor, and reimbursed by an authorized organization 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 calendar quarter regardless of whether income was received.

(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.

(f) Quarterly report for information relating to a manufacturer or distributor license.

(1) A manufacturer or distributor 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 bingo equipment, 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 information being true and correct.

(4) The Commission will deny a renewal application or revoke 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) A manufacturer or distributor shall use the eleven digit taxpayer numbers on file with the Commission when submitting information 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 manufacturer or distributor for correction. If five or less taxpayer numbers 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) 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.

(i) The licensee must file a report with the Commission even if no games were conducted or no rental tax collected. Failure to file a required report by the due date may result in an administrative penalty.

(j) 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) 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 licensee 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 quarters in accordance with Occupations Code §2001.510 and §2001.511.

(l) 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 counties 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, interest 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 adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-201003357
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: July 5, 2010
Proposal publication date: March 26, 2010
For further information, please call: (512) 344-5012

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 203. LICENSING AND ENFORCEMENT--SPECIFIC SUBSTANTIVE RULES

22 TAC §203.30

The Texas Funeral Service Commission (commission) adopts an amendment to §203.30, concerning Continuing Education, with changes to the proposed text as published in the January 8, 2010, issue of the *Texas Register* (35 TexReg 178) and will be republished.

The amendment is adopted to eliminate the time-consuming paperwork and increased efficiency on the part of persons who supervise continuing education.

The commission received no comments on the proposed amendment.

The amendment is adopted under Texas Occupations Code, §651.152. The commission interprets §651.152 as authorizing it to adopt rules as necessary to administer Chapter 651.

§203.30. Continuing Education.

(a) Purpose. Each person holding an active license and practicing as a funeral director or embalmer in this state is required to participate in continuing education as a condition of license renewal.

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

(1) Approved provider--Any person or organization conducting or sponsoring a specific program of instruction that has been approved by the commission.

(2) Approved program--A continuing education program activity that has been approved by the commission. The program shall contribute to the advancement, extension, and enhancement of the professional skills and knowledge of the licensee in the practice of funeral directing and embalming by providing information relative to the funeral service industry and be open to all licensees.

(3) Hour of continuing education--A 50 minute clock hour completed by a licensee in attendance at an approved continuing education program.

(c) Types of acceptable continuing education. Acceptable sources of continuing education are institutes, seminars, workshops, conferences, independent study programs, college academic or continuing education courses which are related to or enhance the practice of funeral directing or embalming and are offered or sponsored by an approved provider and open to all licensees.

(d) Approval of continuing education.

(1) A person or entity seeking approval as a continuing education provider shall file a completed application on a form provided by the commission and include the continuing education provider fee and the fee for each course submitted. Governmental agencies are exempt from paying this fee.

(2) National or state funeral industry professional organizations may apply for approval of seminars or other courses of study given during a convention.

(3) An application for approval must be accompanied by a syllabus for each course submitted which specifies the course objectives, course content and teaching methods to be used, and the number of credit hours each course is requesting to be granted, and a brief resume or description of the instructor and the instructor's qualifications.

(4) A provider is not approved until the executive director communicates in writing that the application has been accepted and issues a Provider Number for the provider and a course number for each course offered under that Provider number. The commission may refuse to approve a provider's application for any valid reason, as determined by the commission.

(5) A Provider Number and Course number are valid for one year, expiring on December 31st of each year, regardless of when the number was granted.

(e) Responsibilities of approved providers.

(1) The provider shall verify attendance at each program and provide a certificate of attendance to each attendee. The certificate of attendance shall contain:

(A) the name of the provider and approval number;

(B) the name of the participant;

(C) the title of the course or program, including the course or program number;

(D) the number of credit hours given;

(E) the date and place the course was held;

(F) the signature of the provider or provider's representative;

(G) the signature of each attendee.

(2) The provider shall maintain the attendance records for a minimum of two years on each course provided.

(3) The provider shall provide a mechanism for evaluation of the program by the participants, to be completed on-site or at the time the program concludes. A copy of the evaluations and/or attendance roster shall be submitted to the commission upon request. Providers shall keep evaluations for two years after the course is presented.

(4) The provider shall provide a syllabus of each course offered, which may include a copy of any video offered for home study.

(5) The provider shall be responsible for ensuring that no licensee receives continuing education credit for time not actually spent attending the program.

(6) Commission staff may monitor any continuing education with or without prior notice.

(f) Credit hours required.

(1) Licensed funeral directors and embalmers who actively practice in this state are required to obtain 16 hours of continuing education every two year renewal period. A licensee may receive credit for a course only once during a renewal period.

(2) The following are mandatory continuing education hours and subjects for each renewal period:

(A) Ethics--2 credit hours--this course must at least cover principals of right and wrong, the philosophy of morals, and standards of professional behavior.

(B) Law Updates--2 credit hours--this course must at least cover the most current versions of Texas Occupations Code Chapter 651, and Chapters 201 and 203 of this title.

(C) Vital Statistics Requirements and Regulations--2 credit hours--this course must at least cover Health and Safety Code Chapters 193, 711 - 715 and 25 TAC Chapter 181.

(g) Credit hour eligibility. The commission will grant the following credit hours toward the continuing education requirements for license renewal.

(1) One credit hour is given for each hour of participation, except in accredited college courses taken for school credit. Such college courses will be evaluated by the executive director on an individual basis for a certification fee set by the commission. College hour credit does not count toward the mandatory hours and subjects described in subsection (f)(2) of this section.

(2) A person is eligible for a maximum of 5 credit hours per renewal period for provisional licensee supervision, regardless of the number of provisionals supervised.

(3) A presenter or instructor of approved continuing education is eligible for a maximum of 5 credit hours per renewal period for instruction, regardless of the number of times the course is presented.

(4) All required hours may be obtained through independent study, including home study or Internet presentation with a maximum of 3 hours credit per course.

(5) A person is eligible for a maximum of 4 credit hours per renewal period for attendance at commission meetings, provided the licensee signs in and out and is present during this period of time.

(6) A licensee may carry over to the next renewal period up to 10 credit hours earned in excess of the continuing education renewal requirements, except for those courses listed in subsection (f)(2) of this section.

(7) It is the responsibility of the licensee to track the number of hours accumulated during a licensing period.

(8) When excessive hours are to be carried over to the next licensing period, the licensee must request and obtain permission in writing to carry over continuing education hours. This request will be kept in the permanent licensing file of the individual.

(h) Exemptions, waivers, reactivation, and conversion.

(1) An individual newly licensed by examination whose initial renewal date is 12 months or less following original licensure is not required to obtain continuing education hours prior to renewal of the license. An individual newly licensed by examination whose initial renewal date is more than twelve months following original licensure is required to complete the hours of the three mandatory courses described in subsection (f)(2) of this section.

(2) Individuals licensed in Texas, but not practicing in the state, are required to obtain the 6 mandatory hours of continuing education set forth in this section. Any individual who returns to practice in this state shall, before the next license renewal period, meet the continuing education requirements before resuming any funeral directing and/or embalming activities in the state.

(3) Persons in a "Retired, Inactive" status are exempt from the continuing education requirements.

(4) Persons in a "Retired, Active" status are required to obtain 10 hours of continuing education, including the mandatory hours and subjects of subsection (f)(2) of this section.

(5) Persons converting from a "Retired, Inactive" status to a "Retired, Active" status shall obtain the continuing education hours required in paragraph (4) of this subsection.

(6) Persons in an active military status are eligible for exemption from the continuing education requirements, upon request. A copy of the active duty orders must be included in the request. Upon release from active duty and return to residency in the state, the individual shall meet the continuing education requirements before the next renewal period after the release and return.

(7) The executive director may authorize full or partial hardship exemptions from the requirements of this section based on personal or family circumstances and may require documentation of such circumstances.

(A) The hardship request must be submitted in writing at least 30 days prior to the expiration of the license.

(B) Hardship exemptions will not be granted for consecutive licensing periods.

(i) Failure to comply.

(1) The commission will not renew the license of an individual who fails to obtain the continuing education requirements of this section, except as provided by paragraph (2) of this subsection.

(2) A $300 noncompliance fee must be paid before a license is subject to renewal if the individual has not obtained the required continuing education.

(A) The $300 noncompliance fee may only be used in lieu of obtaining the required continuing education for every other biennial renewal period.

(B) The noncompliance penalty fee and allowance for every other renewal period does not eliminate the necessity of obtaining continuing education hours in the mandatory courses listed in subsection (f)(2) of this section.

(C) The mandatory courses must be taken before the license expiration. If the mandatory courses do not total 16 hours, the noncompliance fee of $300 is due upon application for renewal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003474

O. C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Effective date: July 8, 2010
Proposal publication date: January 8, 2010
For further information, please call: (512) 936-2469

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22 TAC §203.42

The Texas Funeral Service Commission (commission) adopts new §203.42, concerning New License Applications, without changes to the proposed text as published in the April 9, 2010, issue of the *Texas Register* (35 TexReg 2834) and will not be republished.

The new rule is adopted in accordance with Subchapter D, Chapter 53 of Occupations Code, no later than September 1, 2010.

The commission received no comments on the proposed new section.

The new section is adopted under Texas Occupations Code §651.152. The commission interprets §651.152 as authorizing it to adopt rules as necessary to administer Chapter 651.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003475
O. C. "Chet" Robbins
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Effective date: July 8, 2010
Proposal publication date: April 9, 2010
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PART 11. TEXAS BOARD OF NURSING

CHAPTER 223. FEES

22 TAC §223.1

INTRODUCTION. The Texas Board of Nursing (Board) adopts an amendment to §223.1 (relating to Fees) without changes to the proposed text published in the May 14, 2010, issue of the *Texas Register* (35 TexReg 3755).

REASONED JUSTIFICATION. The amendment is adopted under the Occupations Code §§301.155(a), 301.157(b), and 301.151 and is necessary to increase the required filing fee for the approval of a new nursing education program from $500 to $2,500. Currently, the required filing fee for the approval of a new nursing education program is $500. This fee was established in 2005, following the merger of the Board of Nurse Examiners and the Board of Vocational Nurse Examiners. Since that time, the Board has continued to receive an increasing number of new nursing education program proposals each year. Despite the increase in proposal submissions, the Board has not increased the filing fee for the approval of a new nursing education program since 2005. However, due to the continuing influx of new nursing education program proposals, the Board has now determined that the filing fee associated with the approval of a new nursing education program must be increased in order for the Board to be able to review and approve the proposals in an effective and efficient manner.

Historical Perspective

In 2005, the Board received four new nursing education program proposals. In 2006, the Board received six new nursing education program proposals. In 2007, the Board received nine new nursing education program proposals. In 2008, the Board received eight new nursing education program proposals. In 2009, however, the Board received 14 new nursing education program proposals. The Board has received one new nursing education program proposal thus far in 2010 and 15 letters of intent for additional new nursing education program proposals to be submitted to the Board by the end of this year.

The overwhelming increase in the number of new nursing education program proposals has greatly impacted existing Board resources. Although the number of Board staff dedicated to reviewing new nursing education program proposals has not significantly increased since 2005, the responsibilities and duties associated with reviewing the proposals has. Each new nursing education program proposal must undergo a rigorous review process. Once a new nursing education program proposal is submitted to the Board, the proposal is assigned to a staff member who is responsible for reviewing the proposal. The Board estimates that one staff member spends a minimum of 75 - 90 hours reviewing a single new nursing education program proposal. This estimate includes only those new nursing education program proposals that are substantially complete upon their submission to the Board. Often, staff members will receive new nursing education program proposals that are incomplete or contain inadequate data or information to support Board approval. In these situations, staff members must spend considerably more than 75 - 90 hours reviewing these proposals. For each new nursing education program proposal submitted to the Board, a staff member must: (i) review the proposal to determine if it complies with the requirements of the Nursing Practice Act (the Occupations Code Chapter 301) and the Board's rules; (ii) draft a formal review of the proposal; (iii) consult with the program to discuss any deficiencies in the proposal; (iv) review all revisions to the proposal that are submitted by the program (a minimum of two revisions are usually required); and (v) develop and present information to the Board for its review and consideration. Additionally, a staff member must conduct at least one on-site survey visit of a program's facilities. If serious deficiencies are noted by the staff member on the initial survey visit, additional on-site survey visits may be required. The Board estimates that the average length of an on-site survey visit is approximately 1.22 days and that the average cost of an on-site survey visit is approximately $520.23. This estimate is based upon an average of on-site survey visit costs reported by staff members from 2005 - 2009 and includes costs for staff members' lodging, meals, and airfare and mileage reimbursement. In addition to reviewing new nursing education program proposals, staff members remain responsible for monitoring all approved nursing education programs operating in Texas, conducting on-site survey visits of these facilities, and fulfilling their other daily duties and responsibilities.

The continuing increase in the number of new nursing education program proposals has required staff members to significantly prioritize and divide their energies and resources among their various duties and responsibilities. The duties and responsibilities associated with the review of new nursing education pro-

gram proposals have threatened to monopolize staff members' time and resources to the exclusion or delay of all other nursing education projects. The Board does not anticipate that this trend will change in the near future. In fact, the Board anticipates that the number of new nursing education program proposals will continue to increase over time, due in part to changes in accreditation requirements, including the expansion of accreditation agencies approved by the Texas Higher Education Coordinating Board, and the Board's acceptance of accreditation as one criteria for program approval. The Board anticipates that these changes in state law will continue to make it attractive for new nursing education programs to explore entry into the Texas market. The Board also anticipates that its staff members will continue to spend at least 75 - 90 hours reviewing each new nursing education program proposal, and in some cases, will be required to spend substantially more time reviewing certain proposals. Over the past year, several new nursing education program proposals were submitted to the Board by program representatives with little or no experience in nursing education. As a result, these proposals required substantial revisions to correct outstanding deficiencies in the proposals. Staff members were required to spend additional time reviewing these proposals and providing assistance to these program representatives. Further, some new nursing education program proposals are drafted and submitted by independent consultants who are familiar with the Board's rules and regulations related to nursing education. While such consultants draft competent and effective proposals that are usually approved by the Board, rarely do such consultants serve as directors for the nursing education programs once the proposals have been approved by the Board. As such, the Board has seen newly approved nursing education programs struggle with implementing their own program criteria following Board approval. These nursing education programs generally require additional assistance from staff members, even after their initial approval from the Board. For example, such programs may experience low passage rates on the National Council Licensure Examination (NCLEX) that may warrant additional investigation by staff members and intervention by the Board. Additionally, the Board anticipates that staff members will continue to receive routine phone calls and inquiries regarding the shortage of clinical nursing education sites and qualified nursing faculty for new nursing education programs. In order to ensure that staff members are able to continue to thoroughly review each new nursing education program proposal that is submitted to the Board, in addition to meeting their other assigned duties and responsibilities, the Board has determined that it is necessary to increase the filing fee required for the approval of a new nursing education program.

The Board is authorized by the Occupations Code §301.155 to establish fees in amounts reasonable and necessary to cover the costs of administering the Nursing Practice Act, including costs associated with reviewing and approving new nursing education programs in Texas. In an effort to establish the most reasonable and appropriate filing fee for the approval of a new nursing education program in Texas, the Board surveyed other state boards of nursing to better gauge the range of fees being charged nationwide for the approval of new nursing education programs. Thirty-five other state boards of nursing responded to the Board's survey, including Massachusetts, Nevada, Michigan, Kansas, Florida, Louisiana, Arkansas, Wisconsin, Iowa, New York, Colorado, Alabama, Missouri, Virginia, Ohio, Delaware, Alaska, Pennsylvania, Georgia, Arizona, Vermont, Oregon, New Hampshire, Kentucky, Maryland, West Virginia, Idaho, Washington D.C., Wyoming, Alabama, South Carolina, Utah, New Mexico, Vermont, and North Dakota. Of these state boards of nursing, 18 require a fee associated with the approval of a new nursing education program, including Nevada, Kansas, Florida, Louisiana, Alabama, Missouri, Virginia, Delaware, Pennsylvania, Georgia, New Hampshire, Kentucky, West Virginia, Idaho, Washington D.C., Alabama, Utah, and North Dakota. The types of fees associated with the approval of a new nursing education proposal vary among states. Several state boards of nursing, such as Nevada, Kansas, Florida, Alabama, Missouri, Virginia, Delaware, Pennsylvania, Georgia, Kentucky, West Virginia, Washington D.C., and Alabama require the submission of a filing fee. Other state boards of nursing, such as North Dakota, Idaho, and Louisiana, only require a fee for an on-site survey visit. Still others, such as New Hampshire and Utah, require a filing fee and a fee for an on-site survey visit. The fees associated with the approval of a new nursing education proposal also vary widely among states and range from $50, which is required by West Virginia, to $10,000, which is required by Washington, D.C. Of the state boards of nursing that were surveyed by the Board, the average nationwide fee associated with the approval of a new nursing education program proposal is $1,696.

The Board has determined that a filing fee of $2,500 for the approval of a new nursing education program in Texas is appropriate and reasonable. First, the Board anticipates that this adopted filing fee will better assist the Board in offsetting a portion of the costs associated with the review of a new nursing education program proposal. Based upon the number of new nursing education program proposals received in 2009 and the number of new nursing education program proposals that are anticipated to be received in 2010, the Board estimates that it will continue to receive at least 14 - 16 new nursing education program proposals each year. The Board estimates that each of its staff members currently spends at least 75 - 90 hours reviewing a single new nursing education program proposal. The Board anticipates that its staff members' duties and responsibilities associated with reviewing new nursing education program proposals will continue to grow each year. As such, the Board anticipates that the funds generated by the adopted filing fee may be utilized to obtain additional resources in the future to reduce the workload associated with the review of these additional new nursing education program proposals. Second, the Board anticipates that the adopted filing fee will better assist the Board in offsetting a portion of its travel costs associated with on-site survey visits of new nursing education program facilities. The Board estimates that each on-site survey visit costs approximately $520.23. If the Board continues to receive at least 14 - 16 new nursing education program proposals each year, the Board will continue to expend at least $7,280 in yearly travel costs associated with new nursing education program on-site survey visits. Further, this estimated amount could be significantly increased if additional on-site survey visits are required because of particular facility deficiencies. The Board anticipates that the funds generated by the adopted filing fee may be utilized in the future to offset the incurred costs associated with on-site survey visits of new nursing education program facilities. Third, the Board anticipates that the adopted filing fee will encourage the submission of more organized and complete nursing education program proposals, which should reduce the costs associated with the review of a new nursing education program proposal. Finally, the adopted filing fee is comparable to fees required by other state boards of nursing, including Missouri, whose fee for the approval of a new nursing education program is $3,000; Delaware, whose fee for the approval of a new nursing education program is $2,500; New Hampshire, whose fee for the approval of a new nursing educa-

tion program is $3,000; and Kentucky, whose fee for the approval of a new nursing education program is $2,000.

HOW THE SECTIONS WILL FUNCTION. Adopted §223.1(a)(9) provides that the Texas Board of Nursing has established reasonable and necessary fees for the administration of its functions and that the fee for the approval of a new nursing education program is $2,500.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Board did not receive any comments on the proposal.

STATUTORY AUTHORITY. The amendment is adopted under the Occupations Code §§301.155(a), 301.157(b), and 301.151. Section 301.155(a) provides that the Board by rule shall establish fees in amounts reasonable and necessary to cover the costs of administering the Occupations Code Chapter 301. Further, §301.155(a) provides that the Board may not set a fee that existed on September 1, 1993, in an amount less than the amount of that fee on that date. Section 301.157(b) states that the Board shall: (i) prescribe two programs of study to prepare a person to receive an initial vocational nurse license under Chapter 301 as follows: a program conducted by an educational unit in nursing within the structure of a school, including a college, university, or proprietary school and a program conducted by a hospital; (ii) prescribe and publish the minimum requirements and standards for a course of study in each program that prepares registered nurses or vocational nurses; (iii) prescribe other rules as necessary to conduct approved schools of nursing and educational programs for the preparation of registered nurses or vocational nurses; (iv) approve schools of nursing and educational programs that meet the Board's requirements; (v) select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have acceptable standards, to accredit schools of nursing and educational programs; and (vi) deny or withdraw approval from a school of nursing or educational program that fails to meet the prescribed course of study or other standard under which it sought approval by the Board; fails to meet or maintain accreditation with the national nursing accrediting agency selected by the Board under §301.157(b)(5) under which it was approved or sought approval by the Board; or fails to maintain the approval of the state board of nursing of another state and the board under which it was approved. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 17, 2010.

TRD-201003418
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Effective date: July 7, 2010
Proposal publication date: May 14, 2010
For further information, please call: (512) 305-6822

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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES
SUBCHAPTER E. CONTESTED CASES

22 TAC §661.99

The Texas Board of Professional Land Surveying (TBPLS) adopts an amendment to §661.99, concerning the Sanctions and Penalty Matrix. The new citations inserted into the Sanctions and Penalty Matrix will incorporate new sanctions for rules that were recently adopted. The amendment is adopted without changes as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3401) and will not be republished.

The additions to the Sanctions and Penalty Matrix will add sanctions for §663.17(c) regarding the failure to tie easements to a physical monument of record related to the boundary of the affected tract and §664.8 regarding the failure to complete the continuing education requirement prior to license renewal.

No comments were received regarding adoption of this amendment.

The amendment is adopted pursuant to Title 6, Occupations Code, Subtitle C, §1071.151, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003387
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: July 6, 2010
Proposal publication date: April 30, 2010
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CHAPTER 663. STANDARDS OF RESPONSIBILITY AND RULES OF CONDUCT
SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.20

The Texas Board of Professional Land Surveying (TBPLS) adopts an amendment to §663.20 concerning the procedures that the board will follow in order to administer House Bill 963 that was passed in the 81st Legislative Session. The amendment is adopted without changes as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3402) and will not be republished.

The amendment will allow the board to determine a person's eligibility for licensure and to issue a criminal history evaluation letter.

No comments were received regarding adoption of this amendment.

The amendment is adopted pursuant to Title 6, Occupations Code, Subtitle C, §1071.151, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003386
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: July 6, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 239-5263

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CHAPTER 664. CONTINUING EDUCATION

22 TAC §664.3

The Texas Board of Professional Land Surveying (TBPLS) adopts an amendment to §664.3 concerning the number of continuing education hours required for license renewal. The amendment is adopted with changes to the proposed text as published in the March 5, 2010, issue of the *Texas Register* (35 TexReg 1927) and will be republished. The changes made are a result of a public hearing held regarding this rule.

The amendment will change the number of hours of continuing education that a land surveyor must complete in 2011 in order to renew his or her license.

A public hearing was held on the proposed changes on March 30, 2010. Five individuals presented their comments to the board as follows: against the changes and recommended eliminating the requirement for alternating course subjects in alternating years, against the changes and does not support use of the term "Board designated", in favor of the changes but prefers the use of the word "approve" and that courses in ethics and rules be combined, in favor but excepted the term "Board developed" as it was a departure from previous terminology, in favor but wanted clarification of "Board designated" or "Board developed". Written comments were received from twelve individuals as follows: in conflict--supports the 12 hours but feels the Board should not be in the business of "developing or designating courses for CEU", against changes but in favor of 12 hours but requested "developed or designated" be changed to "approved", in favor but wants Board to accept CE courses from other states, in favor but wanted wording changed from developed to approved, against the requirement for alternating course subjects in alternating years, in favor of increased hours with exception of notation of hours and wording, in favor if the 4 additional hours are honored across common industry lines, requested consideration of requiring one hour of ethics annually and a one-time requirement of the Act and Rules with a one hour requirement each following year, and four were not in favor of increasing the number of hours from 8 to 12.

The amendment is adopted pursuant to Title 6, Occupations Code, Subtitle C, §1071.151, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

§664.3. Numerical Requirements for Continuing Education.

Beginning January 2011, a registrant, to be eligible for renewal of the certificate of registration, must accrue at least twelve (12) hours of completed board approved professional development activities during the immediate preceding twelve months in any annual period. Beginning January 2011 and every year thereafter, a minimum of three (3) of the twelve (12) hours shall be in board developed or approved hours on the Act, Rules, and/or ethics.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003385
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 117. END STAGE RENAL DISEASE FACILITIES

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) adopts the repeal of §§117.1, 117.2, 117.11 - 117.18, 117.31 - 117.34, 117.41 - 117.46, 117.61 - 117.65, and 117.81 - 117.86, and new §§117.1, 117.2, 117.11 - 117.19, 117.31 - 117.33, 117.41 - 117.48, 117.61 - 117.65, 117.81 - 117.86, 117.91 - 117.93, and 117.101 - 117.106, concerning the regulation of end stage renal disease (ESRD) facilities. New §§117.2, 117.12, 117.14, 117.18, 117.31 - 117.33, 117.41, 117.43, 117.45, 117.46, 117.63, 117.91, 117.101, 117.102, and 117.106 are adopted with changes to the proposed text as published in the February 5, 2010, issue of the *Texas Register* (35 TexReg 779). The repeal of §§117.1, 117.2, 117.11 - 117.18, 117.31 - 117.34, 117.41 - 117.46, 117.61 - 117.65, and 117.81 - 117.86 and new §§117.1, 117.11, 117.13, 117.15 - 117.17, 117.19, 117.42, 117.44, 117.47, 117.48, 117.61, 117.62, 117.64, 117.65, 117.81 - 117.86, 117.92, 117.93, and 117.103 - 117.105 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The repeals and new sections are necessary to update, reorganize, and clarify the rules and to implement legislation by the 81st Legislature, Regular Session, 2009, specifically, the amendment to Health and Safety Code, Chapter 251, (Senate Bill 1932) relating to the licensing requirements of hospitals temporarily providing outpatient dialysis services to a person because of a disaster.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 117.1, 117.2, 117.11 - 117.18, 117.31 - 117.34, 117.41 - 117.46, 117.61 - 117.65, and 117.81 - 117.86 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

New §§117.1, 117.2, 117.11 - 117.19, 117.31 - 117.33, 117.41 - 117.48, 117.61 - 117.65, 117.81 - 117.86, 117.91 - 117.93, and 117.101 - 117.106 clarify the rules and update references to statutes, rules, codes, guidelines and standards, the names and contact information of associations, boards, commissions, conferences, societies and the department programs. The new §117.2 deletes definitions not used in the rules, adds definitions and revises the definition of individual, advanced practice registered nurse, licensed vocational nurse, physician, and registered nurse.

The new §117.11 adds facilities exempt from licensing.

The new §117.12 is reordered to update initial licensure requirements, adds a requirement for new facilities to have an isolation treatment room for hepatitis B patients or to receive a waiver by the Centers for Medicare and Medicaid Services (CMS), and requires document submittal to include complete chemical analysis of the product water.

The new §117.13 changes the length of the period during which the department may send renewal notices from 60 to 90 days and updates the license renewal period to 24 months.

The new §117.14 reorders the requirements for a change of ownership and facility relocation, and adds the requirement for a hepatitis B isolation treatment room for facilities increasing services or stations.

The new §117.15 adds requirements for facilities in which services are not provided more than 60 days to request inactive status, and requires facilities to notify the department upon closure of a facility.

The new §117.18 adds that surveyors may interview patients and staff; clarifies the basis for the department conducting inspections and requires the surveyor to inform the facility representative during the exit conference of any preliminary findings which are potentially serious, serious, or life-threatening; clarifies that the surveyor may submit a written summary to the medical review board; clarifies when and how the department provides the facility a statement of deficiencies; clarifies requirements and timelines related to unacceptable corrective action plans submitted by a facility; adds that the department may assess administrative penalties; and adds the process for complaints against a department surveyor.

The new §117.19 adds the requirement for equipment to be Food and Drug Administration (FDA) approved, and deletes the requirement for an electrocardiograph.

The new §117.31 adds requirements for equipment, including FDA approval, preventive maintenance, emergency equipment, and back-up machines

The new §117.32 adds facility owner and medical director responsibility for contaminates in water, adds requirements for a continuous recirculation loop and for monitoring the performance, to prevent retrograde flow of water, to enforce policies and procedures and to minimize the likelihood of inadvertent bypass, to regulate the metering pump, to ensure disinfection of devices regenerated or reconstituted off site, adds that regenerated carbon shall not be used, adds the requirements to document results of all absence testing, for regular disinfection of the machine supply line, clarified the requirement for water analysis and that samples shall be taken from each machine direct feed systems flow and equipment necessary for monitoring as determined by the facility medical director, adds requirement for direct feed systems to prevent retrograde flow of water, clarifies that dead-end piping is not allowed, adds water treatment policies and procedures to be approved by the medical director implemented and enforced, clarifies bypass valves procedures, adds that systems shall be monitored according to manufacturer's instructions with documented test procedures related to chemicals in the water, adds the requirement for alarms in the patient care area, clarifies use and monitoring of deionization tanks, adds a requirement for facilities regarding devices that are regenerated or reconstituted off site, updated type of carbon in carbon tanks, clarifies flow rate for total empty bed contact time (EBCT), adds specific criteria for when water from carbon tanks port should be tested, adds a requirement for endotoxin reducing filter downstream of ultraviolet lights, clarifies the schedule for routine microbiological testing, adds responsibility to notify medical director of action levels are in product water, adds requirements for ozone generators if used, clarifies use of Association for the Advancement of Medical Instrumentation (AAMI) for hot water disinfection systems, adds requirement for absence testing to be documented, adds requirement for procedure for disinfection of lines, adds requirements for chemical analysis of product water, adds quality assessment and performance improvement (QAPI) procedure requirements, adds requirement for newly installed bicarbonate concentrate mixing and delivery systems testing and notification of medical director when action levels are exceeded, defined dialysate components, adds integral system requirements for tank plumbing, adds documentation requirement for results of concentrates tests, including establishment of acceptable limits, adds mixed solution storage requirements related to tanks and containers, adds requirements for pick-up tubes handling, clarifies the location for centralized reprocessing, and requires direct communication between facility and reprocessing medical directors.

The new §117.33 adds the requirement to follow standard infection control precautions; provides specific resources, adds infection control precautions for all patients, to include requirements for disposable gloves, handwashing, waterless antiseptic hand rub, protective equipment, activities related to eating, drinking and smoking, items taken to dialysis station, nondisposable items, unused medications, designation of clean areas and contaminated areas, multiple dose medication vials, common medication carts, carts with clean supplies, and transporting medications and supplies, adds that the facility should provide a safe, functional, comfortable environment for all patients and visitors and the public, adds a requirement for fixing or replacing damaged wall baseboard and floor tiles and documentation, adds reprocessing room to area where portable or ceiling fans are not allowed, adds that dedicated cleaning supplies should be used for blood spills, adds requirement for documentation of disinfection of dialysis machines, adds cleaning between patient shifts of individual televisions sets at each treatment station, adds requirements for waste containers, to include locations, cleaning, type, and strength, clarifies need for order from nephrologists to provide hepatitis B vaccine to patients, adds isolation proce-

dures for HBs-AG positive patients to include separate treatment rooms and dedicated supplies and equipment, labeling of supplies and equipment refillable containers and pick-up tubes, disinfection of refillable containers and pick-up tubes, procedures for wearing gowns, dedicated cleaning supplies, updated term "caregiver" with "direct patient care staff member," updates term "isolated air handling system" with "dedicated exhaust system," and adds requirement to adopt, implement and enforce policy for offering and providing pneumococcal and influenza vaccines for elderly persons per Center for Disease Control annual recommendations including procedures for administering, documenting, and waiving the requirement.

The new §117.41 adds, reorders and clarifies requirements and responsibilities for an ESRD facility governing body including the adoption, implementation and enforcement of policies, procedures, by-laws, rules, and regulations.

The new §117.42 deletes the requirement that a facility must inform a patient of all rules and regulations governing patient conduct and responsibilities and provide a written copy of patient's rights and responsibilities to the patient upon admission.

The new §117.43 adds a requirement for a facility to develop, implement, maintain, and evaluate an effective, ongoing, facility-wide, data-driven, interdisciplinary QAPI program, requires core staff members to participate, provides specific minimal indicators to be measured analyzed and tracked on a monthly basis, and allows a department surveyor to review QAPI activities to ensure compliance.

The new §117.44 clarifies the requirement for the submission of an annual report to the department required by the CMS. The annual report includes aggregate data on specified indicators of quality of care provided to patients, deletes certain examples of indicators, and deletes the requirement that the department determine the specific data to submit.

The new §117.45 adds requirements for the patient's plan of care to include the process, coordination using an interdisciplinary team approach, for including measurable and expected outcomes and estimated timetables for outcomes, for the patient's plan of care including coordination, time lines, outcomes and monitoring, adds outpatient treatments timeline for patient plan of care, requires revision of the plan of care for lack of progress, deterioration or significant changes, adds a minimum of monthly monitoring of the plan of care; adds a requirement for an ESRD facility to maintain information on the department approved reporting system; adds that an attending physician can order medications, clarifies that physician orders must be in compliance within the licensed professional's scope of practice, adds the requirement that medication vials may not be taken to patient stations and that intravenous medication vials labeled for single-use may not be punctured more than once, clarifies that a contract staff person is not considered an employee and cannot be considered as the full-time supervising nurse, adds the requirement that a registered nurse shall be in the facility when patients are present in the facility, clarifies when a patient assessment is required by a registered nurse, adds that a registered nurse functioning as charge nurse shall be present during all dialysis treatments, adds the requirement that a licensed nurse assigned direct patient care responsibility for four patients shall not be assigned responsibility for additional patients, clarifies the requirement that patients are in view of staff during hemodialysis treatments, adds a requirement for written policies and procedures to guide nursing actions in the event a patient's condition deteriorates during treatment, clarifies the requirement that a registered nurse conducts the initial patient assessment at the time of the initial dialysis treatment, clarifies when a nutrition reassessment shall be conducted, clarifies the maximum patient load per full-time equivalent of qualified dietitian time shall not exceed 125 patients, adds requirements for physician standing orders authorizing delegation of responsibilities for the dietitian, adds requirement that medication algorithms and protocols be individualized, adds requirement for social workers to include health-related quality of life surveys, adds counseling to social worker interventions, adds a requirement for social workers to make rehabilitation referrals as appropriate, clarifies when a psychosocial reassessment shall be conducted, clarifies the requirement that personnel shall be assigned to assist a social worker(s) with ancillary tasks when the patient load exceeds 100 patients, clarifies the requirement that the maximum patient load per full-time equivalent of qualified social worker time shall not exceed 125 patients; adds that home dialysis patients may be seen by advanced practice registered nurse or physician's assistant, clarifies that if home dialysis patients are seen by an advanced practice registered nurse or a physician's assistant, the physician shall see the patient at least one time every three months, adds that the advanced practice registered nurse or physician assistant may not replace the physician for the every two week evaluation of the in-center dialysis patient, adds that an advanced practice registered nurse shall meet the requirements of the Texas Board of Nursing and a physician assistant shall meet the requirements established by the Texas Medical Board, adds the role of jointly developed and signed mechanisms which provide authority for an advanced practice registered nurse or a physician's assistant to provide medical aspects of care which are reviewed at least annually, adds the requirement that home dialysis services are at least equivalent to those provided to in-facility patients, adds a requirement for a separate room for home dialysis services, adds a requirement that each individual home dialysis patient shall use one machine exclusively, adds a requirement for one full-time equivalent registered nurse per 20 patients, or portion thereof, adds requirements for training curriculum approved by the medical director for the facility that provides home dialysis training and support to include medication administration, training the patient and/or caregiver, and documentation requirements, adds a requirement that the interdisciplinary team shall oversee training of the home dialysis patient and designated caregiver and monitor home dialysis monitoring data at least every two months, adds the requirement for services for the home dialysis patient to include initial and annual monitoring visit to the patient's home, visit schedule of the physician, advanced practice registered nurse or physician's assistant of no less than one time a month and a requirement for the physician to see the patient at least one time every three months, adds the requirement of the development and periodic review of the patient's individual plan of care to address patient's needs, adds a requirement for the home dialysis facility to monitor the quality of water and dialysate used by a home hemodialysis patient on-site and to correct any water and dialysate problem for the home hemodialysis patient or arrange for backup dialysis, expands the dialysis facility's responsibility for home dialysis supplies and equipment and emergency backup services when needed, adds requirements for home dialysis machines to be cultured, maintenance logs, specifies equipment allowed, clarifies the requirement for separate home dialysis training room for existing and new facilities, and deletes the requirements for temporary admissions.

The new §117.46 adds the requirement that facility staff shall meet qualifications and demonstrate and sustain skills needed

to perform the specific duties of their positions, adds that newly employed dialysis technician must be certified under a national certification program within 18 months of being hired and dialysis technicians employed on October 14, 2008 or later must be certified within 18 months of that date, adds the requirement that each registered nurse assigned to charge nurse shall have at least 12 months of clinical experience and have six months experience in hemodialysis subsequent to completion of the facility's training program, deletes requirements related to a licensed vocational nurse functioning in the charge nurse role, and adds a requirement for documentation of qualifications of other personnel assisting in the training of a patient and patient's caregiver.

The new §117.47 adds a requirement for clinical records to be secured from unauthorized access, adds a requirement for patient's clinical records to include complete and pertinent information and to be accessible to every authorized member of the interdisciplinary team, deletes requirement for adequate space for transcribing records in electronic format, and deletes the requirement for the comprehensive medical history and physical to be completed within two weeks after any patient's admission to the facility.

The new §117.48 adds hospital transfers, involuntary transfer or discharge of a patient, and a fire in the facility to the list of occurrences required to be reported to the department.

The new §§117.61 - 117.64 add requirements for dialysis technicians to include general requirements, training and curriculum, competency evaluation, and documentation of competency.

The new §117.65 prohibits acts by a dialysis technician who is not a licensed vocational nurse.

The new §§117.81 - 117.86 add requirements for corrective action plans, voluntary and involuntary appointment of a temporary manager, disciplinary action, administrative penalties, and recovery of costs.

The new §117.91 adds a requirement for a fire prevention, protection and emergency contingency plan, adopting, implementing and enforcing policies related to fire fighting equipment, fire extinguishers and, if installed, sprinkler systems, a posted plan for patient protection and evacuation in the event of fire, a fire alarm system, to include staff training and fire drill requirements, a system for communication with and providing information to the fire department, arrangements with fire department when outside of service area, an emergency contingency plan for continuity of emergency essential building systems including an emergency power source and potable water, consisting of an emergency generator or an executed contract with an outside supplier/vendor or an executed contract with another licensed ESRD facility within a 100 miles radius to provide emergency contingency care for the patient(s).

The new §117.92 adds a requirement for a physical environment that protects the health, safety and welfare of patients, personnel and the public, adds a requirement that the physical premises and the physical environment of the facility shall meet the local building and fire safety codes, adds a requirement for a self-sufficient emergency communication system with the capability of communication with community or state emergency networks, including police and fire departments, restricts portable and ceiling fans, extension cords and cables, adds a requirement for a nurses emergency calling system in all patient waiting areas, treatment, exam rooms, isolation and toilet rooms, clarifies door lock requirements, and adds requirements for safety and comfort of patients during construction at the facility.

The new §117.93 adds requirements for the handling and storage of gases and flammable liquids in accordance with the National Fire Protection Association standards, adds requirements for the use of alcohol-based hand rubs, and restricts the use of motor vehicles in the ESRD facility.

The new §117.101 adds construction requirements for existing ESRD facilities related to National Fire Protection Association, adds a requirement that all major remodeling, renovations, additions and alterations to an existing ESRD facility must be in accordance with the requirements for new construction and all areas of an existing ESRD facility not part of a major remodel, renovation, addition or alteration are not requirement to meet the new construction requirements, adds that the department may grant a condition approval of minor deviations from the requirements, adds the requirement that new building equipment shall comply with the requirements for new construction and complete plans and specifications must be submitted, reviewed and approved by the department, adds the requirement that minor remodeling or alterations within an existing ESRD facility require evaluation and approval by the department after submission of a written request and floor plan, brief description and sketches of the area being remodeled, adds the requirement that remodeling or alterations which involve load bearing members or partitions, change functional operation, add treatment states, or affect fire safety are major projects and shall submit plans for approval prior to beginning construction of major projects, adds the requirement that new facilities or expanding the capacity of treatment stations in existing facilities shall have an isolation room or be granted a waiver by CMS, adds requirements for phasing of construction in existing facilities to minimize disruptions of existing functions, and adds the requirement that previously licensed ESRD facility which has been vacated or used for other purposes shall comply with all the requirements for new construction.

The new §117.102 adds the requirement for new ESRD facilities including accessibility, prohibits ESRD facilities in proximity to hazardous or undesirable locations, adds the requirement and specifications for means of egress from the building, adds the requirement for facilities constructed in a designated 100-year flood plain, adds the requirement for paved roads, walkways, parking and disability requirements, adds the requirement to design and construct buildings to sustain all dead and live loads in accordance with accepted engineering practices and standards and the local governing building codes, adds the requirement that all construction shall comply with New Ambulatory Health Care Occupancies of the National Fire Protection Association, adds requirements for ESRD facilities which are part of multiple building occupancy, adds spatial requirements for the physical plant, including administration, public areas, equipment rooms, examination rooms, hepatitis B isolation rooms, home or peritoneal dialysis training rooms, janitor's closets, laboratory services, linen and laundry processing area, waste storage and disposal, medication areas, reuse rooms, and treatment areas, adds spatial requirements for service areas, including clean storage room or closet, emergency eyewash, on-site mixing room, patient toilet rooms, staff toilet rooms, and the water room, adds a requirement for details and finishes including additions and alterations, exit corridors and doors, general finish requirements, including portable privacy screens, interior finishes, flooring, wall finishes, ceilings, floor, wall and ceiling penetration or openings, and toilet/restroom signage, adds requirements for mechanical systems, steam and hot and cold water systems, air conditioning, heating and ventilating systems, and thermal and acoustical insulation, to include mounting mechanical equipment on vi-

bration isolators, adds a requirement for testing, balancing and operating all mechanical systems prior to completion and acceptance of the facility, adds a requirement for all heating, ventilating and air condition systems to comply with and be installed in accordance with the National Fire Protection Association, adds a requirement for all rooms and areas in the ESRD facility to have a provision for positive ventilation, adds requirements for the ventilation systems for the reuse room, airborne isolation room, and toilet exhaust, adds that facility design may utilize energy conserving procedures and may present innovative design that provides additional energy conservation to the department for consideration, adds a requirement that outside air intakes shall be located at least 25 feet from exhaust outlets or areas which may collect vehicular exhaust or other noxious fumes, adds requirements for fully ducted supply, return and exhaust air for HVAC systems.

The new §117.103 adds requirements for elevators, escalators, and conveyors.

The new §117.104 adds requirements for the preparation, submittal, review and approval of plans, and the retention of records for construction of new buildings, additions, renovations or conversions of existing buildings for ESRD facilities.

The new §117.105 adds new requirements for construction, inspections, and the approval of projects.

The new §117.106 adds a table depicting nursing staffing levels.

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepted. The commenters were individuals, associations, and groups, including the following: The End Stage Renal Disease Network of Texas, Inc.; Fresenius Medical Care North America; Baker and Hostetler LLP; Total Renal Care, Inc.; Subsidiary of DaVita, Inc.; NxStage; and Renal Ventures. The commenters were not against the rules in their entirety; however, the commenters recommended changes as discussed in the summary of comments.

Comment: Concerning the definition of "Administrator" in §117.2(2), one commenter recommended adding education, experience and professional licensure qualifications for an administrator.

Response: The commission disagrees; administrator education and experience qualifications are a business decision of the facility. No change was made to the rule as a result of this comment.

Comment: Concerning the timeline for notifying the department of a facility administrator change in §117.14(c)(1)(C), one commenter requested the facility be required to notify the department of "planned" changes 30 days prior and to notify the department within five working days of unplanned changes.

Response: The commission agrees and has added the words, "planned change" and "or within five working days of an unplanned change of administrator."

Comment: Concerning §117.18(a)(2), one commenter objected to the department photocopying facility documents which have been reported to a Patient Safety Organization authorized by the Patient Safety Act, during inspections when necessary to determine or to verify compliance with the statute or rules.

Response: The commission disagrees. Federal statutes and regulations require facilities to adhere to state rules. Section 921(7)(B)(iii)(II) of the Patient Safety Quality Improvement Act of 2005 states that "Nothing in this part shall be construed to limit - the reporting of information described in this subparagraph to a Federal, State, or local governmental agency for public health surveillance, investigation or other public health purposes or health oversight purposes." No change was made to the rule as a result of this comment.

Comment: Concerning §117.31(a)(3), one commenter requested that "written evidence" should be changed to "a record" to reflect that some records are electronic and not in written form.

Response: The commission agrees and replaced "written evidence" with "a record."

Comment: Concerning §117.32(b)(3), eight commenters requested clarification of the continuous water flow requirements of the direct feed, as water flow is turned off during backwashing of the carbon tanks and would not be continuous during backwashing.

Response: The commission agrees and added the words, "except during the backwash cycle of the carbon tanks for direct feed systems."

Comment: Concerning §117.32(b)(8)(C)(iii), one commenter requested the addition of "or bank of tanks" to "final tanks" to allow for systems with more than one final tank.

Response: Concerning the need for clarification to allow for systems with more than one final tank, the commission agrees and in §117.32(b)(8)(C)(ii), has replaced "in a series configuration" with "in series with a sample port following the first bed. A sample port shall also be installed following the second bed for use in the event of free chlorine or cloramine breaking through the first bed" and in §117.32(b)(8)(C)(v), added the words "Carbon beds are sometimes arranged as series-connected pairs of beds so that they need not be overly large. The beds within each pair are of equal size and water flows through them are parallel. In this situation, each pair of beds should have a minimum empty bed contact time of 5 minutes at the maximum flow rate through the bed. When series connected pairs of beds are used, the piping should be designed to minimize differences in the resistance to flow from inlet and outlet between each parallel series of beds to ensure that an equal volume of water flows through all beds."

Comment: Concerning §117.32(b)(8)(C)(iv), eight commenters stated that there should be a sample port after the first carbon tank.

Response: The commission agrees and in §117.32(b)(8)(C)(ii) added the words "in series with a sample port following the first bed. A sample port shall also be installed following the second bed for use in the event of free chlorine or cloramine breaking through the first bed."

Comment: Concerning §117.32(b)(12), one commenter requested the addition of the term, "ultrafilter assemblies," to "ultrafilters, or other bacterial reducing filters."

Response: The commission disagrees. The term "ultrafilter assemblies" is not defined in the American National Standards Institute, Water Treatment Equipment for Hemodialysis Applications, RD52:2004 Edition, published by the Association for the Advancement of Medical Instrumentation. No change was made to the rule as a result of this comment.

Comment: Concerning §117.32(b)(20), one commenter requested deletion of the sentence requiring a facility to test that no disinfectant is draining from pipes during the disinfection, as

there is no explicit instruction for how this can be tested by a facility.

Response: The commission agrees and has deleted the words, "A mechanism shall be incorporated in the distribution system to ensure that disinfectant does not drain from pipes during the disinfection period."

Comment: Concerning §117.32(b)(24)(A), related to requirements for containers used, one commenter requested deletion of the phrase, "and pH adjustments," stating facilities do not exercise control over the containers supplied by laboratories and that facilities trust that the containers supplied utilize proper pH adjustments.

Response: The commission disagrees. The facility, through the facility's governing body, is ultimately responsible for the organization, management, control, and operation of the facility, to include appropriate containers and pH adjustments. No change was made to the rule as a result of this comment.

Comment: Concerning §117.33(b)(1)(B)(ii), one commenter requested deletion of the phrase, "in accordance with manufacturer's direction for use," as the ratio for mixing sodium hypochlorite solution is provided in the rule.

Response: The commission disagrees. Facilities that use Environmental Protection Agency registered products should follow manufacturer's directions for use, as the manufacturer's directions for use vary among products. No change was made to the rule as a result of this comment.

Comment: Concerning §117.33(d)(2)(B)(iii), one commenter requested that "antigen or antibody status" be changed to "CDC guidelines" as the basis for repeated serologic screening.

Response: The commission disagrees. The description of "antigen or antibody status" is more specific than referencing external guidelines. No change was made to the rule as a result of this comment.

Comment: Concerning §117.41(m), three commenters supported the social work staffing ratio of 100 patients.

Response: The department acknowledges receipt of this comment from the three individuals. Section 117.41(m) states that personnel shall be assigned to assist a social worker with ancillary tasks when the patient load exceeds 100 patients per facility and that the maximum patient load per full-time equivalent qualified social worker with assigned personnel assistance is 125 patients. No change was made in response to this comment.

Comment: Concerning §117.45(c)(3), one commenter requested reinstatement of language from 2004 rules regarding verbal and telephone orders, which allowed receipt of orders related to a specific service (e.g., dietitian) received by the licensed professional responsible for providing the service (e.g., dietitian) and countersigned by the physician within 25 calendar days.

Response: The commission disagrees with reinstating language from 2004 rules, but agrees with deleting the words, "All verbal or telephone physician orders shall be received by a licensed nurse and shall be countersigned by the physician within 15 calendar days. All physician orders shall be in compliance within the licensed professional's scope of practice." The commission has added the words, "All verbal or telephone physician orders shall be documented and authenticated or countersigned by the physician not more than 15 calendar days from the date the order was given."

Comment: Concerning nursing direct care staffing ratios, one commenter stated that proposed §117.45(d)(5) and proposed §117.45(d)(7)(A) are in conflict, as §117.45(d)(7)(A) suggests that for less than eight patients, the charge nurse may serve as a direct caregiver and be counted in the 4:1 direct care staffing ratio, while §117.45(d)(5) appears to remove the ability of a supervising or charge nurse to function as a direct caregiver. The commenter requested that §117.45(d)(5) be changed to allow a licensed nurse to function as the direct caregiver for four or fewer patients and be counted in the direct caregiver ratio specified in §117.45(d)(7)(A). The commenter requested removal of the sentence, "The licensed nurse assigned direct patient care responsibilities for four patients shall not be assigned more responsibilities for additional patients." The commenter alternately proposed the exemption of facilities with less than 17 chairs from the portion that restricts supervising nurses from providing direct patient care and being counted in the 4:1 direct caregiver ratio with respect to the 13-16th patients at a facility. A second commenter stated that the nursing staffing requirements have increased operating costs, which have the potential to threaten broad access to dialysis care in Texas.

Response: The commission disagrees that there has been a change in the staffing requirements or that there is an increase in operating costs; the staffing requirements remain the same and have not changed since 2004. The position statement issued by the department on December 14, 2004, clarifying current staffing requirements has been incorporated into this rule. The net effect does not cause an increase in staff or operating costs. The commission disagrees with the exemption of facilities with less than 17 chairs from the nurse staffing requirements; however, the commission agrees that changes to clarify §117.45(d) are warranted and have been made. The purpose of this clarification emphasizes the importance of the degree of direct, continuous monitoring which the patient requires while being dialyzed.

In proposed §117.45(d)(5), the commission deleted the paragraph "At least one licensed nurse shall be available on site to provide patient care, functioning in the nursing role (without direct patient care responsibilities) for every twelve patients or portion thereof. This may include the registered nurse(s) functioning in the charge role required by paragraph (4) of this subsection." and §117.45(d)(6) - (10) was renumbered as §117.45(d)(5) - (9).

In §117.45(d)(6)(A), the commission replaced the subparagraph, "The staffing level for a facility shall not exceed four patients per licensed nurse or patient care technician per patient shift. The licensed nurse assigned direct patient care responsibilities for four patients shall not be assigned more responsibilities for additional patients. During treatment of eight or more patients, one of the licensed nurses qualified to function in the charge role shall not be included in this ratio," with the words, "During treatment of seven or fewer patients, direct care staff shall consist of one registered nurse and one direct care staff," and in §117.45(d)(6)(B), added the subparagraph, "During treatment of eight but not more than twelve patients, the registered nurse functioning as charge nurse shall not be assigned as direct care staff as demonstrated in Table 1 of §117.106 of this title." Table 1 of §117.106 was updated to clarify the nurse staffing levels, by adding a column entitled, "Total clinical staff" with rows totaled, deleting the column heading "Charge RN" and adding the words "Direct care staff" as clarifying language.

Comment: Concerning proposed §117.45(d)(5), eight commenters requested clarification on nurse staffing requirements, interpreting that a facility with 28 stations would need three

licensed nurses with no direct patient care responsibilities, in addition to one technician or nurse for every four patients. The commenters stated that this would create an undue burden on staffing levels and would result in stations closing on patient shifts that are most needed and desirous of those requiring public transportation.

Response: The commission disagrees that there has been a change in the staffing requirements; the staffing requirements remain the same and have not changed since 2004. The position statement issued by the department on December 14, 2004, clarifying current staffing requirements has been incorporated into the rule. The net effect does not cause an increase in staff or operating costs. The patient shifts a facility offers treatment is a business decision of the facility. The staffing requirements emphasize the importance of the degree of direct, continuous monitoring which the patient requires while being dialyzed. No change was made to the rule as a result of these comments.

Comment: Concerning proposed §117.45(d)(7)(A), one commenter disagreed that a licensed nurse assigned direct patient care responsibilities for four patients should not be assigned more responsibilities for additional patients, stating that there is no reason why a nurse cannot help another staff member with a patient problem or administer medications to other patients without jeopardizing safety.

Response: The commission disagrees. The rules require a charge nurse in the facility without a patient care assignment. This charge nurse is available to assist other staff members and to administer medications. The staffing requirements emphasize the importance of the degree of direct, continuous monitoring, which the patient requires while being dialyzed. No change was made to the rule as a result of this comment.

Comment: Concerning §117.45(d)(6)(C), one commenter requested that the rules clarify whether the licensed nurse caring for pediatric dialysis patients must be the registered nurse experienced in pediatric dialysis required in §117.45(d)(5). The commenter stated this would restrict the use of licensed vocational nurses and patient care technicians, limiting the provision of outpatient pediatric care.

Response: The commission disagrees. If pediatric dialysis is provided, §117.45(d)(6)(C) requires a licensed nurse to be on site. "Licensed nurse" is defined in §117.2(45) as a registered nurse or licensed vocational nurse. No change was made to the rule as a result of this comment.

Comment: Concerning §117.45(i)(3)(B), eight commenters disagree that physician extenders cannot replace the physician in participation in patient care planning or in QAPI activities, stating this is not in alignment with CMS guidelines.

Response: The commission disagrees, physician extenders are allowed to participate in patient care planning or in QAPI activities, but cannot replace the physician in participation in patient care planning or in QAPI activities. No change was made to the rule as a result of these comments.

Comment: Concerning §117.45(i)(3)(D), one commenter requested deletion of the requirement of the advanced practice registered nurse or physician assistant to notify the treating physician of patient medical emergencies, stating it cannot be required of the dialysis facility as the individual it is referring to is not an employee of the facility.

Response: The commission disagrees, as the advanced practice registered nurse or physician assistant is required to keep the treating physician informed of their patient's status, including any changes in treatment orders and medical emergencies. No change was made to the rule as a result of this comment.

Comment: Concerning §117.45(j)(3), one commenter requested that the machine used for home dialysis patients may be "the original machine provided to the patient as well as any machine provided in a service swap" and the addition of the sentence, "Training equipment may be used for respite treatments."

Response: The commission disagrees. The use of other home hemodialysis equipment in certain situations is addressed in §117.45(j)(11) and (13). However, the commission agrees that changes to clarify §117.45(j)(3) are warranted and has replaced the words, "for all home dialysis patients, regardless of modality, there shall be one machine used exclusively for each individual home dialysis patient" with "on completion of training, each individual home dialysis patient, regardless of modality, shall be assigned one machine for the patient's exclusive use in the home."

Comment: Concerning §117.45(j)(5)(A) and §117.46(c)(2), two commenters noted that the experience requirements for home dialysis training nurses exceed those required by the federal Medicare program. One commenter recommends more lenient requirements if a nurse with required experience is not available; the second commenter requested requirements consistent with the federal Conditions for Coverage.

Response: The commission disagrees; the experience requirements emphasize the importance of nursing experience, which the patient requires while being trained in home dialysis. The experience requirements have not changed, and the net effect does not cause an increase in staff or operating costs. Facilities unable to find a nurse that meets the requirements may request a waiver as described in §117.19 of this title (relating to Exceptions to These Rules). No change was made to the rule as a result of these comments.

Comment: Concerning §117.45(j)(10), one commenter requested the addition of the parenthetical "service swap of the control unit is not a modification" to exclude service swaps of the control unit from testing the chemical quality of the product water.

Response: The commission disagrees that a service swap of the control unit is not a modification. The commission has added the words "and any time repairs or exchanges of the water treatment equipment are made," to clarify when on-site evaluation and testing of the water and dialysate system is required.

Comment: Concerning §117.45(j)(18)(B)(i), one commenter requested a change from "every six months or if there is a change in the source water" to "annually or with changes of home location" for testing of source water.

Response: The commission agrees with changing the requirement from every six months to annually and has replaced the words "every six months" with "annually" in §117.45(j)(10)(A), (18)(B)(i), and (E). The commission disagrees with the change from "changes of home location" to "a change in the source water," as source water is the item being tested to ensure water quality, not the location of the patient.

Comment: Concerning §117.45(j)(18)(B)(iv), one commenter requested that "at the end of a prepared dialysate bag" be deleted and replaced with "quarterly, at the end of a batch" for testing of the microbiological quality of the dialysate, as the prepared dialysate bag is confused with the sterile bag.

Response: The commission disagrees. Section 117.32(c)(4)(A) excludes sterile bags, which are closed systems, from testing requirements. The prepared dialysate bag is prepared in the patient's home and does require testing as per §117.45(j)(18)(B)(iv). No change was made to rule as a result of this comment.

Comment: Concerning §117.45(h)(5), one commenter recommended that patient load per social worker should not exceed 80 patients in facilities in which more than 50% of patients are low income or aged, or are in need of additional socioeconomic assistance.

Response: The commission disagrees; social worker staffing ratios are not differentiated or based on socioeconomic calculations. No change was made to the rule as a result of this comment.

Comment: Concerning §117.46(c)(2), one commenter requests that experience requirements for charge nurses conform with federal Medicare law, and state that "each registered nurse assigned charge nurse responsibilities shall have at least 12 months of clinical experience and have three months experience in hemodialysis." The commenter states that the rule will effectively mandate nine months (three months of training plus six subsequent months of experience) of dialysis experience prior to being eligible for charge nurse status.

Response: The commission disagrees. Part of the orientation for a nurse with no dialysis experience is classroom orientation and is not included as clinical experience; a nurse with no dialysis experience orienting to the dialysis specialty has only a limited number of patients during orientation and is under direct supervision. Consequently, the experience requirement for charge nurse is subsequent to orientation in the dialysis specialty. The commission disagrees that the rule requires nine months of dialysis experience prior to being eligible for charge nurse status; the facility is responsible to ensure that registered nurses with no previous dialysis experience are provided an orientation program of a minimum of six weeks. Facilities may make a business decision to provide a longer orientation program, however a nurse must have completed orientation to begin the six month experience requirement for a charge nurse. No change was made to the rules as a result of this comment.

Comment: Concerning §117.47(f), one commenter states that, in the clinical records discharge summary, it may not be possible to provide data required except for date of discharge or death, diagnosis and/or transplant information.

Response: The commission disagrees, as the disposition of the patient, the diagnosis or cause of death, date of discharge or death, location of death, transplant or relocation information if appropriate, and reason for discharge if not for transplantation or death should be documented in the clinical record. The facility is required to measure, analyze and track a review of each death and monitor modality specific mortality rates as a part of QAPI, and a facility is required to report to the department within ten working days the death of a dialysis patient, which occurs in the facility, at home, or in a hospital. No change was made to the rule as a result of this comment.

Comment: Concerning §117.48(a)(1), one commenter proposes that facilities should only be required to report a death of a dialysis patient that are related to dialysis treatment, and not deaths that may occur for entirely unrelated reasons. The commenter also requested that reporting to the department occur within ten days "of learning of the incident," as it may take a number of days to learn of the death.

Response: The commission disagrees, as the disposition of the patient, the diagnosis or cause of death, date of discharge or death, location of death, transplant or relocation information if appropriate, and reason for discharge if not for transplantation or death should be documented in the clinical record. The facility is required to measure, analyze and track a review of each death and monitor modality specific mortality rates as a part of QAPI, and a facility is required to report to the department within ten working days the death of a dialysis patient, which occurs in the facility, at home, or in a hospital. It is in the interest of the department to receive information in a timely manner. No change was made to the rule as a result of this comment.

Comment: Concerning §117.48(a)(1), one commenter requested that deaths that occur in a hospital after an extended stay or at home should not be the responsibility of the dialysis facility to report, or if required, that the state contract with the ESRD Network to collect, analyze, and report annually on this data. The commenter also requested that reporting of hospital transfers either be deleted or be clarified to only those that are emergent in nature and require transportation via ambulance or rescue squad.

Response: The commission disagrees with contracting with an external entity for collecting, analyzing and reporting annually to the department; the information is needed in a timely manner to monitor for unusual trends or outliers in hospital transfers and/or deaths of patients with end stage renal dialysis or hospital transfers. The commission disagrees with deleting or limiting reporting of hospital transfers or patient deaths. No change was made to the rule as a result of this comment.

Comment: Concerning §117.81(b)(8)(A), one commenter recommends deleting the stipulation that a monitor may not be current of former employees of a facility or an affiliated facility that is the subject of a corrective action plan, and allow otherwise qualified employees of a corporation be allowed to function as nurse managers or monitors after a two year period.

Response: The commission disagrees. The Health and Safety Code, §251.062, states "the monitor may not be or include individuals who are current or former employees of the facility that is the subject of the corrective action plan or of an affiliated facility." No change was made to the rule as a result of this comment.

Comment: One commenter recommends revising section §117.85(e) to impose a four-week time limit for the department to issue a notice of administrative penalties. The commenter pointed out that §117.85 sets forth specific time periods for certain actions, such as 20 days to request a hearing and 30 days to file for judicial review, and that the lack of a timeframe for the department to issue a notice of administrative penalties was contrary to the rest of the rule.

Response: The commission disagrees. Section 117.85(e) reflects the department's authority under the statute to take enforcement action and tracks the language of Texas Health and Safety Code, §251.067(a). The deadlines for requesting a hearing and for filing judicial review are set by statute in Texas Health and Safety Code, §251.067(b) and §251.069. In contrast, §251.067(a) requires the department to give notice of a violation and sets forth what the notice must include but does not impose a deadline for issuing notices of violation. No change was made to the rule in response to this comment.

Comment: Concerning §117.91, one commenter requests deleting references to "potable water" and stated it would be more appropriate to refer to water as "water appropriate for use in dialysis treatment." The commenter also requested segregating water requirements from generator requirements.

Response: The commission disagrees with deleting references to "potable" water, as this is the term used in the industry (documented in another publication, Emergency Preparedness for Dialysis Facility, ESRD Network 14), and refers to water necessary for use in an emergency situation. The commission also disagrees with segregating the emergency water requirements from the generator requirements as these requirements are part of the emergency contingency plan for the continuity of emergency essential building systems. No change was made to the rule as a result of this comment.

Comment: Concerning §117.91(h)(1)(A), eight commenters stated the amount of fuel needed for 24 hours would be prohibitive to store and in an emergency situation, a normal sized storage tank for a generator of that capacity would be exhausted in less than 12 hours.

Response: The commission disagrees; it is a business decision of the facility to size the tank according to the fuel requirement. The following sentence was added to clarify the requirement, "The fuel tank capacity shall be sized by the electrical load demand on the emergency generator for a period of 24 hours." Additionally, facilities have the option of a vapor liquefied petroleum gas (LPG) (natural gas) system, which does not require a 24 hour fuel capacity on site. The type of generator and the quantity of fuel provided is a business decision of the facility. No change was made to the rule as a result of these comments.

Comment: Concerning §117.91(h)(1)(D), eight commenters stated that the requirement to provide a sufficient quantity of potable water is variable and may not be feasible based on the size of the unit and the type of emergency situation, and would add considerable cost without assurances of suitable, quality vendors to provide water.

Response: The commission disagrees; a facility is required to provide a sufficient quantity of potable water as an emergency contingency plan requirement. The amount of potable water that is sufficient is determined by the facility and is a business decision of the facility. No change was made to the rule as a result of these comments.

Comment: Concerning §117.101(b)(1), one commenter stated the language is too restrictive and implies that changing a smoke detector or replacing a broken component of an existing HVAC system with the identical piece, would require submission of plans for review and waiting for approval. The commenter stated the requirement would prevent timely routine preventive maintenance of physical plant issues and could lead to safety issues.

Response: The commission disagrees. Section 117.101(b)(2) states that, "The patching, restoration, or painting of materials, elements, equipment, or fixtures for the purpose of maintaining such materials, elements, equipment, or fixtures in good or sound condition would not require submission to the department for approval." No change was made to the rule as a result of this comment.

Comment: Concerning §117.102(a)(3)(B)(i), one commenter stated the requirement for ESRD facilities constructed in a designated 100-year flood plain to have a finished floor elevation one foot above the set base flood plain elevation is too restrictive and it limits the possible clinic locations for any new or relocated clinic in the Metro Houston and Gulf Coast areas, thus limiting access to care.

Response: The commission disagrees. As per §117.102(a)(3)(B)(i), buildings are required to meet local flood code ordinances and local flood control requirements; however the one foot requirement is designated in the absence of municipal or local building code requirements for public safety. No change was made to the rule as a result of this comment.

Comment: Concerning §117.102(d)(12), one commenter requested replacing the reuse room spatial requirement of "a minimum of three feet of clear and unobstructed working space on all sides of fixed or moveable equipment that require access for staff" with the phrase "adequate space for service," which is similar to the requirement for the water treatment system room in §117.32(b)(3).

Response: The commission disagrees. There is a difference in the function of the water treatment room and the reuse room, necessitating different spatial requirements. The water treatment room contains mechanical equipment, is not an employee duty station, and does not contain biohazard waste. The physical space must be adequate for maintenance, testing and repair of equipment; consequently, water treatment room spatial requirements are a business decision of the facility. The reuse room, however, is the duty station for the reuse technician employee. The reuse room contains biohazard waste, including patient dialyzers, requiring the reuse technician to wear personal protective equipment while working in the room. A spatial requirement of three feet of clear and unobstructed working space on all sides of fixed or moveable equipment that require access for staff is necessary for infection control and employee safety. No change was made to the rule as a result of this comment.

Comment: Concerning §117.102(d)(12)(B), one commenter requested minimum dimensions or specifications for deep utility sinks in the rule.

Response: The commission agrees and has added the sentence, "The minimum depth of the utility sink shall not be less than 14 inches."

Comment: Concerning §117.102(d)(13)(B), one commenter stated that the increase from 70 square feet to 80 square feet in patient treatment areas will be cost prohibitive and will threaten access to care.

Response: The commission disagrees as this requirement is for new construction only and will not impact currently operating facilities. Treatment area supplies, the larger patient recliners currently in use, and the added computer stand necessitate additional square footage in the patient treatment area to provide safe care and allow ventilation for heat emitted by the computer and electronic equipment. No change was made to the rule as a result of this comment.

Comment: Concerning §117.102(e)(6), one commenter requested clarification of the term "enclosed room," questioning whether the room requires a door, a lock, or controlled access, and requested a change to require that "the water treatment and equipment for the dialysis shall be located in an area with controlled access," or alternatively, to specify that the definition of "enclosed" does not require a door, as long as access to the room is controlled.

Response: The commission agrees that changes to clarify §117.102(e)(6) are warranted and deleted the word, "enclosed" and added the words "not accessible to unauthorized persons."

Comment: Concerning §117.102(f)(1)(B)(ix), one commenter requested clarification in the rules that exterior sliding doors with break-away features will be allowed.

Response: The commission disagrees that clarification is needed in the rules; International Building Code allows break-away exterior sliding doors. No change was made to the rule as a result of this comment.

Comment: Concerning §117.102(f)(2)(I), one commenter requested the addition of "a minimum of two coats of wax shall constitute sufficient sealant for vinyl composition tiles."

Response: The commission disagrees, as two coats of wax is not sufficient sealant. No change was made to the rule as a result of this comment.

Comment: Concerning §117.102(g)(5)(A), one commenter objected to the heating, ventilating and air conditioning (HVAC) system requirements, stating geographic location should dictate the climate and humidity; the commenter questioned humidity range requirements when HVAC systems maintain the temperature between 68 and 78 degrees.

Response: The commission disagrees. The facility HVAC equipment must be capable of maintaining a reasonable temperature range for patients, staff and visitors, of between 68 and 78 degrees Fahrenheit. The requirement that equipment be capable of maintaining a humidity range between 45% and 60% is a safety requirement, to prevent static electricity around electrical dialysis equipment and computers, in addition to providing a comfortable environment for patients, staff and visitors. No change was made to the rule as a result of this comment.

Comment: Concerning §117.102(i)(4), one commenter requested a grandfather clause or waiver process to the requirement for electrical service and switchboards to be installed above the 100 year flood plain and located in a permanently dry location, and to evaluate individual clinics requiring renovation for clinics that currently exist below the 100 year flood plain, as it will make it difficult to replace existing equipment.

Response: The commission disagrees, as this is a new construction requirement. No change was made to the rule as a result of this comment.

Comment: Concerning §117.102(i)(11)(J), one commenter requested clarification of acceptable decibel levels for fire alarm systems, including specified minimum and maximum decibel levels.

Response: The commission disagrees, as the rules provide that "the devices shall be listed for the fire alarm service by a nationally recognized laboratory, and be installed in accordance with such listing and the requirements of NFPA 72." No change was made to the rule as a result of this comment.

Comment: One commenter stated that the department should revise §117.104(a)(1), to impose a four-week time limit for the department for review and provide a decision for submitted construction plans.

Response: The commission disagrees with this comment. Texas Health and Safety Code, §251.014, states the rules must contain minimum standards to protect the health and safety of a patient of an ESRD facility, including standards for design and space requirements for the facility for safe access by patients and personnel and for ensuring patient privacy, but does not impose a deadline for review and notification of submitted construction plans. No change was made to the rule as a result of this comment.

Minor changes that will correct errors, update information to maintain rules that are compatible with the CMS, provide consistency, and delete outdated references.

Concerning §117.2(27), the measurement "$feet_3$" was deleted and replaced with "$feet^3$" to correctly reference the measurement.

Concerning §117.18(c)(4)(C)(viii), changed "shall" to "may" to reflect that the department may, but is not required to, verify the correction of deficiencies by mail or on-site inspection.

Concerning §117.32(b)(3)(A) and (B), the sentence, "This rule shall apply to facilities licensed on or after September 1, 2003 or any facility making design changes or reconfiguration of the water distribution system." was deleted to bring the rules into compliance with federal rule.

Concerning §117.33(d)(2)(B)(iii)(II), the statement "provided that the facility's policy on this subject remains congruent with Appendices I and II of the National Surveillance of Dialysis Associated Disease in the United States, 2000, published by the United States Department of Health and Human Services" was replaced with "but must be performed at least annually" to incorporate the requirement into the rule as the reference was outdated.

Concerning §117.41(m), and §117.45(g)(5) and (h)(5), the words "per facility" were added as this was inadvertently omitted in the proposed rule.

Concerning §117.43(a), the word "specific" was replaced with the word "individualized" for accuracy.

Concerning §117.45(c)(2), the statement "medication shall be administered as ordered" was added for accuracy.

Concerning §117.45(i)(2)(E), the statement "any changes in patient treatment shall be per physician's order" was added for accuracy

Concerning §117.46(a)(5), the words "newly employed" were replaced with the word "all," and the statement, "dialysis technicians employed on October 14, 2008 must be certified under a national commercially available certification program within 18 months after such date," was deleted as the deadline related to October 14, 2008 has expired.

Concerning §117.63(b), the words "before September 1, 1996" and "current certification as a dialysis technician by a nationally recognized testing organization may be substituted for the written examination" were deleted as all dialysis technicians must be certified under a national commercially available certification program, within 18 months of being hired as a dialysis technician.

Concerning §§117.12(a)(3), 117.14(c)(2)(F), 117.101(b)(3)(B), and 117.102(d)(4)(G), the words "expanding the capacity" were replaced with "increasing the number," the words "in-center dialysis" were added, and the parenthetical words "in-center dialysis, peritoneal dialysis, or home hemodialysis teaching rooms" were deleted to update and reflect changes in the CMS requirements.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §117.1, §117.2

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER B. FACILITY LICENSING

25 TAC §§117.11 - 117.18

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. MINIMUM STANDARDS FOR DESIGN AND SPACE, EQUIPMENT, WATER TREATMENT AND REUSE, AND SANITARY AND HYGIENIC CONDITIONS

25 TAC §§117.31 - 117.34

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. MINIMUM STANDARDS FOR PATIENT CARE AND TREATMENT

25 TAC §§117.41 - 117.46

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. DIALYSIS TECHNICIANS

25 TAC §§117.61 - 117.65

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. CORRECTIVE ACTION PLAN AND ENFORCEMENT

25 TAC §§117.81 - 117.86

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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General Counsel
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SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §117.1, §117.2

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§117.2. Definitions.

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

(1) Action level--The point at which steps shall be taken to interrupt the trend towards unacceptable levels.

(2) Administrator--A person who is delegated the responsibility for the implementation and proper application of policies, programs, and services established for the end stage renal disease facility.

(3) Advanced practice registered nurse (APRN)--A registered nurse who is currently licensed and authorized by the Texas Board of Nursing to practice.

(4) Adverse event--An event that results in unintended harm to the patient by an act of commission or omission rather than by the underlying disease or condition of the patient or those events affecting patient's family members, visitors, or staff.

(5) Affiliate--An applicant or owner which is:

(A) a corporation--includes each officer, consultant, stockholder with a direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company--includes each officer, member, and parent company;

(C) an individual--includes:

(i) an individual;

(ii) an individual's spouse if the spouse is actively involved in the management of the facility;

(iii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iv) each corporation in which the individual is an officer, consultant, or stockholder with direct ownership of at least 5.0%.

(D) a partnership--includes each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--includes each officer, consultant, or the equivalent under the specific business arrangement and each parent company.

(6) Applicant--The owner of an end stage renal disease facility which is applying for a license under the statute. This is the person in whose name the license is issued.

(7) Biofilm--A coating on surfaces consisting of microcolonies of bacteria embedded in a protective extracellular matrix. The matrix, a slimy material secreted by the cells, protects the bacteria from antibiotics and disinfectants.

(8) Caregiver--A person trained, qualified, and competent in the use of a device for the selected modality prescribed by the physician.

(9) Change of ownership--A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership and the tax identification number of the partnership changes; or a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons and the tax identification number of the corporation changes.

(10) Charge nurse--A registered nurse practicing nursing in accordance with applicable provisions of law who is responsible for making daily staff assignments based on patient needs, providing immediate supervision of patient care, monitoring patients for changes in condition, and communicating with the physician, dietician, and social worker regarding patient needs.

(11) Closed system--A dialysis system, hemodialysis or peritoneal dialysis, which uses sterile manufactured bagged dialysate, or dialysate solution.

(12) CMS--Centers for Medicare and Medicaid Services.

(13) Commissioner--The commissioner of the Department of State Health Services.

(14) Competency--The demonstrated ability to carry out specified tasks or activities with reasonable skill and safety that adheres to the prevailing standard of practice.

(15) Conventional dialysis system--The facility's water treatment components and single pass dialysis machines.

(16) Core staff members--The facility's medical director, supervising nurse, dietitian, social worker, administrator, and chief technician.

(17) Corrective action plan--A written strategy for correcting a licensing violation. The corrective action plan is developed by the facility and addresses the system(s) operation(s) of the facility as the system(s) operation(s) applies to the deficiency.

(18) Delegation--The transfer to a qualified and properly trained individual of the authority to perform a selected task or activity in a selected situation.

(19) Department--The Department of State Health Services.

(20) Dialysate--An aqueous fluid containing electrolytes and usually dextrose, which is intended to exchange solutes with blood during hemodialysis. The word "dialysate" is used throughout this document to mean the fluid made from water and concentrate which is delivered to the dialyzer by the dialysate supply system. Such phrases as "dialyzing fluid" or "dialysis solution" may be used in place of dialysate. It does not include peritoneal dialysis fluid.

(21) Dialysate supply system--Devices that prepare dialysate on line from water and concentrates or store and distribute premixed dialysate; circulate the dialysate through the dialyzer; monitor the dialysate for temperature, conductivity, pressure, flow and blood leaks; and prevent dialysis during disinfection or cleaning modes. The term includes reservoirs; conduits; proportioning devices for the dialysate; and monitors, associated alarms, and controls assembled as a system for the characteristics listed above. The dialysate supply system is often an integral part of single-patient dialysis machines.

(22) Dialysis--A process by which dissolved substances are removed from a patient's body by diffusion, osmosis, and convection (ultrafiltration) from one fluid compartment to another across a semipermeable membrane.

(23) Dialysis technician--An individual who provides hands on dialysis care to specifically assigned patients during their dialysis treatment under the direct supervision of a registered nurse. If unlicensed, this individual may also be known as a patient care technician.

(24) Dietitian--A person who is currently licensed under the laws of this state to use the title of licensed dietitian, is a registered dietitian, and has one year of experience in clinical dietetics after becoming a registered dietitian.

(25) Direct care staff--Staff who provide hands on dialysis care to specifically assigned patients during their dialysis treatment (e.g., registered nurse, licensed vocational nurse, patient care technician).

(26) Director--The director of the Patient Quality Care Unit of the department or his or her designee.

(27) Empty bed contact time (EBCT)--A measure of how much contact occurs between particles, such as activated carbon, and water as the water flows through a bed of the particles. EBCT = (7.48 xV)/Q where V is the volume of particles in the bed (feet^3), Q is the flow rate of the water through the bed (gallon/minute), and 7.48 is the conversion factor for gallons to feet^3.

(28) End stage renal disease (ESRD)--That stage of renal impairment that appears irreversible and permanent and that requires a regular course of dialysis or kidney transplantation to maintain life (also known as chronic kidney disease stage V).

(29) End stage renal disease facility--A facility that provides dialysis treatment or dialysis training and support to individuals with end stage renal disease.

(30) Endotoxin--Lipopolysaccharides consisting of a polysaccharide chain covalently bound to lipid A and the major component of the outer cell wall of gram-negative bacteria.

(31) Endotoxin-retentive filter--Membrane filter specifically proven to remove bacteria and endotoxins.

(32) EOC--Emergency Operations Center in local jurisdictions.

(33) Full-time--The time period established by a facility as a full working week, as defined and specified in the facility's policies and procedures.

(34) Full-time equivalent--Work time equivalent to 2,080 hours per 12 consecutive months.

(35) Governing body--An identified group, which includes the medical director and a representative(s) of the owner of the facility, with full legal authority and responsibility for the governance and operation of the facility.

(36) Ground fault circuit interrupters (GFCI)--GFCI receptacles shall be provided for all general use receptacles located within three feet of a wash basin or sink. When GFCI receptacles are used, they shall be connected to not affect other devices connected to the circuit in the event of a trip. Receptacles connected to the critical branch that may be used for equipment that should not be interrupted do not have to be GFCI protected. Receptacles in wet locations, as defined by National Fire Protection Association (NFPA) 70, §517.20 and $517.21, shall be GFCI protected regardless of the branch of the electrical system serving the receptacle.

(37) Health care facility--Any type of facility or home and community support services agency licensed to provide health care in any state or certified for Medicare (Title XVIII) or Medicaid (Title XIX) participation in any state.

(38) Home dialysis service--Dialysis performed at home by an end stage renal disease patient or caregiver who has completed an appropriate course of training as described in §117.45(j) of this title (relating to Provision and Coordination of Treatment and Services).

(39) Hospital--A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241, or if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §1395 et seq.).

(40) Incident--Death of a dialysis patient, which occurs in the facility, at home, or in a hospital; hospital transfers; conversion of staff or a patient to hepatitis B surface antigen (HbsAg) positive; involuntary transfer or discharge of a patient; and a fire in the ESRD facility.

(41) Inspection--An investigation or survey conducted by a representative of the department to determine if an applicant or licensee is in compliance with this chapter.

(42) Integrated dialysis system--A preconfigured system which incorporates water treatment and dialysis preparation and delivery into one system.

(43) Interdisciplinary team (IDT)--A group composed of the primary dialysis physician, the registered nurse, the dietitian, and the social worker who are responsible for planning care for the patient.

(44) Intermediate-level disinfection--A surface treatment using chemical germicides or disinfectants which are capable of inactivating various classes of microorganisms including, but not limited to, viruses (primarily medium to large viruses and lipid-containing viruses), fungi, and actively growing bacteria (including tubercle bacteria) when such chemical germicides or disinfectants are used in accordance with the manufacturer's directions for use or per established guidelines. Intermediate-level disinfection is generally not effective in inactivating or eliminating bacterial endospores. Examples of intermediate-level disinfectants include bleach, 70 - 90% ethanol or isopropanol, and certain phenolic or iodophor preparations.

(45) Licensed nurse--A registered nurse or licensed vocational nurse.

(46) Licensed vocational nurse (LVN)--A person who is currently licensed under the Nursing Practice Act by the Texas Board of Nursing as a licensed vocational nurse, or who holds a valid vocational nursing license with multi-state licensure privilege from another compact state, and who may provide dialysis treatment after meeting the competency requirements specified for dialysis technicians.

(47) Manager--An individual approved or selected by the department who assumes overall management of an end stage renal disease facility to ensure adequate and safe services are provided to patients.

(48) Medical director--A physician who:

(A) is board certified in internal medicine by the American Board of Internal Medicine or pediatrics by the American Board of Pediatrics, has completed a board-approved training program in nephrology, and has at least 12 months of experience providing care to patients receiving dialysis; or

(B) is board certified in nephrology or pediatric nephrology and has at least 12 months of experience providing care to patients receiving dialysis.

(49) Medical review board (MRB)--A medical review board that is appointed by a renal disease network organization which includes this state, with the network having a contract with the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services under 42 United States Code §1395rr.

(50) Modality--Different treatment options and settings for patients with end stage renal disease, for example, in-center dialysis, home hemodialysis, peritoneal dialysis, self-care dialysis, nocturnal dialysis, and transplantation.

(51) Monitor--An individual approved or selected by the department who observes, supervises, consults, and educates a facility to correct identified violations of the statute or this chapter.

(52) Owner--One of the following which holds or will hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a limited liability company;

(C) an individual;

(D) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(E) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(F) all co-owners under any other business arrangement.

(53) Patient--An individual receiving dialysis treatment or training from an end stage renal disease facility.

(54) Patient plan of care--Documentation of the interactive process whereby the interdisciplinary team and the patient and/or family member or guardian develop and implement a plan, based on the assessments preformed by the interdisciplinary team members, to as-

sist the end stage renal disease patient in managing the disease and its complications.

(55) Pediatric patient--An individual from birth and continuing through 18 years of age.

(56) Person--An individual, corporation, or other legal entity.

(57) Physician--A physician licensed by the Texas Medical Board.

(58) Physician assistant--A person licensed as a physician assistant by the Texas Medical Board.

(59) Physician extender--A health care provider (advanced practice registered nurse or physician assistant) who is not a physician but who performs medical activities typically performed by a physician.

(60) Presurvey conference--A conference held with department staff and the applicant or his or her representatives to review licensure standards and survey documents and provide consultation prior to the issuance of the license. The applicant's representatives shall include an individual who will be responsible for the day-to-day supervision of care by the facility.

(61) Product water--Water produced by a water treatment system or by an individual component of a system.

(62) Progress note--A record of an event dated and signed by facility staff, which summarizes facts about the patient's care and the patient's response during a given period of time.

(63) Pyrogen--A fever producing substance. Pyrogens are most often lipopolysaccharides of gram-negative bacterial origin.

(64) Quality assessment and performance improvement (QAPI)--An ongoing program which measures, analyzes, and tracks quality indicators related to improve health outcomes. The program implements improvement plans and evaluates the implementation until resolution is achieved.

(65) Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing as a registered nurse, or who holds a valid registered nursing license with multi-state licensure privilege from another compact state.

(66) Self-care patients--In-center patients who perform all or part of their dialysis treatments.

(67) Social worker--A person who:

(A) is currently licensed as a social worker under the Occupations Code, Chapter 505, and holds a master's degree from a graduate school of social work accredited by the Council on Social Work Education; or

(B) has worked for at least two years as a social worker, one year of which was in a dialysis facility or transplantation program prior to September 1, 1976, and has established a consultative relationship with a social worker who has a master's degree from a graduate school of social work accredited by the Council on Social Work Education.

(68) Sorbent regeneration system--A system that regenerates dialysate by passing the dialysate through substances that restore the dialysate to a condition comparable to fresh dialysate.

(69) Station--An area in the facility in which a patient receives in-center dialysis treatment, or dialysis instruction, (i.e., home hemodialysis training, or peritoneal dialysis training).

(70) Statute--The Health and Safety Code, Chapter 251.

(71) Supervising nurse (also may be known as the director of nursing)--A registered nurse who:

(A) has at least 18 months experience as an RN, which includes at least 12 months experience in dialysis which has been obtained within the last 24 months; or

(B) has at least 18 months experience as an RN, and holds a current certification from a nationally recognized board in nephrology nursing or hemodialysis.

(72) Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity. Immediate supervision means the supervisor is actually observing the task or activity as it is performed. Direct supervision means the supervisor is on the premises but not necessarily immediately physically present where the task or activity is being performed. Indirect supervision means the supervisor is not on the premises but is accessible by two-way communication and able to respond to an inquiry when made, and is readily available for consultation.

(73) Technical supervisor--The supervisor of the facility's mechanical, reuse and water treatment systems.

(74) Training--The learning of tasks through on-the-job experience or instruction by an individual who has the capacity through education or experience to perform the task or activity to be delegated.

(75) Ultrafilter--A membrane filter with a pore size in the range 0.001 to 0.05 micron (µm). Performance is usually rated in terms of a nominal molecular weight cut off (MWCO), which is defined as the smallest molecular weight species for which the filter membrane has more than 90% rejection. Ultrafilters with a nominal MWCO of 20,000 or less are generally adequate for endotoxin removal.

(76) Water distribution systems--Components to include any storage tanks and piping used to distribute the product water from the purification cascade to or from its point of use, including individual hemodialysis machines, dialyzer reprocessing equipment, and dialysate concentrate preparation systems.

(77) Water treatment system--A collection of water purification devices and associated piping, pumps, valves, gauges, etc., that together produce purified water for hemodialysis applications and deliver it to the point of use.

(78) Working day--Any day of the calendar week excluding Saturday or Sunday or holidays.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. APPLICATION AND ISSUANCE OF A LICENSE

25 TAC §§117.11 - 117.19

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§117.12. Application and Issuance of Initial License.

(a) The applicant shall comply with the following before the projected opening date of the facility:

(1) the applicant shall submit an accurate and complete application form;

(2) the applicant shall submit the appropriate license fee as required in §117.16 of this title (relating to Fees); and

(3) as of February 9, 2009, the applicant for a new facility or for an existing facility that is increasing the number of in-center dialysis treatment stations in existing facilities shall have an isolation room or shall provide a waiver by the Centers for Medicare and Medicaid Services. The waiver shall demonstrate that there is sufficient capacity in the geographic area for isolation rooms for hepatitis B positive patients. An applicant may submit a written request for waiver through the Texas Department of State Health Services, Health Facility Compliance Group, Mail Code 1979, P.O. Box 149347, Austin, Texas, 78714-9347 for transmission to CMS.

(b) The applicant or the applicant's representative shall attend a presurvey conference at the office designated by the department. The purpose of the presurvey conference, which is conducted by department staff, is to review facility staff qualifications, survey documents and licensure rules, and to provide consultation prior to the on-site licensure survey. The department staff conducting the presurvey conference is responsible for making a recommendation regarding the issuance of the initial license. The department may waive the presurvey conference requirement.

(c) In addition to the document submittal requirements in subsection (a) of this section, the following shall be completed prior to the issuance of an ESRD facility license to newly constructed ESRD facility or ESRD facility from conversion of non-ESRD building.

(1) Final construction documents shall be reviewed and approved by the department in accordance with §117.104 of this title (relating to Preparation, Submittal, Review and Approval of Plans and Retention of Records).

(2) For new construction, necessary intermediate inspections and final construction inspections shall be conducted by the department in accordance with §117.105(b) of this title (relating to Construction, Inspections, and Approval of Project) to determine that the ESRD facility was constructed in compliance with this chapter.

(3) When an applicant intends to reopen and relicense a building formerly licensed as a ESRD facility, an on-site inspection shall be conducted by the department in accordance with §117.105 of this title to determine compliance with applicable construction and fire safety requirements.

(4) A certificate of occupancy for the project issued by the local building authority, if applicable and a written approval of the project by the fire authority.

(5) A complete and accurate Final Construction Approval form shall be submitted to the department.

(d) The facility shall submit a complete chemical analysis of the product water, and reports to verify that bacteriological and endotoxin levels of product water and dialysate are in compliance with §117.32 of this title (relating to Water Treatment, Dialysate Concentrates, and Reuse). The reports shall be kept on file at the facility and made available to department staff during the on-site inspection.

(e) When it is determined that the facility has complied with subsections (a) - (d) of this section, the department shall issue the license to the applicant.

(1) The license shall be effective on the date the facility is determined to be in compliance with subsections (a) - (d) of this section.

(2) Expiration date.

(A) If the effective date of the license is the first day of a month, the license expires on the last day of the 23rd month after issuance.

(B) If the effective date of the license is the second or any subsequent day of a month, the license expires on the last day of the 24th month after issuance.

(f) If an applicant decides not to continue the application process for a license or renewal of a license, the application may be withdrawn.

(g) Denial of a license shall be governed by §117.84 of this title (relating to Disciplinary Action).

(h) During the initial licensing period, the department shall conduct an inspection of the facility to ascertain compliance with the provisions of the Health and Safety Code, Chapter 251, and this chapter.

(1) A facility shall request an on-site inspection to be conducted after at least one patient has been admitted and provided services.

(2) A facility shall be providing services to at least one patient at the time of the inspection. The department may interview patients at the time of the inspection in the patient's home or at the facility.

§117.14. Changes in Status.

(a) A change of ownership occurs when there is a change in the person legally responsible for the operation of the facility, whether by lease or by ownership. If a corporate licensee amends its articles of incorporation to revise its name, this subsection does not apply, except that the corporation shall notify the department not later than the 10th calendar day after the effective date of the name change. The sale of stock of a corporate licensee does not cause this subsection to apply.

(1) The new owner shall submit an application for an initial license to the department at least 60 days before the date of the change of ownership. The application shall be in accordance with subsections (a) and (b) of this section. The applicant shall include the effective date of the change of ownership. The new owner shall be responsible for previous regulatory violations, and shall ensure compliance with all rules and regulations.

(2) The inspection required by subsection (h) of this section may be waived by the department.

(3) When the new owner has complied with the provisions of subsections (a) and (b) of this section, the department shall issue a license which shall be effective the date of the change of ownership.

(4) The expiration date of the license shall be in accordance with subsection (e)(2) of this section.

(5) The previous owner's license shall be void on the effective date of the new owner's license.

(b) A facility planning to relocate shall notify the department at least 90 days before the planned relocation. Relocations shall be within the same geographical area, and services shall continue to be provided to the facility's existing patient population.

(1) The facility shall submit an application for an initial license to the department prior to the date of the relocation. The application shall be in accordance with subsections (a) - (d) of this section.

(2) The inspection required by subsection (h) of this section may be waived by the department.

(3) The license shall be effective on the date the facility is determined to be in compliance with subsections (a) - (d) of this section.

(4) The expiration date of the license shall be in accordance with subsection (e)(2) of this section.

(5) The previous facility license shall be void on the effective date of the relocation.

(c) Changes which affect the license.

(1) A facility shall notify the department in writing at least 30 days before the occurrence of any of the following:

(A) any remodeling, renovations, additions and alterations, shall comply with the provisions of §117.101(b) of this title (relating to Construction Requirements for an Existing End Stage Renal Disease Facility);

(B) change in facility name, mailing address, telephone number, or fax number;

(C) planned change of administrator, or within five working days of an unplanned change of administrator; or

(D) cessation of operation of the facility.

(2) A facility shall obtain written approval from the department prior to the utilization of added services or an increased number of stations. The written request shall be submitted 30 days prior to the planned change.

(A) For an additional service or increase in stations, the department may request that the facility provide evidence of appropriate staffing and policies and procedures which demonstrate the intent to comply with the applicable requirements, and any other documentation it determines is necessary to evaluate the request.

(B) For an increase in stations, the facility shall also be required to submit written evidence that the water treatment system is of sufficient size to accommodate the increase and maintain a safe water supply.

(C) The department may conduct an on-site inspection prior to taking action on the requested change.

(D) The facility shall submit a complete chemical analysis of the product water, and reports to verify that bacteriological and endotoxin levels of product water and dialysate are in compliance with §117.32 of this title (relating to Water Treatment, Dialysate Concentrates, and Reuse). The reports shall be kept on file at the facility and made available to department staff during the next on-site inspection.

(E) The department shall send the facility written notice of the approval or disapproval of the requested change.

(F) As of February 9, 2009, all existing facilities increasing the number of in-center dialysis treatment stations shall have an isolation room or be granted a waiver by the Centers for Medicare and Medicaid Services. The waiver shall demonstrate that there is sufficient capacity in the geographic area for isolation rooms for hepatitis B positive patients. A written request for waiver shall be made through the Texas Department of State Health Services, Health Facility Compliance Group, Mail Code 1979, P.O. Box 149347, Austin, Texas, 78714-9347 for transmission to CMS.

(d) The facility shall submit a complete chemical analysis of the product water, and reports to verify that bacteriological and endotoxin levels of product water and dialysate are in compliance with §117.32 of this title. The reports shall be kept on file at the facility and made available to department staff during the on-site inspection.

(e) When it is determined that the facility has complied with subsections (a) - (d) of this section, the department shall issue the license to the applicant.

(1) The license shall be effective on the date the facility is determined to be in compliance with subsections (a) - (d) of this section.

(2) Expiration date.

(A) If the effective date of the license is the first day of a month, the license expires on the last day of the 23rd month after issuance.

(B) If the effective date of the license is the second or any subsequent day of a month, the license expires on the last day of the 24th month after issuance.

(f) If an applicant decides not to continue the application process for a license, the application may be withdrawn.

(g) Denial of a license shall be governed by §117.84 of this title (relating to Disciplinary Action).

(h) During the initial licensing period, the department shall conduct an inspection of the facility to ascertain compliance with the provisions of the Health and Safety Code, Chapter 251, and this chapter.

(1) A facility shall request an on-site inspection to be conducted after at least one patient has been admitted and provided services.

(2) A facility shall be providing services to at least one patient at the time of the inspection. The department may interview patients at the time of the inspection in the patient's home or at the facility.

§117.18. Inspections.

(a) The department may conduct an inspection at any time to verify compliance with the statute or this chapter. By applying for or holding a license, the facility consents to entry and inspection of the facility by the department or representative of the department in accordance with the statute and this chapter.

(1) An authorized representative of the department (surveyor) may enter the premises of a license applicant or license holder at reasonable times during business hours to conduct an on-site inspection incidental to the issuance of a license, and at other times as the department considers necessary to ensure compliance with:

(A) the statute or this chapter;

(B) an order of the commissioner;

(C) a court order granting injunctive relief;

(D) a corrective action plan; or

(E) other enforcement action(s).

(2) The surveyor is entitled to access all books, records, or other documents maintained by or on behalf of the facility, interview patients and staff to the extent necessary to ensure compliance with the statute, this chapter, an order of the commissioner, a court order granting injunctive relief, a corrective action plan, or other enforcement action. The department shall maintain the confidentiality of facility records as applicable under federal or state law. Ensuring compliance includes permitting photocopying by the department or providing photocopies to a department surveyor of any records or other information by or on behalf of the department as necessary to determine or verify compliance with the statute or this chapter.

(b) Types of inspections.

(1) Construction inspection.

(A) The department shall conduct an inspection to determine compliance with the spatial, physical plant, and system requirements described in §117.102 of this title (relating to Construction Requirements for a New End Stage Renal Disease Facility), the requirements in §117.31(a) and (c) of this title (relating to Equipment), and §117.32(b) and (c) of this title (relating to Water Treatment, Dialysate Concentrates, and Reuse) prior to issuance of the initial license.

(B) During any license period, the department may conduct a construction inspection to determine whether modifications or renovations comply with §117.102 of this title.

(2) A department surveyor may conduct an initial inspection after the date of issuance of the initial license to determine if the facility meets the requirements of the statute and this chapter. The initial inspection is an evaluation of compliance with all requirements of the statute and this chapter.

(3) At the department's discretion, a department surveyor may perform an on-site inspection prior to renewal of a facility license to verify compliance with the statute and this chapter. The renewal inspection may include an evaluation of compliance with all requirements of the statute and this chapter.

(4) The department surveyor shall perform an inspection of a facility on site or by mail, if the facility has demonstrated noncompliance with the statute or this chapter, or to investigate a complaint received by the department.

(5) After review of a facility's annual report, the department may request additional information, or conduct an inspection by mail or on site to determine compliance with the statute and this chapter.

(6) The department may conduct an inspection incidental to an incident report as described in §117.48 of this title (relating to Incident Reports).

(7) A department surveyor shall perform an inspection on site or by mail to verify completion of a corrective action plan(s) for deficiencies cited during any of the inspections described in paragraphs (1) - (6) of this subsection.

(c) Inspection procedures.

(1) The department's surveyor shall hold an entrance conference with the person who is in charge of the facility prior to commencing the inspection for the purpose of explaining the nature and scope of the inspection.

(2) Except for the purposes of conducting an inspection under subsection (b)(1), (4), (6), or (7) of this section, an on-site inspection shall include an evaluation to determine compliance with the statute and this chapter.

(3) Following an inspection of a facility the surveyor shall hold an exit conference with the facility administrator or his or her designee. During the exit conference, the surveyor shall:

(A) fully inform the facility representative of the preliminary finding(s) of the inspection;

(B) inform the facility representative regarding the preliminary finding(s) of the inspection of those circumstances which are potentially serious, serious, or life-threatening;

(C) give the facility representative a reasonable opportunity to submit additional facts or other information to the surveyor in response to those findings before the surveyor exits the facility; and

(D) identify any records that were duplicated.

(4) Written notice of findings.

(A) The surveyor shall:

(i) prepare and provide the facility administrator or his or her designee specific and timely written notice of the findings in accordance with subparagraphs (B) and (C) of this paragraph; and

(ii) if the findings result in a referral described in §117.81(a) of this title (relating to Corrective Action Plan), the surveyor may submit a written summary of the findings to the medical review board for its review and recommendation for appropriate action by the department.

(B) If no deficiencies are found during an inspection, the department shall provide a statement indicating this fact.

(C) If the written notice of findings includes deficiencies, the department and the facility shall comply with the procedure set out in this subparagraph.

(i) The department shall provide the facility with a statement of the deficiencies not later than the 10th working day after the exit conference.

(ii) The facility administrator or administrator's designee shall sign the written statement of deficiencies and return it to the department with an acceptable corrective action plan(s) for each deficiency no later than 10 working days of the facility's initial receipt of the statement of deficiencies. The signature does not indicate the administrator's or designee's agreement with deficiencies stated on the form. If the corrective action plan(s) is not acceptable to the department, the department shall notify the facility in writing and request that the corrective action plan(s) be modified and resubmitted no later than 10 working days from the facility's receipt of such request.

(iii) The facility shall come into compliance 60 calendar days prior to the expiration date of the license or no later than the dates designated in the corrective action plan(s), whichever comes first.

(iv) The requirements in clause (i) of this subparagraph do not apply if the surveyor's written notice of findings results in a referral to the medical review board as described in subparagraph (A)(ii) of this paragraph.

(v) A corrective action plan completion date shall not exceed 45 calendar days from the date the deficiency(ies) is cited (exit date of the survey).

(vi) The facility may challenge any deficiency cited after receipt of the statement of deficiencies. A challenge to a deficiency(ies) shall be in accordance with this subparagraph.

(I) The facility shall comply with clause (ii) of this subparagraph regardless of its intent to challenge the deficiency(ies).

(II) An initial challenge to a deficiency(ies) shall be submitted in writing no later than five working days from the facility's receipt of the statement of deficiencies to the applicable zone office.

(III) If the initial challenge is favorable to the department, the facility may request a review of the initial challenge by submitting a written request to the Director or his or her designee, Patient Quality Care Unit, Department of State Health Services. The facility shall submit its written request for review of the initial challenge no later than five working days from its receipt of the department's response to the initial challenge. The department shall not accept or review any documents that were not submitted with the initial challenge. A determination by the director of the patient quality care unit relating to a challenge to a deficiency(ies) is the department's final determination concerning the challenge.

(IV) The department shall respond to any written challenge submitted under subclause (II) or (III) of this clause no later than 15 working days from its receipt.

(V) The department shall determine if a written corrective action plan(s) is acceptable. If the corrective action plan(s) is not acceptable to the department, the department shall notify the facility in writing and request that the corrective action plan(s) be modified and resubmitted no later than 10 working days from the facility's receipt of such request.

(vii) If the facility does not come into compliance by the required date of correction reflected on the corrective action plan(s), the department may:

(I) appoint a monitor as described in §117.81 of this title (relating to Corrective Action Plan);

(II) appoint a temporary manager as described in §117.83 of this title (relating to Involuntary Appointment of a Temporary Manager);

(III) propose to deny, suspend, or revoke the license in accordance with §117.84 of this title (relating to Disciplinary Action);

(IV) assess an administrative penalty(ies) in accordance with §117.85 of this title (relating to Administrative Penalties); or

(V) take all of the actions described in subclauses (I) - (IV) of this clause.

(viii) The department may verify the correction of deficiencies by mail or on-site inspection.

(ix) Acceptance of a corrective action plan does not preclude the department from taking enforcement action as appropriate under §§117.83, 117.84, or 117.85 of this title.

(x) The department shall refer issues and complaints relating to the conduct of or action(s) by licensed health care professionals to the appropriate licensing board(s).

(d) Complaint against a department surveyor.

(1) An ESRD facility may register a complaint against a Department of State Health Services surveyor who conducts an inspection or investigation.

(2) A complaint against a surveyor shall be registered with the Patient Quality Care Unit, Department of State Health Services, Mail Code 1979, P.O. Box 149347, Austin, Texas 78714-9347, telephone (512) 834-6650 or (888) 973-0022.

(A) A complaint against a surveyor which is received by telephone will be referred not later than the second working day to the appropriate supervisor. The caller will be requested to submit the complaint in writing.

(B) When a complaint is received in writing, it will be forwarded to the appropriate supervisor not later than the second working day. Not later than the 10th calendar day after the department receives the complaint, the department will inform the complainant in writing that the complaint has been forwarded to the appropriate supervisor.

(C) Not later than the 10th calendar day after the supervisor receives the complaint, the supervisor will notify the complainant in writing that an investigation will be done.

(D) The supervisor will review the documentation in the survey packet and interview the surveyor identified in the complaint to obtain facts and assess the objectivity of the surveyor in the surveyor's application of this chapter during the ESRD facility's inspection or investigation.

(E) The supervisor will review the applicable rules, personnel policies, and review the training and qualifications of the surveyor as it relates to the inspection or investigation.

(F) The supervisor will document the investigation. A report of the investigation will be placed in the ESRD facility file if the complaint and investigation affected the inspection process. A counseling form will be used and placed in the surveyor's personnel file if the complaint relates to personnel performance.

(G) The supervisor shall offer to meet with the complainant to resolve the issue. The surveyor identified in the complaint will participate in the discussion. The resolution meeting may be conducted at the division's office or during an on-site follow-up visit to the hospital.

(H) Changes and deletions will be made to the inspection report, if necessary.

(I) The supervisor will notify the complainant in writing of the status of the investigation not later than the 30th calendar day after the date the supervisor received the complaint.

(J) The supervisor will forward all final documentation to the director of the Patient Quality Care Unit and notify the complainant of the results.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. MINIMUM STANDARDS FOR EQUIPMENT, WATER TREATMENT AND REUSE, AND SANITARY AND HYGIENIC CONDITIONS

25 TAC §§117.31 - 117.33

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§117.31. Equipment.

(a) All equipment used by a facility, including backup equipment, shall be FDA approved, operated in accordance with the manufacturer's direction for use, and maintained free of defects which could be a potential hazard to patients, staff, or visitors. Maintenance and repair of all equipment shall be performed by qualified staff or contract personnel.

(1) Staff shall be able to identify malfunctioning equipment and report such equipment to the appropriate staff for immediate repair.

(2) Medical equipment that malfunctions shall be clearly labeled and immediately removed from service until the malfunction is identified and corrected.

(3) A record of all maintenance and repairs shall be maintained.

(4) After repairs or alterations are made to any equipment or system, the equipment or system shall be thoroughly tested for proper operation and disinfected before returning to service.

(5) A facility shall comply with the Federal Food, Drug, and Cosmetic Act, 21 United States Code (USC), §360i(b), concerning reporting when a medical device as defined in 21 USC §321(h) has or may have caused or contributed to the injury or death of a patient of the facility.

(6) Completion of the requirements listed in paragraphs (1) - (5) of this subsection shall be documented on the facility's equipment or system repair log.

(b) A facility shall develop, implement, and enforce a written preventive maintenance program to ensure patient care related equipment used in a facility or provided by a facility for use by the patient in the patient's home receives electrical safety inspections, if appropriate, and maintenance at least annually or more frequently in accordance with the manufacturer's direction for use. The preventive maintenance may be provided by facility staff or by contract personnel.

(c) At least one complete dialysis machine shall be available on site as backup for every ten dialysis machines in use. At least one of these backup machines shall be completely operational during hours of treatment. Machines not in use during a patient shift may be counted as backup except at the time of an initial or an expansion survey.

(d) If pediatric patients are treated, a facility shall use equipment and supplies, to include blood pressure cuffs, dialyzers, and blood tubing, appropriate for this special population.

(e) All equipment and appliances shall be properly grounded in accordance with the National Fire Protection Association 99, Standard for Health Care Facilities, §4.3.2.2.2, 2002 Edition (NFPA 99), published by the NFPA. All documents published by the NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address and telephone number: National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101 or (800) 344-3555.

(f) An ESRD facility shall have emergency equipment and supplies immediately accessible in the treatment area.

(1) At a minimum, the emergency equipment and supplies shall include the following:

(A) oxygen;

(B) ventilatory assistance equipment, to include airways, manual breathing bag, and mask;

(C) suction equipment;

(D) supplies specified by the medical director; and

(E) automated external defibrillator.

(2) If pediatric patients are treated, the facility shall have the appropriate type and size emergency equipment and supplies listed in paragraph (1) of this subsection for this special population.

(3) A facility shall establish, implement, and enforce a policy for the periodic testing and maintenance of the emergency equipment. Staff shall properly maintain and test the emergency equipment and supplies, and document the testing and maintenance.

§117.32. Water Treatment, Dialysate Concentrates, and Reuse.

(a) A facility shall meet the requirements of this section. A facility may follow more stringent requirements than the minimum standards required by this section.

(1) The facility owner and medical director shall each demonstrate responsibility for the water treatment and dialysate supply systems to protect hemodialysis patients from adverse effects arising from known chemical and microbial contaminates that may be found in water and improperly prepared dialysate, to ensure that the dialysate is correctly formulated and meets the requirements of all applicable quality standards.

(2) The facility owner and medical director shall each assure that policies and procedures related to water treatment, dialysate, and reuse are understandable and accessible to the operator(s), and that the training program includes quality testing, risks and hazards of improperly prepared concentrate, and bacterial issues.

(3) The facility owner and medical director shall be informed prior to any alteration of, or any device being added to, the water system.

(b) These requirements apply to water intended for use in the delivery of hemodialysis, including the preparation of concentrates

from powder at a dialysis facility and dialysate, and for reprocessing dialyzers for multiple use.

(1) The design for the water treatment system in a facility shall be based on considerations of the source water for the facility and designed by a water quality professional with education, training, or experience in dialysis system design.

(2) When a public water system supply is not used by a facility, the source water shall be tested by the facility at monthly intervals in the same manner as a public water system as described in 30 Texas Administrative Code, §290.104 (relating to Summary of Maximum Contaminant Levels, Maximum Residual Disinfectant Levels, Treatment Techniques, and Action Levels), and §290.109 (relating to Microbial Contaminants) as adopted by the Texas Commission on Environmental Quality.

(3) The physical space in which the water treatment system is located shall be adequate to allow for maintenance, testing, and repair of equipment. If mixing of concentrates is performed in the same area, the physical space shall also be adequate to house and allow for the maintenance, testing, and repair of the mixing equipment and for performing the mixing procedure. Water distribution systems shall be configured as a continuous recirculation loop, and to minimize biofilm formation, there shall always be flow in a piping system, except during the backwash cycle of the carbon tanks for direct feed systems.

(A) For indirect feed systems a minimum of three feet per second water flow shall be achieved in the distribution loop.

(B) For direct feed systems a minimum of 1.5 feet per second water flow shall be achieved in the distribution loop.

(C) This rule shall not apply to facilities providing only home training and support services utilizing single patient devices.

(D) The water treatment and distribution system shall include appropriate pressure gauges, flow meters, sample ports, and other ancillary equipment necessary to allow monitoring of the performance of individual system components and the system as a whole, as determined by the facility medical director.

(4) The water treatment system components shall be arranged and maintained so that bacterial and chemical contaminant levels in the product water do not exceed the standards for hemodialysis water quality described in §4.1.1 (concerning Maximum level of chemical contaminants in water) and §4.1.2 (concerning Bacteriology of water) of the American National Standards Institute (ANSI), Water Treatment Equipment for Hemodialysis Applications, RD52:2004 Edition, published by Association for the Advancement of Medical Instrumentation (AAMI). All documents published by the AAMI as referenced in this section may be obtained by writing the following address: 1110 North Glebe Road, Suite 220, Arlington, Virginia 22201.

(A) Direct feed systems shall include a means of verifiably preventing retrograde flow of water into the distribution loop from the feed side of the reverse osmosis unit.

(B) Dead-end piping (risers with no flow, branches with no fixture) shall not be installed. In any renovation work, dead-end piping shall be removed.

(5) Written policies and procedures for the operation of the water treatment system shall be developed, approved by the medical director, implemented, and enforced. Parameters for the operation of each component of the water treatment system shall be developed in writing and known to the operator. Each major water system component shall be labeled in a manner that identifies the device; describes its function, how performance is verified, and actions to take in the event performance is not within an acceptable range. Facility's policy and/or procedure for the bypass valves for the carbon tanks and any other bypass valves considered to be critical by the medical director shall have a means to minimize the likelihood the device will be inadvertently bypassed during normal operation of the system.

(6) The materials of any components of water treatment systems (including piping, storage, filters, and distribution systems) that contact the product water shall not interact chemically or physically so as to affect the purity or quality of the product water adversely. Such components shall be fabricated from unreactive materials (e.g., plastics) or appropriate stainless steel. The use of materials that are known to cause toxicity in hemodialysis, such as copper, brass, galvanized material, or aluminum, is prohibited at any point beyond the water treatment component used to remove contaminating metal ions (e.g., reverse osmosis system or deionizer).

(7) Chemicals infused into the water such as iodine, acid, flocculants, and complexing agents shall be shown to be nondialyzable or shall be adequately removed from product water. Systems shall be monitored in accordance with the manufacturer's direction for use, and specific test procedures to verify removal of additives shall be provided and documented. Chemical injection systems shall include a means of regulating the metering pump to control the addition of chemical. This control system shall be designed to tightly control addition of the chemical. The control system shall ensure that chemical is added only when the water is flowing through the pre-treatment cascade and that it is added in fixed proportion to the water flow. If an automated control system is used to inject the chemical, there shall be an independent monitor of the controlling parameter.

(8) Each water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of two carbon tanks in series. If the source water is from a private supply which does not use chlorine/chloramine, the water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of one carbon tank.

(A) Reverse osmosis systems, if used, shall meet the standards in §6.2.7 (concerning Reverse Osmosis) of the American National Standards Institute, Dialysate for Hemodialysis RD 52:2004 Edition, published by the AAMI.

(B) Deionization systems.

(i) Deionization systems, if used, shall be monitored continuously to produce water of one megohm-centimeter (cm) or greater specific resistivity (or conductivity of one microsiemen/cm or less) at 25 degrees Celsius. An audible and visual alarm shall be activated in the facility to include the patient care area when the product water resistivity falls below this level and the product water stream shall be prevented from reaching any point of use.

(ii) Patients shall not be dialyzed on deionized water with a resistivity less than 1.0 megohm-cm measured at the output of the final deionizer.

(iii) Deionization tanks if used shall be a minimum of two mixed beds in series, and shall be used with resistivity monitors including audible and visual alarms placed pre and post the final deionization tank in the system and audible in the patient care area.

(iv) Feed water for deionization systems shall be pretreated with activated carbon adsorption, or a comparable alternative, to prevent nitrosamine formation.

(v) If a deionization system is the last process in a water treatment system, it shall be followed by an ultrafilter or other bacteria and endotoxin reducing device.

(vi) Facilities shall ensure that all devices that are regenerated or reconstituted off site, such as deionizers, shall be disinfected at the time of regeneration or reconstitution, so that contaminated water is not reintroduced into the system after regeneration or reconstitution.

(C) Carbon tanks.

(i) The carbon tanks shall contain granular activated carbon, with a minimum iodine number of 900. Regenerated carbon shall not be used.

(ii) A minimum of two carbon adsorption beds shall be installed in series with a sample port following the first bed. A sample port shall also be installed following the second bed for use in the event of free chlorine or cloramine breaking through the first bed.

(iii) The total empty bed contact time (EBCT) shall be at least ten minutes, with the final tank providing at least five minutes EBCT at the maximum flow rate through the bed. Carbon adsorption systems used to prepare water for home dialysis or for portable dialysis systems are exempt from the requirement for the second carbon and a ten minute EBCT, if removal of chloramines to below 0.1 milligram (mg)/liter is verified before each treatment.

(iv) A sample port shall also be installed following the second bed for use in the event of free chlorine or chloramine breaking through the first bed. Water from this port(s) shall be tested for chlorine/chloramine levels at the beginning of each treatment day prior to patients initiating treatment, prior to reprocessing of dialyzers, and again prior to the beginning of each patient shift. If there are no set patient shifts, testing should be performed every four hours during hours of operation.

(v) Carbon beds are sometimes arranged as series-connected pairs of beds so that they need not be overly large. The beds within each pair are of equal size and water flows through them are parallel. In this situation, each pair of beds should have a minimum empty bed contact time of 5 minutes at the maximum flow rate through the bed. When series connected pairs of beds are used, the piping should be designed to minimize differences in the resistance to flow from inlet and outlet between each parallel series of beds to ensure that an equal volume of water flows through all beds.

(vi) All samples for chlorine/chloramine testing shall be drawn when the water treatment system has been operating for at least 15 minutes.

(vii) Tests for total chlorine, which include both free and combined forms of chlorine, may be used as a single analysis with the maximum allowable concentration of 0.1 mg/liter (L). Test results of greater than 0.5 parts per million (ppm) for chlorine or 0.1 ppm for chloramine from the port between the initial tank(s) and final tank(s) shall require testing to be performed at the final exit and replacement of the initial tank(s). Testing equipment, supplies and procedures shall be used in accordance with the manufacturer's directions for use.

(viii) In a system without a holding tank, if test results at the exit of the final tank(s) are greater than the parameters for chlorine or chloramine described in this subparagraph, dialysis treatment shall be immediately terminated to protect patients from exposure to chlorine/chloramines, and the medical director shall be notified. In systems with holding tanks, if the holding tank tests less than 0.1 mg/L for total chlorine, the reverse osmosis (RO) may be turned off and the product water in the holding tank may be used to finish treatments in process. The medical director shall be notified.

(ix) If means other than granulated carbon are used to remove chlorine/chloramine, the facility's governing body shall approve such use in writing after review of the safety of the intended method for use in hemodialysis applications. If such methods include the use of additives, there shall be evidence the product water does not contain unsafe levels of these additives.

(9) Water softeners, if used, shall be tested at the end of the treatment day to verify their capacity to treat a sufficient volume of water to supply the facility for the entire treatment day, and shall be fitted with a mechanism to prevent water containing the high concentrations of sodium chloride used during regeneration from entering the product water line during regeneration.

(10) If used, the face(s) of timer(s) used to control any component of the water treatment or dialysate delivery system shall be visible to the operator at all times. Written evidence that timers are checked for operation and accuracy each day of operation shall be maintained.

(11) Filter housings, if used during disinfectant procedures, shall include a means to clear the lower portion of the housing of the disinfecting agents. Filter housings shall be opaque.

(12) Ultrafilters, or other bacterial reducing filters, if used, shall be fitted with pressure gauges on the inlet and outlet water lines to monitor the pressure drop across the membrane. Ultrafilters shall be included in routine disinfection procedures.

(13) If used, storage tanks shall have a conical or bowl-shaped base, and shall drain from the lowest point of the base. Storage tanks shall have a tight-fitting lid, and be vented through a hydrophobic 0.2 micron air filter. A means shall be provided to effectively disinfect any storage tank installed in a water distribution system.

(14) Ultraviolet (UV) lights, if used, shall be monitored at the frequency in accordance with the manufacturer's direction for use, and shall have an endotoxin reducing filter located down stream of the device. A log sheet shall be used to record monitoring.

(15) Water treatment system piping shall be labeled to indicate the contents of the pipe and direction of flow.

(16) The water treatment system shall be continuously monitored during patient treatment and be guarded by audible and visual alarms which can be seen and heard in the dialysis treatment area should water quality drop below specific parameters. Quality monitor sensing cells shall be located at the last component of the water treatment system and at the beginning of the distribution system. No water treatment components that could affect the quality of the product water as measured by this device shall be located after the sensing cell.

(17) When deionization tanks do not follow a reverse osmosis system, parameters for the rejection rate of the membranes shall assure that the lowest rate accepted would provide product water in compliance with §4.1.1 (concerning Maximum level of chemical contaminants of water) of the American National Standards Institute, Dialysate for Hemodialysis, RD 52:2004 Edition published by the AAMI.

(18) A facility shall maintain written logs of the operation of the water treatment system for each treatment day. The log book shall include each component's operating parameter and the action taken when a component is not within the facility's set parameters.

(19) Microbiological testing of product water shall be conducted.

(A) Routine microbiological testing shall be conducted monthly. For a newly installed water distribution system, or when any repairs, modifications or changes to the configuration has been made to an existing system, weekly testing shall be conducted for one month

to verify that bacteria and endotoxin levels are consistently within the allowed limits. Changes to components that are designed to be replaced on a routine schedule such as filters, ultrafilters and ultraviolet lamps do not require a period of more frequent testing.

(B) At a minimum, sample sites chosen for the testing shall include the beginning of the distribution piping, the product water in the reuse room, at any site of concentrate mixing, and the end of the distribution piping.

(C) Samples shall be collected prior to sanitization/disinfection of the water treatment system, and the dialysis machines. Water testing results shall be routinely trended and reviewed by the medical director in order to determine if results seem questionable or if there is an opportunity for improvement. The medical director shall determine if there is a need for retesting. If internal testing is performed with repeated results of "no growth" for three consecutive months, the testing shall be validated via an outside laboratory. A calibrated loop may not be used in microbiological testing of water samples. Colonies shall be counted using a magnifying device.

(D) Product water used to prepare dialysate, concentrates from powder, or to reprocess dialyzers for multiple use shall contain a total viable microbial count less than 200 colony forming units (CFU)/millimeter (ml) and an endotoxin concentration less than 2 endotoxin units (EU)/ml. The action level for the total viable microbial count in the product water shall be 50 CFU/ml and the action level for the endotoxin concentration shall be 1 EU/ml.

(E) If the action levels described at subparagraph (D) of this paragraph are observed in the product water, the medical director shall be notified and corrective measures shall be taken promptly to reduce the levels into an acceptable range.

(F) All bacteria and endotoxin results shall be recorded on a log sheet in order to identify trends that may indicate the need for corrective action.

(20) If ozone generators are used to disinfect any portion of the water or dialysate delivery system, the ozone generator shall be capable of delivering ozone at the concentration and for the exposure time specified and in accordance with the manufacturer's direction for use. Testing based on the manufacturer's direction shall be used to measure the ozone concentration each time disinfection is performed, to include testing for safe levels of residual ozone at the end of the disinfection cycle. Testing for ozone in the ambient air shall be conducted on a periodic basis as recommended by the manufacturer. The records of all testing shall be maintained in a log. The frequency of disinfection shall be performed at least monthly.

(21) If used, hot water disinfection systems shall utilize AAMI quality water, be capable of delivering hot water at the temperature and for the exposure time specified and in accordance with the manufacturer's direction for use; and be monitored for temperature and time of exposure to hot water as specified by the manufacturer. Temperature of the water shall be monitored at a point furthest from the water heater, where the lowest water temperature is likely to occur. The water temperature shall be measured each time a disinfection cycle is performed. A record that verifies successful completion of the heat disinfection shall be maintained. The frequency of disinfection shall be performed at least monthly.

(22) After chemical disinfection, a mechanism shall be incorporated to ensure that the equipment and the system are restored to a safe condition prior to using the equipment and the product water being used for dialysis applications. The results of all absence testing shall be documented. The frequency of disinfection shall be performed at least monthly. A mechanism shall be incorporated in the distribution system to ensure that disinfectant does not drain from pipes during the disinfection period.

(23) Users shall establish a procedure for regular disinfection of the line between the outlet from the water distribution system and the back of the dialysis machine.

(24) Samples of product water used for dialysis shall be submitted for chemical analysis every six months, and after a change of the reverse osmosis membranes, and shall demonstrate that the quality of the product water used to prepare dialysate, concentrates from powder, or to reprocess dialyzers for multiple use meets §4.1.1 (concerning Maximum level of chemical contaminants in water) of the American National Standards Institute, Water Treatment Equipment for Hemodialysis Applications, RD52:2004 Edition, published by the AAMI.

(A) Samples for chemical analysis shall be collected at the most distal point in each water distribution loop. All other outlets from the distribution loops shall be inspected to ensure that the outlets are fabricated from compatible materials. Appropriate containers and pH adjustments shall be used to ensure accurate determinations. New facilities or facilities that add or change the configuration of the water distribution system shall draw samples at the most distal point for each water distribution loop, and then every six months thereafter.

(B) Additional chemical analysis shall be submitted when any modification or change to the configuration of the existing system are made to the water treatment system, or if the percent rejection of a reverse osmosis system decreased 5.0% or more from the percent rejection measured at the time the water sample for the preceding chemical analysis was taken.

(25) Facility records shall include all test results and evidence that the medical director has reviewed the results of the water quality testing and directed corrective action when indicated.

(26) Only persons qualified by the education or experience described in §117.46(f) of this title (relating to Qualifications of Staff) may operate, repair, or replace components of the water treatment system.

(c) Dialysate.

(1) The facility shall develop, implement, maintain, and evaluate quality assessment and performance improvement (QAPI) procedures to ensure ongoing conformance to policies and procedures regarding dialysate quality.

(2) Each facility shall set all hemodialysis machines to use only one family of concentrates. When new machines are put into service or the concentrate family or concentrate manufacturer is changed, dialysate samples shall be taken from each machine, and shall be sent to a laboratory for verification of the dialysate electrolyte values.

(3) Prior to each patient treatment, staff shall verify the dialysate conductivity and pH of each machine with an independent device.

(4) Bacteriological testing shall be conducted.

(A) For newly installed bicarbonate concentrate mixing and delivery systems, weekly testing shall be conducted for one month to verify that bacteria and endotoxin levels are consistently within the allowed limits. Responsible facility staff shall develop a schedule to ensure each hemodialysis machine is tested quarterly for bacterial growth and the presence of endotoxins. Hemodialysis machines of home patients, conventional and integrated dialysis systems, shall be cultured monthly until results not exceeding 200 colony forming units per milliliter are obtained for three consecutive months, and thereafter

quarterly samples shall be cultured. This subparagraph does not apply to closed systems as defined in §117.2(11) of this title (relating to Definitions).

(B) Dialysate shall contain less than 200 CFU/ml and an endotoxin concentration of less than 2 EU/ml. The action level for total viable microbial count shall be 50 CFU/ml, and the action level for endotoxin concentration shall be 1 EU/ml.

(C) Disinfection and retesting shall be done when bacterial or endotoxin counts exceed the action levels. The medical director shall be notified. Additional samples shall be collected when there is a clinical indication of a pyrogenic reaction and/or septicemia.

(5) Only a qualified licensed nurse may use an additive to increase concentrations of specific electrolytes in the acid concentrate. Mixing procedures shall be followed as specified by the additive manufacturer. When additives are prescribed for a specific patient, the container holding the prescribed acid concentrate shall be labeled with the name of the patient, the final concentration of the added electrolyte, the date the prescribed concentrate was made, and the name of the person who mixed the additive.

(6) All components used in concentrate preparation systems (including mixing and storage tanks, pumps, valves, and piping) shall be fabricated from materials (e.g., plastics or appropriate stainless steel) that do not interact chemically or physically with the concentrate so as to affect its purity, or with the germicides used to disinfect the equipment. The use of materials that are known to cause toxicity in hemodialysis such as copper, brass, galvanized material, and aluminum is prohibited.

(7) Facility policies shall address means to protect stored dialysate components (acid concentrates, bicarbonate concentrates, or bulk storage of dialysate components) from tampering or from degeneration due to exposure to extreme heat or cold.

(8) Procedures shall be developed, implemented, and enforced:

(A) to control the transfer of acid concentrates from the delivery container to the storage tank and prevent the inadvertent mixing of different concentrate formulations. The storage tanks shall be clearly labeled;

(B) the tank and associated plumbing shall form an integral system to prevent contamination of the acid concentrate; and

(C) the storage tank and inlet and outlet connections, if remote from the tank, shall be secured and clearly labeled.

(9) Concentrate mixing systems shall include a purified water source, a suitable drain, and a ground fault protected electrical outlet.

(A) Operators of mixing systems shall use personal protective equipment as specified and in accordance with the manufacturer's direction for use during all mixing processes.

(B) The manufacturer's directions for use of a concentrate mixing system shall be followed, including instructions for mixing the powder with the correct amount of water. The number of bags or weight of powder added shall be determined and recorded.

(C) The mixing tank shall be clearly labeled to indicate the fill and final volumes required to correctly dilute the powder.

(D) Systems for preparing either bicarbonate or acid concentrate from powder shall be monitored according to the manufacturer's directions for use, to ensure compliance with paragraph (11)(A) of this subsection.

(E) Concentrates shall not be used or transferred to holding tanks or distribution systems until all tests are completed per manufacturer's specifications and in accordance with the manufacturer's directions for use. The results of the tests shall be documented, with the signature of the person who completed the tests.

(F) If a facility designs its own system for mixing concentrates, procedures shall be developed and validated using an independent laboratory to ensure proper mixing of the concentrate, including establishment of acceptable limits for tests of proper concentration.

(10) Acid concentrate mixing tanks shall be designed to allow the inside of the tank to be rinsed when changing concentrate formulas.

(A) Acid mixing systems shall be designed and maintained to prevent rust and corrosion.

(B) Acid concentrate mixing tanks shall be emptied completely and rinsed with product water before mixing another batch of concentrate to prevent cross contamination between different batches.

(C) Acid concentrate mixing equipment shall be disinfected as specified by the equipment manufacturer or, in the case where no specifications are given, as defined by facility policy.

(D) Records of disinfection and rinsing of disinfectants to safe residual levels shall be maintained.

(11) Bicarbonate concentrate mixing tanks shall have conical or bowl-shaped bottoms and shall drain from the lowest point of the base. The tank design shall allow all internal surfaces to be disinfected and rinsed.

(A) Bicarbonate concentrate mixing tanks shall not be pre-filled the night before use, and mixed solution shall not remain in mixing or holding tanks overnight.

(B) If disinfectant remains in the mixing tank overnight, this solution shall be completely drained, the tank rinsed and tested for residual disinfectant prior to preparing the first batch of that day of bicarbonate concentrate.

(C) The container shall be emptied and rinsed with product water prior to mixing a new batch of bicarbonate solution, and unused portions of bicarbonate concentrate shall not be mixed with fresh concentrate.

(D) At a minimum, bicarbonate distribution systems shall be disinfected weekly. More frequent disinfection shall be done if required in accordance with the manufacturer's direction for use, or if dialysate culture results are above the action level.

(E) If jugs are reused to deliver bicarbonate concentrate to individual hemodialysis machines:

(i) jugs shall be emptied of concentrate, rinsed, and inverted to drain at the end of each treatment day;

(ii) pick-up tubes shall be rinsed and allowed to air dry at the end of each treatment day;

(iii) at a minimum, jugs and pick-up tubes shall be disinfected weekly, more frequent disinfection shall be considered by the facility QAPI committee if dialysate culture results are above the action level; and

(iv) following disinfection, jugs shall be drained, rinsed free of residual disinfectant, and inverted to dry. Pick-up tubes shall be rinsed free of residual disinfectant and allowed to air day. Testing for residual disinfectant shall be done and documented.

(12) All mixing tanks, bulk storage tanks, dispensing tanks, and containers for single hemodialysis treatments shall be labeled as to the contents.

(A) Prior to batch preparation, a label shall be affixed to the mixing tank that includes the date of preparation and the chemical composition or formulation of the concentrate being prepared. This labeling shall remain on the mixing tank until the tank has been emptied.

(B) Bulk storage/dispensing tanks shall be permanently labeled to identify the chemical composition or formulation of their contents.

(C) At a minimum, single-machine containers shall be labeled with sufficient information to differentiate the contents from other concentrate formulations used in the facility and permit positive identification by users of container contents.

(13) Permanent records of batches produced shall be maintained to include the concentrate formula produced, the volume of the batch, lot number(s) of powdered concentrate packages, the manufacturer of the powdered concentrate, date and time of mixing, test results, person performing mixing, and expiration date (if applicable).

(14) If acid and bicarbonate concentrates are prepared in the facility, preventive maintenance shall be completed in accordance with the manufacturer's direction for use. Records shall be maintained indicating the date, time, person performing the procedure, and the results (if applicable).

(d) Reuse of hemodialyzers and related devices.

(1) Reuse practice in a facility shall comply with the American National Standards Institute (ANSI), Reuse of Hemodialyzers, Third Edition, ANSI/AAMI RD47:2002 and RD47:2002/A1:2003, published by the AAMI.

(2) Dialyzer manufacturer's labeling shall be reviewed to determine if a specific dialyzer requires special considerations.

(3) A transducer protector shall be replaced when wetted during a dialysis treatment, and shall be used for one treatment only. Equipment with internal transducer protectors shall be inspected quarterly to ensure that it has not been contaminated.

(4) Arterial lines may be reused only when the arterial lines are labeled to allow for reuse by the manufacturer, and the manufacturer-established protocols for the specific line have been approved by the United States Food and Drug Administration.

(5) The water supply in the reuse room shall incorporate a check valve to prevent chemical agents used from inadvertently back flowing into the water distribution system.

(6) Ventilation systems in the reuse room shall be connected to an exhaust system to the outside which is separate from the building exhaust system, have an exhaust fan located at the discharge end of the system, and have an exhaust duct system of noncombustible corrosion-resistant material as needed to meet the planned usage of the system. Exhaust outlets shall be above the roof level and arranged to minimize recirculation of exhaust air into the building.

(7) A facility shall establish, implement, and enforce a policy for dialyzer reuse criteria (including any facility-set number of reuses allowed), which is included in patient education materials and posted in the waiting room and patient treatment areas. A dialyzer may be reused only if that dialyzer's original volume is measured and recorded prior to its first use, and the volume of that dialyzer is used as the basis for discard for that dialyzer.

(8) A facility shall consider and address the health and safety of patients sensitive to disinfectant solution residuals.

(9) A facility shall provide each patient with information regarding the reuse practices at the facility and the opportunity to have questions answered.

(10) A facility shall restrict the reprocessing room to authorized personnel during the reprocessing of dialyzers.

(11) A facility shall obtain written informed consent of the patient or legal representative.

(e) If a facility participates in centralized reprocessing at a different location, in which dialyzers from multiple facilities are reprocessed at one site, the facility shall:

(1) ensure direct communication with the medical director at the centralized reprocessing center and the facility's medical director;

(2) require the use of automated reprocessing facility;

(3) maintain responsibility and accountability for the entire reuse process;

(4) adopt, implement, and enforce policies to ensure that the transfer and transport of used and reprocessed dialyzers to and from the off-site location does not increase contamination of the dialyzers, staff, or the environment;

(5) assure that each dialyzer is returned to the appropriate facility or patient home, and, in the case of home patients who participate in a dialyzer reprocessing program, a system shall be established to verify that the correct dialyzers are being returned to each patient's home; and

(6) provide department staff access to the off-site reprocessing site as part of a facility inspection.

§117.33. Sanitary Conditions and Hygienic Practices.

(a) General infection control measures.

(1) Universal precautions.

(A) Universal precautions shall be followed in the facility for all patient care activities in accordance with 29 Code of Federal Regulations, §1910.1030(d)(1) - (3) (concerning Bloodborne Pathogens) and the Health and Safety Code, Chapter 85, Subchapter I (concerning Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis B Virus by Health Care Workers).

(B) The facility shall demonstrate that it follows standard infection control precautions by implementing the Recommended Infection Control Practices for Hemodialysis Units at a Glance, with the exception of screening for Hepatitis C, found in Recommendations for Preventing Transmission of Infections Among Chronic Hemodialysis Patients, Morbidity and Mortality Weekly Report, Volume 50, Number RR - 5, April 27, 2001, pages 18 through 22, developed by the Centers for Disease Control and Prevention, to prevent and control cross-contamination and the spread of infectious agents.

(C) Infection control precautions for all patients.

(i) Disposable gloves shall be worn when caring for the patient or touching the patient's equipment or bloodlines at the dialysis station.

(ii) Gloves shall be removed and hands shall be cleaned between each patient contact, as well as after touching blood, body fluids, secretions, excretions, and contaminated items or station. A sufficient number of sinks, with hands-free operable controls, with warm water and soap shall be available to facilitate hand washing.

Provisions for hand drying shall be included at each hand washing sink.

(iii) If hands are not visibly soiled, use of a waterless antiseptic hand rub can be substituted for handwashing.

(iv) Staff members shall wear gowns, face shields, eye wear, or masks to protect themselves and prevent soiling of clothing when performing procedures during which spurting or spattering of blood might occur (e.g., during initiation and termination of dialysis, cleaning of dialyzers, and centrifugation of blood).

(v) Staff members shall not eat, drink, or smoke in the dialysis treatment area or in the laboratory.

(vi) Items taken to the dialysis station shall either be disposed of, dedicated for use only on a single patient, or cleaned and disinfected before being taken to a common clean area or used on another patient.

(vii) Nondisposable items that cannot be cleaned and disinfected (e.g., adhesive tape, cloth covered blood pressure cuffs) shall be dedicated for use only on a single patient.

(viii) Unused medications or supplies (syringes, alcohol swabs, etc.) taken to the patient's station shall be used only for that patient and shall not be returned to a common clean area or used on other patients.

(ix) Clean areas shall be clearly designated for the preparation, handling, and storage of medications and unused supplies and equipment. Medications or clean supplies shall not be handled and stored in the same or an immediately adjacent area where used supplies, equipment, or blood samples are handled.

(x) Contaminated areas where used supplies, equipment, or blood samples are handled shall be clearly designated.

(xi) When multiple dose medication vials are used (including vials containing diluents), individual patient doses shall be prepared in a clean (centralized) area away from dialysis stations, and delivered separately to each patient.

(xii) Multiple dose medications vials shall not be carried from station to station.

(xiii) Common medication carts shall not be used to deliver medications to patients. If trays are used to deliver medications to individual patients, they shall be cleaned between each patient.

(xiv) If a common supply cart is used to store clean supplies in the patient treatment area, this cart shall remain in a designated area at a sufficient distance from patient stations to avoid contamination with blood. Such carts shall not be moved between stations to distribute supplies.

(xv) Medication vials, syringes, alcohol swabs or supplies shall not be carried in pockets.

(D) Location and arrangement of hand washing sinks shall permit ease of access and proper use.

(E) Facility staff shall explain the potential risks associated with blood and blood products to patients and family members and provide the indicated personal protective equipment to a patient or family member, if the patient or family member assists in procedures which could result in contact with blood or body fluids.

(2) Documentation and coordination of infection control activities.

(A) The facility shall designate a person to monitor and coordinate infection control activities.

(B) A facility shall develop, maintain, and enforce a system to identify and track infections to allow identification of trends or patterns. This activity shall be reviewed as a part of the facility's quality assessment and performance improvement (QAPI) program described in §117.43 of this title (relating to Quality Assessment and Performance Improvement). The record shall include trends, corrective actions, and improvement actions taken.

(b) Physical environment.

(1) General procedures.

(A) A facility shall develop implement and enforce policies and procedures to provide and actively monitor a safe, functional, comfortable, and sanitary environment which minimizes or prevents transmission of infectious diseases for all patients and visitors, and the public.

(i) Wall bases in patient treatment and other areas which are frequently subject to wet cleaning methods shall be tightly sealed to the floor and the wall, impervious to water, and constructed without voids that can harbor insects. Wall baseboard and floor tiles in all patient treatment care areas and bathrooms that are loose, torn, cracked, or not sealed shall be fixed or replaced. The maintenance safety occurrence shall be recorded in the safety report or maintenance log records and maintained in the facility.

(ii) Wall finishes shall be washable and, in the immediate areas of plumbing fixtures, smooth and moisture resistant.

(iii) All exposed ceilings and ceiling structures in areas normally occupied by patients, staff, and visitors shall be finished so as to be cleanable with equipment used in daily housekeeping activities, and shall be replaced if stained with blood. No portable or ceiling fans shall be utilized in patient treatment areas, or in the reprocessing room.

(iv) Floors that are subject to traffic while wet shall have nonslip surfaces. Floor materials shall be easily cleanable and have wear resistance appropriate for the location involved. In all areas subject to wet cleaning methods, floor materials shall not be physically affected by germicidal and cleaning solutions. Floor and wall penetrations by pipes, ducts, and conduits shall be tightly sealed to minimize entry of rodents and insects. Joints of structural elements shall be similarly sealed.

(v) A facility shall utilize a ventilation system which provides adequate comfort to patients during treatment and which minimizes the potential of insect access.

(vi) All storage areas shall be kept clean and orderly at all times, with a separate space designated for wheelchair storage.

(B) Blood spills shall be cleaned immediately or as soon as is practical with a disposable cloth and an appropriate chemical disinfectant.

(i) The surface shall be subjected to intermediate-level disinfection in accordance with the manufacturer's directions for use, if a commercial liquid chemical disinfectant is used.

(ii) If a solution of chlorine bleach (sodium hypochlorite) is used, the solution shall be at least 1:100 sodium hypochlorite and mixed in accordance with the manufacturer's directions for use. The surface to be treated shall be compatible with this type of chemical treatment.

(iii) The facility shall utilize dedicated cleaning supplies (i.e., mop, bucket) for the cleaning of blood spills.

(2) Specific procedures for equipment and dialysis machines.

(A) Routine disinfection of active and backup dialysis machines shall be performed according to facility defined protocol, accomplishing at least intermediate-level disinfection. The facility personnel responsible for the disinfection of the dialysis machines shall document the date, and the time of the disinfection, and verify that the dialysis machines were rinsed and that the disinfectant was removed.

(B) Between patient shifts, facility staff shall clean machine exteriors, treatment chairs, tourniquets, blood pressure cuffs, facility individual television sets at each treatment station, and hemostats. Blood pressure cuffs which become contaminated with blood shall be removed from service, disinfected, and allowed to dry prior to being returned to use.

(c) Waste and waste disposal.

(1) Special waste and liquid/sewage waste management.

(A) The ESRD facility shall comply with the requirements set forth by the department in §§1.131-1.137 of this title (relating to Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities) and the Texas Commission on Environmental Quality (TCEQ) requirements in 30 Texas Administrative Code, §330.1207 (relating to Generators of Medical Waste).

(B) All sewage and liquid wastes shall be disposed of in a municipal sewerage system or a septic tank system permitted by the TCEQ in accordance with Title 30, Texas Administrative Code, Chapter 285 (relating to On-Site Sewage Facilities).

(2) Waste containers.

(A) Waste containers shall be conveniently available in all toilet rooms, patient areas, staff work areas, and waiting rooms. Receptacles shall be routinely emptied of their contents at a central location(s) into closed containers.

(B) Waste containers shall be cleaned and properly maintained and free of visible residue.

(C) All containers for other municipal solid waste shall be leak-resistant, have covers, be rodent-proof, and comply with local sanitation requirements.

(D) Nonreusable containers shall be of suitable strength to minimize animal scavenging or rupture during collection operations.

(d) Hepatitis B prevention.

(1) The facility shall offer hepatitis B vaccination to previously unvaccinated, susceptible new staff members in accordance with 29 Code of Federal Regulations, §1910.1030(f)(1) - (2) (concerning Bloodborne Pathogens). Staff vaccination records shall be maintained in each staff member's health record.

(2) Prevention requirements concerning patients.

(A) Hepatitis B vaccination.

(i) With an order from the patient's nephrologist, facility staff shall make the hepatitis B vaccine available to a patient who is susceptible to hepatitis B, provided that the patient has coverage or is willing to pay for vaccination.

(ii) The facility shall make available to patients literature describing the risks and benefits of the hepatitis B vaccination.

(B) Serologic screening of patients.

(i) The Hepatitis B virus (HBV) serological status to include Hepatitis B surface antigen (HBsAg), total anti-Hepatitis B core antibody (anti-HBc), and antibody to Hepatitis B surface antigen (anti-HBs) of all patients should be known before admission to the hemodialysis unit. The anti-HBc results obtained previously or on admission shall be maintained in the clinical record and repeated only if clinically indicated.

(ii) A patient returning to a facility after extended hospitalization or absence of 30 calendar days or longer shall have been screened for hepatitis B surface antigen (HBsAg) within one month before or at the time of admission to the facility or have a known hepatitis B surface antibody (anti-HBs) status of at least 10 milli-international units per milliliter no more than 12 months prior to admission. The facility shall document how this screening requirement is met.

(iii) Repeated serologic screening shall be based on the antigen or antibody status of the patient.

(I) Monthly screening for HBsAg is required for patients whose previous test results are negative for anti-HBs.

(II) Screening of HBsAg-positive or anti-HBs-positive patients may be performed on a less frequent basis, but must be performed at least annually.

(C) Isolation procedures for the HBsAg-positive patient.

(i) An ESRD facility which was licensed prior to the effective date of these rules shall comply with §117.101 of this title (relating to Construction Requirements for an Existing End Stage Renal Disease Facility). An ESRD facility which is licensed after the effective date of these rules shall treat patients positive for HBsAg in a separate treatment room which complies with §117.102(d)(4) of this title (relating to Construction Requirements for a New End Stage Renal Disease Facility).

(ii) Separate dedicated supplies and equipment, including blood glucose monitors, shall be used to provide care to the Hepatitis B positive patients. All supplies used in the isolation area/room, such as clamps, blood pressure cuffs, testing reagents, etc., shall be labeled "isolation" and not routinely removed from the isolation area/room.

(iii) Refillable concentrate containers shall be surface disinfected at the completion of each treatment. Refillable acid concentrate containers shall be kept in the isolation area/room and refilled at the door. Refillable bicarbonate concentrate containers shall be removed for cleaning and disinfection. In the disinfection area, containers labeled "isolation" container(s) and pick-up tube(s) shall be segregated in a dedicated, designated area away from all other containers and pick-up tubes.

(iv) Separate gowns shall be used in the isolation area/room and removed before leaving the isolation area/room. Any one entering the isolation area/room during the patient's treatment must wear a protective gown.

(v) Dedicated cleaning supplies (i.e., mop, bucket) for the cleaning of the isolation area/room and blood spills shall be utilized and labeled "isolation."

(vi) A patient who tests positive for HBsAg shall be dialyzed on equipment reserved and maintained for an HBsAg-positive patient's use only.

(vii) When a direct patient care staff member is assigned to both HBsAg-negative and HBsAg-positive patients, the HBsAg-negative patients assigned to this grouping shall be Hepatitis B antibody positive. Hepatitis B antibody positive patients are to be seated

at the treatment stations nearest the isolation station and be assigned to the same staff member who is caring for the HBsAg-positive patient.

(viii) If an HBsAg-positive patient is discharged, the equipment which had been reserved for that patient shall be given intermediate-level disinfection prior to use for a patient testing negative for HBsAg.

(ix) In the case of patients new to dialysis or a patient returning to a facility after extended hospitalization or absence of 30 calendar days or longer, if these patients are admitted for treatment before results of HBsAg or anti-HBs testing are known, these patients shall undergo treatment as if the HBsAg test results were potentially positive, except that they shall not be treated in the HBsAg isolation room, area, or machine.

(I) The facility shall treat potentially HBsAg-positive patients in a location in the treatment area which is outside of traffic patterns and may not reuse the dialyzer until the HBsAg test results are known.

(II) The dialysis machine used by this patient shall be given intermediate-level disinfection prior to its use by another patient.

(III) The facility shall obtain HBsAg status results of the patient no later than three days from admission.

(e) Tuberculosis prevention.

(1) The facility's direct care staff shall be screened for tuberculosis upon employment prior to patient contact, or provide documentation of negative tuberculosis status.

(2) Subsequent screening of facility staff shall be performed after any potential exposure to laryngeal or pulmonary tuberculosis.

(3) Respiratory isolation procedures and precautions developed by the facility shall be employed by facility staff providing treatment to patients with pulmonary tuberculosis.

(4) The facility shall screen patients for tuberculosis when indicated by the presence of risk factors for, or the signs and symptoms of tuberculosis. Screening shall be performed after potential exposure to active laryngeal or pulmonary tuberculosis.

(f) The facility shall adopt, implement, and enforce a policy for offering and providing pneumococcal and influenza vaccines for elderly persons. The policy shall:

(1) establish that an elderly person, defined as 65 years of age or older, who receives ongoing care at the facility, is offered, to the extent possible as determined by the facility, the opportunity to receive the pneumococcal and influenza vaccines, if a physician, or an advanced practice registered nurse or physician assistant on behalf of a physician, determines that the vaccine is in the person's best interest. If the facility decides it is not feasible to offer the vaccine, the facility shall provide the person with information on other options for obtaining the vaccine;

(2) include provisions that the influenza vaccine shall be offered according to the Centers for Disease Control annual recommendations, and the pneumococcal vaccine shall be offered throughout the year;

(3) require that the person administering the vaccine ask the elderly patient if they are currently vaccinated against influenza or pneumococcal disease, assess potential contraindications, and then, if appropriate, administer the vaccine under approved facility protocols;

(4) address required documentation of the vaccination in the patient clinical record; and

(5) include that the department may waive requirements related to the administration of the vaccines based on established shortages of the vaccines.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. MINIMUM STANDARDS FOR PATIENT CARE AND TREATMENT

25 TAC §§117.41 - 117.48

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§117.41. Governing Body.

(a) There shall be an identified governing body responsible for the organization, management, control, and operation of the facility, including the appointment of the facility's medical director as defined in §117.2(48) of this title (relating to Definitions).

(1) A qualified medical director is a physician who is board certified in internal medicine by the American Board of Internal Medicine or pediatrics by the American Board of Pediatrics or is board certified in nephrology or pediatric nephrology, and has at least 12 months of experience providing care to patients receiving dialysis.

(2) A facility may request a waiver to appoint or retain as medical director a physician who does not meet one or more of the qualifications in paragraph (1) of this subsection. The waiver shall explain why a physician meeting the board certification requirement is not available and include a resume of the physician the facility seeks to appoint or retain. A written request for waiver shall be made through the Texas Department of State Health Services, Health Facility Compliance Group, Mail Code 1979, P.O. Box 149347, Austin, Texas, 78714-9347 for transmission to CMS.

(b) The governing body shall develop, implement, and enforce polices and procedures for all services provided by the facility.

(c) The governing body shall ensure that the medical staff has current bylaws, rules and regulations that are adopted, implemented, and enforced.

(d) The governing body shall ensure that effective administrative rules, regulations, and policies designed to protect the health and safety of patients are implemented and reviewed annually.

(e) The governing body shall ensure that there is a quality assessment and performance improvement (QAPI) program to evaluate the provision of patient care. The governing body shall review and monitor QAPI activities quarterly.

(f) The governing body shall ensure that all facility staff are qualified (i.e., advanced practice registered nurse, physician assistant, registered nurse, licensed vocational nurse, licensed master social worker, registered dietitian, patient care technician, and other technical staff) to serve the complex needs of dialysis patients and deliver dialysis services. The registered nurse, licensed vocational nurse, patient care technician and other technical staff must demonstrate and sustain the skills needed to perform the specific duties of their positions.

(g) The governing body shall ensure adequate numbers of qualified personnel are present whenever patients are undergoing dialysis so that the patient/staff ratio is appropriate to the level of dialysis care given and meets the needs of patients.

(h) The governing body shall review and approve the facility's training program for staff, patients, and/or patient's caregiver.

(i) The governing body shall develop, implement, and enforce policies and procedures relating to the facility's disaster preparedness plan, to meet the requirements of §117.45(b)(5) of this title (relating to Provision and Coordination of Treatment and Services). The plan shall address the continuity of essential building systems including emergency power and water, or a contract with another licensed ESRD facility to provide emergency contingency care to patients to meet the requirements of §117.91(h) of this title (relating to Fire Prevention, Protection, and Emergency Contingency Plan).

(j) The governing body shall ensure that all equipment utilized by facility staff and/or patients is properly maintained in accordance with the manufacturer's direction for use.

(k) The governing body shall ensure a physical environment that protects the health and safety of patients, personnel, and the public. The physical premises of the facility and those areas of the facility's surrounding physical structure that are used by the patients (including stairwells, corridors, and passageways) shall meet the local building and fire safety codes as they relate to design and space requirements for safe access and patient privacy.

(l) The governing body shall develop, implement, and enforce policies and procedures regarding disruptive patients or family members to ensure the health and safety of patients, personnel and the public.

(m) The governing body shall ensure that personnel shall be assigned to assist a social worker(s) with ancillary tasks (e.g., assistance with financial services, transportation, administrative, clerical, etc.), when the patient load, including all modalities, exceeds 100 patients per facility. The maximum patient load, including all modalities, per full-time equivalent qualified social worker, with assigned personnel assistance, is 125 patients.

§117.43. Quality Assessment and Performance Improvement.

(a) A facility shall develop, implement, maintain, and evaluate an effective, ongoing, facility-wide, data-driven, interdisciplinary quality assessment and performance improvement (QAPI) program. The program shall be individualized to the facility and meet the criteria and standards described in this section.

(b) The program shall reflect the complexity of the facility's organization and services involved. All facility services (including those services furnished under contract or arrangement); shall focus on indicators related to improved health outcomes and the prevention and reduction of medical errors.

(c) The program shall include, but not be limited to, an ongoing program that achieves measurable improvement in health outcomes and reduction of medical errors by using indicators or performance measures associated with improved health outcomes and with the identification and reduction of medical errors.

(d) The facility shall demonstrate that facility staff evaluate the provision of dialysis care and patient services, set treatment goals, identify opportunities for improvement, develop and implement improvement plans, and evaluate the implementation until resolution is achieved. The dialysis facility shall measure, analyze, and track quality indicators or other aspects of performance that the facility adopts or develops that reflect processes of care and facility operations. Evidence shall support that aggregate patient data, including identification and tracking of patient infections, is continuously reviewed for trends.

(e) Core staff members shall actively participate in the QAPI activities and monthly meetings.

(f) Core staff members shall actively participate in QAPI meetings more often as necessary to identify or correct problems. The QAPI meetings shall be conducted separately from a patient plan of care conference and the meetings shall be documented.

(g) The facility's QAPI program shall include:

(1) an ongoing review of key elements of care using comparative and trend data to include aggregate patient data;

(2) identification of areas where performance measures or outcomes indicate an opportunity for improvement;

(3) appointment of interdisciplinary improvement team(s) to:

(A) identify, measure, analyze, and track indicators for variation from desired outcomes;

(B) create and implement improvement plan(s);

(C) evaluate the implementation of the improvement plan(s); and

(D) continue monitoring and improvement activities until resolution of the improvement plan.

(4) establishment and monitoring of quality indicators related to improved health outcomes. For each quality assessment indicator, the facility shall establish and monitor a level of performance consistent with current professional knowledge. These performance components shall influence or relate to the desired outcomes themselves. At a minimum, the following indicators shall be measured, analyzed, and tracked on a monthly basis:

(A) water quality (chemical, bacteriological analysis, and other indicators specific to the facility's water treatment system);

(B) equipment preventive maintenance and repair;

(C) reprocessing of hemodialyzers (dialyzer performance measures, labeling, and disinfection);

(D) infection control (staff and patient screening; standard precautions; bacteriological monitoring of dialyzer(s), water, machine(s), and dialysate; pyrogen reactions; sepsis episodes; patient infections; and peritonitis rate);

(E) adverse event;

(F) vascular access;

(G) reportable incidents as required to be reported under §117.48 of this title (relating to Incident Reports);

(H) mortality (review of each death and monitoring modality specific mortality rate(s));

(I) complaints and suggestions (from patients, family, or staff);

(J) staffing to include, but not limited to orientation, training, delegation, licensing and certification, and non-adherence to policies and procedures by facility staff;

(K) safety (fire and disaster preparedness, use of a department approved reporting system, and disposal of special waste);

(L) clinical records review to include dialysis treatment errors, and medication errors;

(M) clinical outcomes (laboratory indicators, hospitalizations, vascular access complications, intradialytic complications, patient no-shows, patient non-adherence to the dialysis prescription, and transplantation);

(N) patient's health-related quality of life surveys; and

(O) involuntary transfer or discharge of a patient.

(5) The dialysis facility shall continuously monitor the performance, take actions that result in performance improvement, and track performance to ensure that improvements are sustained over time. The facility shall immediately correct any identified problems that threaten the health and safety of patients.

(h) The department shall review a facility's QAPI activities to determine compliance with this section.

(1) A department surveyor shall verify that the facility has a QAPI program which addresses concerns relating to quality of care provided to its patients and that the core staff members have knowledge of and the ability to access the facility's QAPI program.

(2) The department shall require disclosure of QAPI program records when disclosure is necessary to determine compliance with this section.

§117.45. Provision and Coordination of Treatment and Services.

(a) Patient plan of care.

(1) A facility shall develop, implement, and enforce policies and procedures on the patient's plan of care process which specifies the services necessary to address the patient's comorbid conditions and other needs based on the patient's interdisciplinary assessment. The patient services are coordinated using an interdisciplinary team approach. The interdisciplinary team shall consist of the patient, the patient's primary dialysis physician, registered nurse, social worker, and dietitian.

(2) The interdisciplinary team shall engage in an interactive conference in order to develop a written, individualized, comprehensive patient plan of care that specifies the services necessary to address the patient's medical, psychological, social, and functional needs, and includes treatment goals.

(3) The plan of care shall include measurable and expected outcomes and estimated timetables to achieve these outcomes. The plan of care shall include, but not be limited to, the patient's current dose of dialysis, dialysis adequacy, other medical comorbidity issues, nutritional status, mineral metabolism, anemia, vascular access, psychosocial status, modality, transplantation status, rehabilitation status, patient's goals, and patient education and training.

(4) The patient plan of care shall include evidence of coordination with other service providers (e.g., hospitals, long term care facilities, home and community support services agencies, or transportation providers) as needed to assure the provision of continuity of safe care.

(5) The patient plan of care shall include evidence of the patient's (or patient's legal representative's) input and participation, unless they refuse to participate. At a minimum, the patient plan of care shall demonstrate that the content was discussed with the patient or the patient's legal representative by a member of the interdisciplinary team.

(6) The patient plan of care shall be developed and implemented within 30 calendar days or 13 outpatient dialysis treatments from the patient's admission to the facility. The plan of care shall be revised due to the patient's lack of progress towards the goals of the plan of care, marked deterioration in health status, significant changes in the patient's psychosocial needs, or changes in the patient's nutritional condition, as needed but no less than annually after the date of the patient's last plan of care.

(7) The facility shall monitor the plan of care at least monthly to recognize and address any deviations from the plan of care as follows:

(A) implement changes in interventions due to the lack of progress toward the goals of the plan of care;

(B) document as to the reasons why the patient was unable to achieve the goals; and

(C) implement changes to address the revised plan of care.

(8) An interdisciplinary team conference may be conducted via phone conferencing. A phone plan of care conference conducted with the interdisciplinary team and the patient (or their legal representative) shall be documented as a phone conference.

(9) In the case of disruptive patients or family members or patients who do not conform to the treatment plan, the facility shall develop, implement, and enforce a process for more intensive interdisciplinary team intervention with this patient to include assessment of needs and planned interventions to assist the patient in adjusting to the requirements for safe care.

(b) Emergency preparedness.

(1) A facility shall implement written procedures which describe staff and patient actions to manage potential medical and non-medical emergencies, including but not limited to fire, equipment failure, power outages, medical emergencies, and natural or other disasters which are likely to threaten the health, welfare, or safety of facility patients, the staff, or the public.

(2) A facility shall have a functional plan to access the community emergency medical services.

(3) A facility shall have personnel qualified to operate emergency equipment and to provide emergency care to patients on site and available during all treatment times. A charge nurse qualified to provide basic cardiopulmonary life support (BCLS) shall be on site and available to the treatment area whenever patients are present.

All direct care staff members shall maintain current certification and competency in BCLS.

(4) A facility shall have a transfer agreement with one or more hospitals which provide acute dialysis service for the provision of inpatient care and other hospital services to the facility's patients. The facility shall have documentation from the hospital to the effect that patients from the facility shall be accepted and treated in emergencies. There shall be reasonable assurances that:

(A) the transfer or referral of patients will be effected between the hospital and the facility whenever such transfer or referral is determined as medically appropriate by the attending physician, with timely acceptance and admission;

(B) the interchange of medical and other information necessary or useful in the care and treatment of the patient transferred shall occur within one working day; and

(C) security and accountability shall be assured for the transferred patient's personal effects.

(5) A written disaster preparedness plan for natural and other disasters specific to each facility shall be developed and in place. The plan shall be based on an assessment of the probability and type of disaster in each region and the local resources available to the facility.

(A) The plan shall incorporate the use of the department approved reporting system and participation in the ESRD Network of Texas disaster preparedness activities. Contact shall be made annually with a local disaster management representative Emergency Operations Center (EOC) to assess the need to revise the plan and to ensure that local agencies are aware of the dialysis facility, its provision of life-saving treatment, and the patient population served.

(B) The plan shall include procedures designed to minimize harm to patients and staff along with ensuring safe facility operations. The plan and in-service programs for patients and staff shall include provisions or procedures for responsibility of direction and control, communications, alerting and warning systems, evacuation, and closure. Each staff member employed by or under contract with the facility shall be able to demonstrate their role or responsibility to implement the facility's disaster preparedness plan. The facility shall designate a person to monitor and coordinate disaster preparedness activities. The facility shall maintain documentation of the monitoring and coordination of disaster preparedness activities.

(C) The plan shall address the continuity of essential building systems including emergency power and water, or a contract with another licensed ESRD facility to provide emergency contingency care to patients to meet the requirements of §117.91(h) (relating to Fire Prevention, Protection, and Emergency Contingency Plan).

(6) A facility shall post a telephone number listing specific to the facility equipment and locale to assist staff in contacting mechanical and technical support in the event of an emergency.

(7) The facility shall maintain information on the department approved reporting system to be updated online monthly.

(c) Medication storage and administration.

(1) Pharmaceutical and therapeutic items shall be provided in accordance with accepted professional principles and federal and state laws and regulations.

(2) Medications shall be administered only if such medication is ordered by the patient's physician or an attending physician. Medication shall be administered as ordered.

(3) All verbal or telephone physician orders shall be documented and authenticated or countersigned by the physician not more than 15 calendar days from the date the order was given.

(4) Medications maintained in the facility shall be properly stored and safeguarded in enclosures of sufficient size which are not accessible to unauthorized persons. Refrigerators used for storage of medications shall be maintained with documentation of the appropriate temperatures for such storage.

(5) A facility shall maintain emergency medications, as specified by the medical director, to treat the emergency needs of patients.

(6) Medications shall not be prepared for administration in the patient's immediate treatment area. The medication preparation area shall be located in such a manner as to prevent contamination of medicines being prepared for administration and shall include a work counter and a sink.

(7) Medication vials shall not be taken to a patient station. Intravenous medication vials labeled for single-use shall not be punctured more than once.

(8) Medications not given immediately shall be labeled with the patient's name, the name of the medication, the dosage prepared, and the initials of the person preparing the medication, and shall be protected to prevent contamination and casual access of the prepared medications to unauthorized persons. All medications shall be administered by the individual who prepared the medication.

(9) All medications shall be administered by licensed nurses, physician assistants, or physicians except that intravenous normal saline, intravenous heparin, subcutaneous lidocaine, and oxygen may be administered as part of a routine hemodialysis treatment by dialysis technicians qualified according to §117.62 of this title (relating to Training Curricula and Instructors) and §117.63 of this title (relating to Competency Evaluation). Such administration by dialysis technicians shall be in compliance with Chapter 157 of the Occupations Code concerning the delegation of medical acts by a licensed physician in the State of Texas.

(d) Nursing services.

(1) Nursing services shall be provided to prevent or reduce complications, to maximize the patient's functional status, and to educate the ESRD patient, the patient's family, patient's caregiver, or significant other.

(2) A full-time supervising nurse shall be employed to supervise and manage the provision of safe patient care. A contract staff person shall not be considered an employee, and shall not be considered for the full-time supervising nurse.

(3) A registered nurse shall:

(A) be in the facility when patients are present in the facility;

(B) conduct admission nursing assessments;

(C) conduct assessments of a patient when indicated by a question relating to a change in the patient's status, extended or frequent hospitalizations, or at the patient's request;

(D) participate in the interdisciplinary team review of a patient's progress;

(E) recommend changes in treatment based on the patient's current needs;

(F) facilitate communication between the patient, patient's family or significant other, and other interdisciplinary members to ensure needed care is delivered;

(G) provide oversight and direction to dialysis technicians and licensed vocational nurses; and

(H) participate in the facility's QAPI activities.

(4) A registered nurse functioning in the charge role shall be present during all dialysis treatments.

(5) If pediatric dialysis is provided, a registered nurse with experience or training in pediatric dialysis shall be available to provide care for pediatric dialysis patients smaller than 35 kilograms in weight.

(6) Sufficient direct care staff, as defined in §117.2(25) of this title (relating to Definitions), shall be on site to meet the needs of the patients, and at least one licensed nurse shall be available on site for every twelve patients or portion thereof.

(A) During treatment of seven or fewer patients, direct care staff shall consist of one registered nurse and one direct care staff as demonstrated in Table 1 of §117.106 of this title (relating to Definitions).

(B) During treatment of eight but not more than twelve patients, the registered nurse functioning as charge nurse shall not be assigned as direct care staff as demonstrated in Table 1 of §117.106 of this title.

(C) For pediatric dialysis patients, one licensed nurse shall be provided on site for each patient weighing less than ten kilograms and one licensed nurse provided on site for every two patients weighing from ten to 20 kilograms.

(7) A facility shall ensure that patients are in view of staff during hemodialysis treatments, and shall visualize the patient, their access site, and their bloodline connections during the dialysis treatment.

(8) A licensed nurse or dialysis technician shall collect and document objective and subjective data for each patient before and after treatment according to facility policy and the staff member's level of training. There shall be written policies and procedures specific to the facility to guide actions to be taken by the nursing staff in the event a patient's condition deteriorates during treatment, to identify parameters which would require a patient be referred to a nurse for evaluation. A registered nurse shall conduct a patient assessment when indicated by a question relating to a change in the patient's status or at the patient's request.

(9) A registered nurse shall conduct the initial patient assessment at the time of the patient's initial dialysis treatment in the facility.

(e) This chapter does not preclude a licensed vocational nurse (LVN) from practicing in accordance with the rules adopted by the Texas Board of Nursing. If the LVN is acting in the capacity of a dialysis technician, the facility shall determine that the LVN has passed a training and competency evaluation curriculum which meets the requirements in §117.62 of this title and §117.63 of this title.

(f) A dialysis technician providing direct patient care shall demonstrate knowledge and competency for the responsibilities specified in §117.62 of this title and §117.63 of this title.

(g) Nutrition services.

(1) Nutrition services shall be provided to a patient and the patient's caregiver(s) in order to maximize the patient's nutritional status.

(2) The dietitian shall be responsible for:

(A) conducting a nutrition assessment of a patient;

(B) participating in an interdisciplinary team review of a patient's progress;

(C) recommending therapeutic diets in consideration of cultural preferences and changes in treatment based on the patient's nutritional needs in consultation with the patient's physician;

(D) counseling a patient, a patient's family, and a patient's significant other on prescribed diets and monitoring adherence and response to diet therapy. Correctional institutions shall not be required to provide counseling to family members or significant others;

(E) referring a patient for assistance with nutrition resources such as financial assistance, community resources, or in-home assistance;

(F) participating in the facility's QAPI activities; and

(G) providing ongoing monitoring of subjective and objective data to determine the need for timely intervention and follow-up. Measurement criteria include but are not limited to weight changes, blood chemistries, adequacy of dialysis, and medication changes which affect nutrition status and potentially cause adverse nutrient interactions.

(3) The initial contact between the dietitian and the patient to assess nutritional status shall occur, and be documented, within two weeks or seven treatments from admission to the facility, whichever occurs later. A comprehensive nutrition assessment with an educational component shall be completed within 30 days or 13 treatments from the patient's admission to the facility, whichever occurs later.

(4) A nutrition reassessment shall be conducted no less than annually or more often when indicated by a question relating to a change in the patient's status, extended or frequent hospitalizations, a change in the patient's modality, or at the patient's request.

(5) Each facility shall employ or contract with a dietitian(s) to provide clinical nutrition services for each patient. One full-time equivalent of dietitian time shall be available for up to 100 patients per facility with the maximum patient load per full-time equivalent of dietitian time being 125 patients for all modalities.

(6) Nutrition services shall be available at the facility during scheduled treatment times. Access to services may require an appointment.

(7) There shall be written physician standing orders specific to the facility authorizing delegation of responsibilities for the facility dietitian as determined by the Medical Director and the facility. These standing orders shall be reviewed and approved by the medical director at least annually, and be consistent with the statutes and rules of the Texas Medical Board, the Texas Board of Nursing, and the Texas State Board of Examiners of Dietitians licensure.

(8) If the facility is using a medication algorithm/protocol for managing renal bone disease the nutritional care for each patient shall be individualized.

(h) Social services.

(1) Social services shall be provided to patients and their families and shall be directed at supporting and maximizing the adjustment, social functioning, and rehabilitation of the patient.

(2) The social worker shall be responsible for:

(A) conducting psychosocial evaluations, which include health-related quality of life surveys;

(B) participating in the interdisciplinary team review of a patient's progress;

(C) providing an ongoing assessment and recommend changes in treatment based on the patient's current psychosocial needs;

(D) providing social work interventions including counseling, case work and group work services to patients and their families in dealing with the special problems associated with end stage renal disease;

(E) except in the case of social workers providing service in correctional institutions, identifying community social agencies and other resources, and assisting patients and families to utilize them;

(F) participating in the facility's QAPI activities; and

(G) assisting patients to achieve optimum levels of productive activity and making rehabilitation referrals as appropriate.

(3) Initial contact between the social worker and the patient shall occur, and be documented, within two weeks or seven treatments from the patient's admission, whichever occurs later. A comprehensive psychosocial assessment shall be completed within 30 days or 13 treatments from the patient's admission, whichever occurs later.

(4) A psychosocial reassessment shall be conducted no less than annually or more often when indicated by a significant change in the patient's psychosocial needs, extended or frequent hospitalizations, any event that would interfere with the patient's ability to follow aspects of the plan of care, a change in the patient's modality, or at the patient's request.

(5) Each facility shall employ or contract with a social worker(s) to meet the psychosocial needs of the patients. Personnel shall be assigned to assist a social worker(s) with ancillary tasks (e.g., assistance with financial services, transportation, administrative, clerical, etc.), when the patient load per facility, including all modalities, exceeds 100 patients. The maximum patient load, including all modalities, per full-time equivalent qualified social worker, with assigned personnel assistance, is 125 patients.

(6) Social services shall be available at the facility during the times of patient treatment. Access to social services may require an appointment.

(i) Medical services.

(1) The medical director is responsible for:

(A) developing facility treatment goals which are based on review of aggregate data assessed through QAPI activities;

(B) assuring adequate training of licensed nurses and dialysis technicians;

(C) adequate monitoring of patients and the dialysis process; and

(D) developing, implementing, and enforcing all policies required by this chapter.

(2) Medical staff.

(A) Each patient shall be under the care of a nephrologist on the medical staff.

(B) The care of a pediatric dialysis patient shall be in accordance with this subparagraph. If a pediatric nephrologist is not available as the primary physician, an adult nephrologist may serve as the primary physician with direct patient evaluation by a pediatric nephrologist according to the following schedule:

(i) for patients two years of age or younger--monthly (two of three evaluations may be by phone);

(ii) for patients three to 12 years of age--quarterly; and

(iii) for patients 13 to 18 years of age--semiannually.

(C) At a minimum, each patient receiving dialysis in the facility shall be seen by a physician on the medical staff once every two weeks during the patient's treatment time. Home dialysis patients shall be seen by a physician, advanced practice registered nurse, or physician's assistant no less than one time a month. If home dialysis patients are seen by an advanced practice registered nurse or a physician's assistant, the physician shall see the patient at least one time every three months. This visit may be conducted in the dialysis facility, at the physician's office, or in the patient's home. The record of these contacts shall include evidence of assessment for new and recurrent problems and review of dialysis adequacy each month.

(D) A physician on the medical staff shall be on call and available 24 hours a day (in person or by telecommunication) to patients and staff.

(E) Orders for treatment shall be in writing and signed by the physician. Routine orders for treatment shall be updated at least annually. Any changes in patient treatment shall be per physician's order.

(i) Orders for hemodialysis treatment shall include length of treatment, dialyzer, blood flow rate, dialysate composition, target weight, medications including heparin, and, as needed, specific infection control measures.

(ii) Orders for peritoneal dialysis treatment shall include fill volume(s), number of exchanges, dialysate concentrations, catheter care, medications, and, as needed, specific infection control measures.

(3) Physician Extenders. If advanced practice registered nurses or physician assistants are utilized:

(A) there shall be evidence of communication with the treating physician whenever the advanced practice registered nurse or physician assistant changes treatment orders;

(B) the advanced practice registered nurse or physician assistant may not replace the physician in participating in patient care planning or in QAPI activities;

(C) the advanced practice registered nurse or physician assistant may not replace the physician for the every two week evaluation of the in-center dialysis patient;

(D) the advanced practice registered nurse or physician assistant shall notify the treating physician of patient medical emergencies;

(E) if an advanced practice registered nurse or physician assistant is utilized, such individuals shall meet the requirements established by the Texas Board of Nursing (for an advanced practice registered nurse) or the Texas Medical Board (for a physician assistant); and

(F) if an advanced practice registered nurse or a physician assistant is utilized such individuals shall utilize mechanisms which provide authority for that care. These mechanisms shall include, but are not limited to protocols or other written authorization. The protocols or other written authorization shall be jointly developed by the practitioner and the appropriate physician(s), be signed by both the practitioner and the physician(s), be reviewed and re-signed at least

annually, be maintained in the practice setting of the practitioner, and be made available as necessary to the department to verify authority to provide medical aspects of care.

(j) Home dialysis service.

(1) A dialysis facility that provides home dialysis training and support shall be approved to provide home dialysis services, and ensure through its interdisciplinary team that home dialysis services are at least equivalent to those provided to in-facility patients and meet all applicable licensure rules.

(2) A facility shall provide a separate room for home dialysis services.

(A) The room shall include a hand washing sink with hands-free operable controls, warm water, and soap to facilitate hand washing. Provisions for hand drying shall be included at each hand washing sink.

(B) Clean areas shall be clearly designated for the preparation, handling, and storage of medications and unused supplies and equipment. Medications or clean supplies shall not be handled and stored in the same or an immediately adjacent area to that where used supplies, equipment, or blood samples are handled.

(C) There shall be a designated area in the facility with a separate sink for the disposal of blood or body fluids. Contaminated areas where used supplies, equipment, or blood samples are handled shall be clearly designated.

(3) On completion of training, each individual home dialysis patient, regardless of modality, shall be assigned one machine for the patient's exclusive use in the home.

(4) The staffing level for home dialysis patients, including all modalities, shall be one full-time equivalent registered nurse per 20 patients, or portion thereof.

(5) The training curriculum for the facility that provides home dialysis training and support shall be developed and approved by the medical director of the facility and include, but not be limited to, the following:

(A) be conducted by a registered nurse with at least 12 months clinical experience and six months experience in the specific modality with the responsibility for training the patient, and the patient's caregiver;

(B) be conducted for each home dialysis patient and address the specific needs of the patient, in the nature and management of end stage renal disease;

(C) include the full range of techniques associated with the treatment modality selected, including effective use of dialysis supplies and equipment in achieving and delivering the physician's prescription;

(D) training of the patient, and/or caregiver regarding the effective, and safe administration of erythropoiesis-stimulating agent(s) (if prescribed) to achieve and maintain a target level hemoglobin, hematocrit, and blood pressure levels, or hematocrit as written in the patient's plan of care;

(E) training of the patient, and/or caregiver how to detect, report, and manage potential dialysis complications, including water treatment problems;

(F) training of the patient, and/or caregiver regarding the availability of support resources and how to access and use resources;

(G) training of the patient, and/or caregiver how to self-monitor health status and record and report health status information;

(H) training of the patient, and/or caregiver how to handle medical and nonmedical emergencies;

(I) training of the patient, and/or caregiver regarding infection control precautions;

(J) training of the patient, and/or caregiver regarding proper waste storage and disposal procedures;

(K) training of the patient, and/or caregiver how to order supplies on an ongoing basis;

(L) training of the patient, and/or caregiver that nonmedical electrical equipment shall not be used within 6 feet of the home hemodialysis machine; and

(M) maintain the documentation in the clinical record that the patient, the caregiver, or both received and demonstrated adequate comprehension of the training.

(6) The interdisciplinary team shall oversee training of the home dialysis patient and the designated caregiver before the initiation of home dialysis, and when the home dialysis caregiver or home dialysis modality changes.

(7) The dialysis facility shall retrieve and review complete self-monitoring data and other information from the home dialysis self-patient or their designated caregiver(s) at least every two months, and maintain this information in the patient's clinical record in the facility.

(8) A home dialysis facility shall furnish home dialysis support services, regardless of whether dialysis supplies may be provided by the dialysis facility or a durable medical equipment company.

(9) Services include, but are not limited to, the following:

(A) initial monitoring visit of the patient's home adaptation, including visits to the patient's home by facility personnel (including, but not limited to, the registered nurse responsible for training the patient in the chosen modality and technical staff as appropriate) in accordance with the patient's plan of care, and no less than annually thereafter. The initial home visit shall be completed prior to the patient beginning training for the selected home modality.

(B) The patient shall be seen by the prescribing physician, advanced practice registered nurse, or physician's assistant no less than one time a month. The prescribing physician shall see the patient at least one time every three months, if an advanced practice registered nurse, or physician's assistant sees the patient on a monthly basis. This visit may be conducted in the dialysis facility, at the physician's office, or in the patient's home.

(C) The development and periodic review of the patient's individualized comprehensive plan of care that specifies the services necessary to address the patient's needs and meets the measurable and expected outcomes, which meet a hemodialysis Kt/V of at least 1.2 (3 times a week), or standard Kt/V of 2.0 (4-6 times a week), or a peritoneal dialysis weekly Kt/V of at least 1.7, or meet an alternative equivalent professionally-accepted clinical practice standard for adequacy of dialysis.

(D) The facility shall provide patient consultation with members of the interdisciplinary team, as needed.

(10) A home dialysis facility shall monitor the quality of water and dialysate used by a home hemodialysis patient including an on-site evaluation and testing of the water and dialysate system initially, and any time repairs or exchanges of the water treatment equipment are made.

(A) An AAMI analysis of the product water used for dialysate preparation shall be performed annually.

(B) The water and dialysate system shall be tested in accordance with the manufacturer's direction for use.

(C) The water and dialysate system shall be tested in accordance with the system's Food and Drug Administration (FDA) approved labeling, for integrated dialysis system designed, tested, and validated to meet AAMI quality (which includes standards for chemical and chlorine/chloramines testing) water and dialysate. The facility shall meet testing and other requirements of AAMI RD 52:2004, when using an integrated water and dialysate system, which is designed and validated to meet AAMI quality.

(D) The bacteriological and endotoxin testing of water used for dialysate preparation and dialysate shall be performed monthly until results do not exceed 200 CFU/ml and an endotoxin concentration less than 2 EU/ml are obtained for three consecutive months and quarterly thereafter, on a more frequent basis as needed, to ensure that the water and dialysate are within the AAMI limits.

(11) The dialysis facility shall correct any water and dialysate quality problem for the home hemodialysis patient, and if necessary, arrange for backup dialysis until the problem is corrected if:

(A) an analysis of the water and dialysate quality indicates contamination; or

(B) if the home hemodialysis patient demonstrates clinical symptoms associated with water and dialysate contamination.

(12) The dialysis facility shall be responsible for the purchase, lease, or rent, and delivery, installation, repair, and shall maintain medically necessary home dialysis supplies and equipment (including supportive equipment) as prescribed by the attending physician. (If the patient purchases, leases or rents dialysis equipment, the facility shall ensure that the equipment is installed, repaired and maintained in accordance with the manufacturer's directions for use.)

(13) The dialysis facility shall identify a plan and arrange for emergency backup dialysis services when needed.

(14) The dialysis facility shall maintain a record keeping system that ensures continuity of care and patient privacy.

(15) Hemodialysis machines of home patients shall be cultured and measured for colony forming units and endotoxins prior to disinfection, if the machine is to be disinfected.

(16) All dialysis machines and dialysis equipment shall have maintenance logs maintained at the dialysis facility.

(17) The electrical connection for the home hemodialysis machines shall be connected to a GFCI receptacle in accordance with §117.102(i)(8)(F) of this title (relating to Construction Requirements for a New End Stage Renal Disease Facility).

(18) Equipment for home hemodialysis includes the conventional (single pass) dialysis machine, the integrated dialysis system, the dialysis system which uses manufactured bagged dialysate, the peritoneal dialysis system which uses manufactured bagged dialysis solution, and the sorbent regeneration system.

(A) The conventional (single pass) dialysis machine shall comply with the requirements at §117.31 of this title (relating to Equipment), and §117.32 of this title (relating to Water Treatment, Dialysate Concentrates, and Reuse). The facility shall ensure that the water pressure in the patient's home meets the minimum requirement specified by the manufacturer of the water treatment system.

(B) Integrated dialysis system.

(i) The facility shall perform an analysis of the source water used for dialysate to ensure the water quality meets the manufacturer's guidelines for source water purity annually or if there is a change in the source water.

(ii) The chemical quality of the product water shall be obtained every six months prior to a replacement of the water purification disposable component, or when any modifications are made to the integrated dialysis system to ensure that the product water meets the primary standards of AAMI RD 52:2004.

(iii) A means shall be provided to sample the product water to test for chlorine/chloramines levels immediately prior to using the dialysate. Chlorine/chloramines level shall be less that 0.1 mg/L, and the results shall be documented.

(iv) The microbiological quality of the dialysate shall be obtained at the end of a prepared dialysate bag, with the requirements at §117.32 of this title.

(C) The dialysis system, which uses sterile manufactured bagged dialysate, in its existing form, shall be used according to manufacturer's directions for use.

(D) The peritoneal dialysis system, which uses manufactured bagged dialysis solution, shall be used according to manufacturer's directions for use.

(E) When sorbent technology is used, the quantity of water used shall not exceed six liters per treatment; and testing for chlorine/chloramines is not required. Prior to each treatment the sorbent regeneration dialysis system (machine) shall be tested through the manufacturer's self-test method, and the evidence of the self-test shall be documented. The facility shall perform an analysis of the source water used for dialysate to ensure the water quality meets the manufacturer's guidelines for source water purity annually or if there is a change in the source water.

(19) An ESRD facility which was licensed prior to the effective date of these rules shall comply with §117.101 of this title (relating to Construction Requirements for an Existing End Stage Renal Disease Facility). An ESRD facility which is licensed after the effective date of these rules shall provide a separate training room for home dialysis patients in compliance with §117.102(d)(5) of this title.

(k) If a facility dialyzes a patient who is normally dialyzed in a distant facility, the facility shall meet the requirements in this subsection.

(1) The facility shall continuously evaluate staffing levels and utilize this information in determining whether to accept a transient patient for treatment.

(2) The facility shall obtain the information described in §117.47(e) of this title (relating to Clinical Records) prior to providing dialysis. However, if the transient patient arrives unannounced, the facility may provide dialysis with, at a minimum, the following information:

(A) evidence of evaluation of the patient by a physician on the staff of the facility;

(B) orders for treatment;

(C) hepatitis B status; and

(D) medical justification by the physician ordering treatment that the patient's need for dialysis outweighs the need for the additional clinical information set out in §117.47(e) of this title.

(3) In the event a transient patient's hepatitis status is unknown, the patient may undergo treatment as if the HBsAg test results

were potentially positive, except that such a patient shall not be treated in the HBsAg isolation room, area, or machine.

(l) A facility that provides laboratory services shall comply with the requirements of Federal Public Law 100 - 578, Clinical Laboratory Improvement Amendments of 1988 (CLIA 1988). CLIA 1988 applies to all facilities that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

(m) A facility shall not violate Occupations Code, Chapter 102, concerning the prohibition on soliciting patients or patronage.

(n) The facility shall comply with the Health and Safety Code, Chapter 166, concerning out-of-hospital do-not-resuscitate orders.

(o) A facility or its corporate ownership, shall develop, implement, and enforce a compliance policy for monitoring its receipt and expenditure of state or federal funds.

(p) If the facility has a contract or agreement with an accredited school of health care to use their facility for a portion of the students' clinical experience, those students may provide care under the following conditions.

(1) Students may be used in facilities, provided the instructor gives class supervision and assumes responsibility for all student activities occurring within the facility. If the student is licensed (e.g., a licensed vocational nurse attending a registered nurse program for licensure as a registered nurse) the facility shall ensure that the administration of any medication(s) is within the student's licensed scope of practice.

(2) A student may administer medications only if:

(A) on assignment as a student of his or her school of health care; and

(B) the instructor is on the premises and immediately supervises the administration of medication by an unlicensed student and the administration of such medication is within the instructor's licensed scope of practice.

(3) Students shall not be used to fulfill the requirement for administration of medications by licensed personnel.

(4) Students shall not be considered when determining staffing levels required by the facility.

(q) A facility shall adopt, implement, and enforce procedures for the resolution of complaints relevant to quality of care or services rendered by licensed health care professionals and other members of the facility staff, including contract services or staff. The facility shall document the receipt and the disposition of the complaint. The investigation and documentation shall be completed within 30 calendar days after the facility receives the complaint, unless the facility has and documents reasonable cause for a delay.

§117.46. Qualifications of Staff.

(a) The dialysis facility's staff (whether employees or contractors) shall meet the personnel qualifications and demonstrated competencies necessary to serve collectively the comprehensive needs of the patients. The dialysis facility's staff shall have the ability to demonstrate and sustain the skills needed to perform the specific duties of their positions.

(1) The facility shall have a written orientation program to familiarize all new employees (including office staff) with the facility, its policies, and job responsibilities. The orientation program shall be developed and implemented.

(2) The facility shall ensure that each new direct care staff member (whether employee or contractor) is provided sufficient time to become familiar with the facility. The orientation program provided by the facility shall be a minimum time of two weeks for individuals with previous dialysis experience. For new direct care staff members with no previous dialysis experience, the orientation program shall be two weeks plus additional orientation time as determined by the facility.

(3) The facility shall ensure that, in facilities with similar policies and equipment, experienced staff oriented to one facility may be shared with another facility after a shorter orientation period. Documentation of current competency of any shared staff and delegation by that facility's medical director to unlicensed technicians shall be on file in each facility where the shared employee works.

(4) The facility shall ensure that registered nurses with no previous dialysis experience shall be provided an orientation program of a minimum of six weeks. For these registered nurses, the six-week orientation program shall contain at least the following subject content specific to the management of the end stage renal disease patient and appropriate to the population served by the facility:

(A) fluid, electrolyte and acid-base balance;

(B) kidney disease and treatment;

(C) dietary management of kidney disease;

(D) principles of dialysis;

(E) dialysis technology;

(F) venipuncture technique;

(G) care of the dialysis patient;

(H) psychological, social, financial, and physical complications of long-term dialysis;

(I) prevention of hepatitis and other infectious diseases; and

(J) risks and benefits of reuse (if reuse is practiced).

(5) The facility shall ensure that each licensed nurse and dialysis technician demonstrate competency through written and skills testing after the completion of the training program and annually thereafter. Evidence of competency shall be documented in writing and maintained in personnel files. Current certification by a nationally recognized board may substitute for the annual written test. All dialysis technicians must be certified under a national commercially available certification program, within 18 months of being hired as a dialysis technician.

(6) The facility shall ensure that documentation shall be maintained to demonstrate that each staff member providing patient care completes at least five hours of continuing education related to end stage renal disease annually. Continuing education may be provided by facility staff. Documentation shall include the title, duration, and the author or instructor of the continuing education course.

(b) Medical staff.

(1) Each physician on the medical staff shall have a current license to practice medicine in the State of Texas.

(2) The members of the medical staff may include nephrologists and other physicians with training or demonstrated experience in the care of end stage renal disease patients.

(3) If an advanced practice registered nurse is utilized, such individuals shall meet the requirements established by the Texas Board

of Nursing in Texas Administrative Code, Title 22, Part 11, Chapter 221, Advanced Practice Registered Nurses.

(4) If a physician assistant is utilized, such individuals shall meet the requirements established by the Texas Medical Board in Texas Administrative Code, Title 22, Part 9, Chapter 185, Physician Assistants.

(c) Nursing staff.

(1) Each person licensed as a nurse shall have a current Texas license to practice nursing in accordance with the statutes and rules of the Texas Board of Nursing.

(2) Each registered nurse assigned charge nurse responsibilities shall have at least 12 months of clinical experience and have six months experience in hemodialysis subsequent to completion of the facility's training program. The hemodialysis experience shall be within the last 24 months. A registered nurse who holds a current certification from a nationally recognized board in nephrology nursing or hemodialysis may substitute the certification for the six months experience in dialysis obtained within the last 24 months.

(3) There shall be written physician standing orders specific to the facility to guide actions to be taken by the nursing staff in the event a patient's condition deteriorates during treatment. These standing orders shall be reviewed and approved by the medical director at least annually, and be consistent with the Texas Medical Board statutes and rules, and the Texas Board of Nursing practice act, rules, and policy statements for registered nurses and licensed vocational nurses.

(4) If patient self-care training is provided, a registered nurse who has at least 12 months clinical experience and six months experience in the specific modality shall be responsible for training the patient or family in that modality. When other personnel assist in the training, supervision by the qualified registered nurse shall be demonstrated.

(5) When other personnel assist in the training of a patient and the patient's caregiver for self-care training, there shall be documentation in the personnel record that the employee is qualified.

(d) Each dietitian shall have a current Texas license, be a registered dietitian, and have a minimum of one year professional work experience in clinical dietetics after becoming a registered dietitian.

(e) Each social worker shall:

(1) be licensed as a social worker under the Occupations Code, Chapter 505, and hold a masters degree in social work from a graduate school of social work accredited by the Council on Social Work Education; or

(2) have worked for at least two years as a social worker, one year of which was in a dialysis facility or transplantation program prior to September 1, 1976, and have established a consultative relationship with a social worker who has a masters degree in social work from a graduate school of social work accredited by the Council on Social Work Education.

(f) A facility shall have the technical staff as described in this subsection. The facility's technical staff may be one or more individuals (including nursing staff) employed by or under contract with the facility as long as the individual(s) meets the minimum qualifications for each required level of responsibility as described in this subsection.

(1) Only individuals qualified by training, education, or experience may operate, repair, or replace components of the systems utilized in providing dialysis treatment or reprocessing dialyzers.

(A) Technical staff shall have the following minimum education, training, and experience and documentation of such education, training, and experience shall be maintained on file in the facility:

(i) high school diploma or equivalent. For technical staff employed by the facility for two or more years prior to April 11, 1999, this requirement is waived; and

(ii) training or experience in one or more of the following:

(I) completion of a college based technical dialysis program;

(II) completion of the didactic training and education requirement for patient care technicians set out in §117.62(a) and (b) of this title (relating to Training Curricula and Instructors);

(III) current certification in technical aspects of dialysis by a nationally recognized testing organization; or

(IV) 12 months experience in dialysis within the last two years.

(B) Any staff member assigned responsibilities in the technical area shall pass a written competency examination, demonstrate skills related to the required level of responsibility, and be certified by the facility's medical director as competent to perform their assigned duties. Current certification by a national board in dialysis technology may substitute for the written test.

(C) The technical staff shall demonstrate competency for the required level of responsibility through written and skills testing annually. Current certification by a national board in dialysis technology may substitute for the written test. Evidence of competency shall be documented in writing and maintained in the personnel file.

(D) The technical staff shall complete a minimum of five hours of continuing education with a technical or end stage renal disease focus annually. Continuing education may be provided by facility staff. Documentation shall include the title, duration, and the author or instructor of the continuing education course.

(2) The technical supervisor is responsible for the supervision of technical services. The technical supervisor shall meet the education, training, and experience requirements described in this paragraph.

(A) The technical supervisor shall meet the requirements in paragraph (1) of this subsection.

(B) At a minimum, the technical supervisor shall demonstrate competency in equipment maintenance and repair; mechanical service; water treatment systems; and reprocessing of hemodialyzers (if applicable).

(i) Prior to initially assuming technical supervisory responsibility, a technical supervisor trainee shall successfully complete the facility's orientation and training course(s) as established for each technical area.

(ii) The training course(s) shall be approved by the medical director and follow a written curriculum with stated objectives. The curriculum shall include all items noted in paragraphs (3)(B)(ii), (4)(B), and (5)(A) of this subsection.

(3) Staff responsible for water treatment and dialysate systems.

(A) Facility staff responsible for the water treatment and dialysate systems shall demonstrate understanding of the risks to patients of exposure to water which has not been treated so as to

remove contaminants and impurities. Documentation of training to assure safe operation of the water treatment and dialysate systems shall be maintained for each individual who operates (regularly or intermittently) these systems.

(B) The staff responsible for the water treatment and dialysate systems shall meet the education, training, and experience requirements described in paragraph (1) of this subsection and shall demonstrate competency by:

(i) successful completion of the facility training course specific to water treatment, dialysate preparation, and related tasks. The training course shall be approved by the medical director and follow a written curriculum with stated objectives;

(ii) completion of a training curriculum which includes the following minimum components:

(I) introduction to end stage renal disease;

(II) principles of hemodialysis;

(III) principles of infection control and basic microbiology for water treatment systems, machines, and sampling techniques;

(IV) rationale for water treatment for dialysis;

(V) risks and hazards of the use of unsafe water for dialysis;

(VI) current water standards;

(VII) source water characteristics;

(VIII) communication with source water agencies and water treatment vendors;

(IX) selection of water treatment equipment;

(X) water purification equipment to include filtration, carbon adsorption, and reverse osmosis;

(XI) ion exchange to include softeners and deionizers;

(XII) water distribution system and other equipment specific to the facility;

(XIII) monitoring system performance to include on-line and off-line monitoring, aseptic sample collection, incubation of samples, and interpretation of results;

(XIV) evaluation of water treatment component performance to include filters, activated carbon adsorption beds, reverse osmosis, and ion exchange;

(XV) evaluation of system performance to include monitoring schedules and review of system failures;

(XVI) purpose of each component of dialysate to include electrolytes, glucose, acid, and buffer;

(XVII) hazards of exposure of patients to a dialysate containing a different concentration of electrolytes than prescribed;

(XVIII) testing methods in use to verify expected concentrations in any reconstituted components of the dialysate are achieved;

(XIX) action to take in the event testing of a mixed batch of dialysate concentrate does not meet the expected parameters;

(XX) labeling employed to positively identify each concentrate; and

(XXI) procedures to ensure the proper transfer of concentrates from the manufacturer's drums to the holding tanks.

(iii) confirmation of the ability to distinguish all primary colors; and

(iv) successful completion of the facility's orientation and training course as established for the water treatment and dialysate preparation systems technician trainee prior to the trainee's initial assumption of responsibility.

(4) The staff responsible for equipment maintenance and repair shall meet the education, training, and experience requirements described in paragraph (1) of this subsection and shall demonstrate competency by:

(A) successful completion of the facility training course outlined in paragraph (3) of this subsection, relating to water treatment systems;

(B) successful completion of a training curriculum which includes the following minimum components:

(i) prevention of transmission of hepatitis through dialysis equipment;

(ii) safety requirements of dialysate delivery systems;

(iii) repair and maintenance of dialysis and other equipment specific to the facility;

(iv) electrical safety, including lockout or tagout;

(v) emergency equipment maintenance;

(vi) building maintenance;

(vii) fire safety and prevention requirements; and

(viii) emergency response procedures.

(C) successful completion of a written competency exam and demonstration of skills specific to the facility's mechanical and equipment service and water treatment and distribution systems.

(5) The staff responsible for reprocessing hemodialyzers and other supplies shall meet the education, training, and experience requirements described in paragraph (1) of this subsection and shall demonstrate competency by:

(A) successful completion of a training curriculum which includes the components in the American National Standards Institute (ANSI), Reuse of Hemodialyzers, Third Edition, ANSI/AAMI RD47:2002 and RD47:2002/A1:2003, §5.2.1 published by the Association for the Advancement of Medical Instrumentation, 1110 North Glebe Road, Suite 220, Arlington, Virginia 22201; and

(B) successful completion of a written competency exam which includes return demonstration of skills specific to reprocessing of hemodialyzers and other dialysis supplies.

This agency 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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Lisa Hernandez
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SUBCHAPTER E. DIALYSIS TECHNICIANS

25 TAC §§117.61 - 117.65

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§117.63. Competency Evaluation.

(a) The governing body shall ensure that the core staff members of the facility review the training records of each trainee, including tests and skills checklists, hear comments from the training instructor(s) and preceptor(s), and validate that the trainee has successfully completed the training program.

(b) An individual who completed the facility's orientation program and was determined by the facility to be qualified to deliver dialysis patient care may qualify as a dialysis technician by passing the written examination described in §117.62(f) of this title (relating to Training Curricula and Instructors) and demonstrating competency by completion of the skills checklist described in subsection (c) of this section.

(c) The supervising nurse or a registered nurse who qualifies as an instructor under §117.62(g)(2) of this title shall complete a competency skills checklist to document each dialysis technician trainee's knowledge and skills for the following allowed acts:

(1) assembling necessary supplies;

(2) preparing dialysate according to procedure and dialysis prescription;

(3) assembling and preparing the dialysis extracorporeal circuit correctly;

(4) securing the correct dialyzer for the specific patient;

(5) installing and rinsing dialyzer and all necessary tubing;

(6) testing monitors and alarms, conductivity, and (if applicable) presence and absence of residual sterilants;

(7) setting monitors and alarms according to facility and manufacturer protocols;

(8) obtaining predialysis vital signs, weight, and temperature according to facility protocol and informing the registered nurse of unusual findings;

(9) inspecting access for patency and, after cannulation is performed and heparin administered, initiating dialysis according to the patient's prescription, observing universal precautions, and reporting unusual findings to the registered nurse;

(10) adjusting blood flow rates according to established protocols and the patient's prescription;

(11) calculating and setting the dialysis machine to allow fluid removal rates according to established protocols and the patient's prescription;

(12) monitoring the patient and equipment during treatment, responding appropriately to patient needs and machine alarms, and reporting unusual occurrences to the registered nurse;

(13) changing fluid removal rate, placing patient in Trendelenburg position, and administering replacement normal saline as directed by the registered nurse, physician order, or facility protocol;

(14) documenting findings and actions per facility protocol;

(15) describing appropriate response to dialysis-related emergencies such as cardiac or respiratory arrest, needle displacement or infiltration, clotting, blood leaks, or air emboli and to nonmedical emergencies such as power outages or equipment failure;

(16) discontinuing dialysis and establishing hemostasis:

(A) inspecting, cleaning, and dressing access according to facility protocol; and

(B) reporting unusual findings and occurrences to the registered nurse;

(17) obtaining and recording postdialysis vital signs, temperature, and weight and reporting unusual findings to the registered nurse;

(18) discarding supplies and sanitizing equipment and treatment chair according to facility protocol;

(19) communicating the patient's emotional, medical, psychological, and nutritional concerns to the registered nurse;

(20) obtaining current certification in cardiopulmonary resuscitation; and

(21) maintaining professional conduct, good communication skills, and confidentiality in the care of patients.

(d) For dialysis technician trainees who will be assisting with training or treatment of peritoneal dialysis patients, the following checklist shall be completed satisfactorily:

(1) assisting patients in ordering supplies;

(2) making a dialysate exchange (draining and refilling the peritoneal space with dialysate) to include continuous ambulatory peritoneal dialysis exchange procedures, and initiation or discontinuation of continuous cycling peritoneal dialysis;

(3) observing peritoneal effluent;

(4) knowing what observations to report;

(5) collecting dialysate specimen;

(6) performing a transfer tubing change; and

(7) setting up and operating continuous cycling peritoneal dialysis equipment.

(e) For dialysis technician trainees who will be cannulating dialysis access, administering heparin, normal saline, lidocaine, or oxygen the following checklist shall also be completed satisfactorily:

(1) cannulation to include:

(A) inspecting the access for patency;

(B) preparing the skin;

(C) using aseptic technique;

(D) placing needles correctly;

(E) establishing blood access;

(F) replacing needles;

(G) knowing when to call for assistance; and

(H) securing needles;

(2) administration of heparin to include:

(A) checking the patient's individual prescription;

(B) preparing the dose;

(C) labeling the prepared syringe;

(D) administering the dose; and

(E) observing for complications;

(3) administration of normal saline to include:

(A) understanding unit protocol;

(B) checking the patient's prescription;

(C) recognizing signs of hypotension;

(D) notifying the registered nurse;

(E) administering normal saline; and

(F) rechecking vital signs;

(4) administration of lidocaine to include:

(A) checking the patient's prescription;

(B) identifying the correct vial of medication;

(C) preparing the dose;

(D) administering the dose; and

(E) observing for complications; and

(5) administration of oxygen to include:

(A) verifying the ordered flow rate from the nurse functioning in the charge role;

(B) setting up the equipment; and

(C) connecting the tubing for the patient.

(f) If a dialysis technician other than a licensed vocational nurse is to cannulate a dialysis access, administer normal saline, heparin, lidocaine, or oxygen, the medical director shall verify and document competency of the dialysis technician to perform these tasks and delegate authority to the technician in accordance with Occupations Code, Chapter 157.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. CORRECTIVE ACTION PLAN AND ENFORCEMENT

25 TAC §§117.81 - 117.86

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

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SUBCHAPTER G. FIRE PREVENTION AND SAFETY REQUIREMENTS

25 TAC §§117.91 - 117.93

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§117.91. Fire Prevention, Protection, and Emergency Contingency Plan.

(a) An ESRD facility shall comply with the provisions of this section with respect to fire prevention and protection.

(1) An ESRD facility shall comply with local fire codes.

(2) All incidents of fire shall be reported to the local fire authority and shall be reported in writing to the Facility Licensing Group, Regulatory Licensing Unit, Department of State Health Services, Mail Code 2835, P.O. Box 149347, Austin, TX 78714-9347 as soon as possible, but not later than 10 calendar days following the incident. Any fire incident causing injury to a person shall be reported no later than the next business day.

(3) An ESRD facility shall adopt, implement, and enforce a written smoking policy.

(b) An ESRD facility shall adopt, implement, and enforce a written policy for periodic inspection, testing, and maintenance of fire fighting equipment, portable fire extinguishers, and when installed sprinkler systems. If installed, fire sprinkler systems shall comply with National Fire Protection Association 13, Standard for the Installation of Sprinkler Systems, 2002 Edition (NFPA 13).

(1) All fire sprinkler systems, fire pumps, fire standpipe and hose systems, water storage tanks, and valves and fire department connections shall be inspected, tested, and maintained in accordance with National Fire Protection Association 25, Standard for the Inspection, Testing and Maintenance of Water-Based Fire Protection Systems, 2002 Edition.

(2) Every portable fire extinguisher located in an ESRD facility or upon ESRD facility property shall be installed, tagged, and maintained in accordance with National Fire Protection Association 10, Standard for Portable Fire Extinguishers, 2002 Edition.

(c) A plan for the protection of patients in the event of fire and their evacuation from the building when necessary shall be formulated according to NFPA 101, §21.7.1.1. Copies of the plan shall be available to all staff.

(1) An evacuation floor plan shall be prominently and conspicuously posted for display throughout the ESRD facility in public areas that are readily visible to patients, employees, and visitors.

(2) Each ESRD facility shall conduct an annual training program for instruction of all personnel in the location and use of fire fighting equipment. All employees shall be instructed regarding their duties under the fire protection and evacuation plan.

(3) The ESRD facility shall conduct one fire drill per shift per quarter, which shall include the transmission of the fire alarm signal and simulation of the emergency fire condition, simulation of evacuation of patients and other occupants, and use of fire-fighting equipment. Written reports shall be maintained to include evidence of patient and staff participation. Fire exit drills shall incorporate the minimum requirements of NFPA 101, §§21.7.1.2 - 21.7.2.3.

(4) All staff shall be familiar with the locations of fire fighting equipment. Fire fighting equipment shall be located so that a person shall not have to travel more than 75 feet from any point to reach the equipment.

(d) A fire alarm system shall be installed, maintained, and tested, in accordance with National Fire Protection Association 72, National Fire Alarm Code, 2002 Edition (NFPA 72) and NFPA 101, §21.3.4.

(e) A reliable communication system shall be provided as a means of reporting a fire to the fire department. This is in addition to the automatic alarm transmission to the fire department required by NFPA 101, §21.3.4.4.

(f) As an aid to fire department services, every ESRD facility shall provide the following:

(1) The ESRD facility shall maintain driveways, free from all obstructions, to main buildings for fire department apparatus use.

(2) Upon request, the ESRD facility shall submit a copy of the floor plans of the building to the local fire department officials.

(3) The ESRD facility shall place proper identification on the outside of the main building showing the locations of siamese connections and standpipes as required by the local fire department services.

(g) When an ESRD facility is located outside of the service area or range of the public fire protection, arrangements shall be made to have the nearest fire department respond in case of a fire.

(h) The ESRD facility shall provide an emergency contingency plan for the continuity of emergency essential building systems. The emergency contingency plan shall consist of one of the three options as described as follows.

(1) An onsite emergency generator shall be provided with a Type II essential electrical distribution system in accordance with requirements of NFPA 99, §4.5, and National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 2002 Edition.

(A) An emergency generator standby power system(s) shall require an onsite fuel source and enough fuel capacity in the tank for a period of twenty-four hours or more. When a vapor liquefied petroleum gas (LPG) (natural gas) system is used, the twenty-four hour fuel capacity on site is not required. The vapor withdrawal LPG system shall require a dedicated fuel supply. The fuel tank capacity shall be sized by the electrical load demand on the emergency generator for a period of twenty-four hours.

(B) The emergency generator shall be installed, tested and maintained in accordance with the National Fire Protection Association 99, §4.5.4, and National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 2002 Edition.

(C) When the emergency generator(s) and electrical transformer(s) are located within the same area, they shall be located at least 10 feet apart.

(D) Sufficient quantity of potable water supply shall be on site for the operation of the water treatment system for at least twenty-four hours. A water valve connection shall be provided to allow hook-up for potable water from an outside vendor to supply the water treatment system.

(2) An executed contract with an outside supplier/vendor that will provide a portable emergency generator(s) and potable water on demand.

(A) An electrical transfer switch with plug-in device sized to provide emergency power for the patient care areas and the provisions in NFPA 99, §4.5.2.2.2.

(B) A water valve connection to allow hook-up for potable water from an outside vendor to supply the water treatment system.

(C) An alternate source of power (battery power lighting) shall be provided separate and independent from the normal electrical power source that will be effective for a minimum of 1-1/2 hours after loss of the electrical power. The emergency lighting system shall be capable of providing sufficient illumination to allow safe evacuation

from the building. The battery pack systems shall be maintained and tested quarterly.

(D) The facility shall implement the emergency contingency plan upon the loss of electrical power following a natural weather or man-made event when the electrical power may not be restored within 24 hours. The facility shall exercise the contract(s) with the supplier/vendor(s) in order to have portable emergency generator(s) and potable water available within 36 hours after the loss of electrical power.

(3) An executed contract with another licensed ESRD facility within a 100 mile radius to provide emergency contingency care for the patient(s).

(A) The accepting licensed ESRD facility shall meet the requirements of paragraph (1) of this subsection.

(B) An alternate source of power shall be provided separate and independent from the normal electrical power source that will be effective for a minimum of 1-1/2 hours after loss of the electrical power. The emergency lighting system shall be capable of providing sufficient illumination to allow safe evacuation from the building. The battery pack systems shall be maintained and tested quarterly.

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SUBCHAPTER H. PHYSICAL PLANT AND CONSTRUCTION REQUIREMENTS

25 TAC §§117.101 - 117.106

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; Health and Safety Code, Chapter 251; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§117.101. Construction Requirements for an Existing End Stage Renal Disease Facility.

(a) All buildings in which existing ESRD facilities licensed by the department are located shall comply with this subsection.

(1) A licensed ESRD facility which is licensed prior to the effective date of these rules is considered to be an existing licensed ESRD facility and shall continue, at a minimum, to meet the licensing requirements under which it was originally licensed.

(2) Existing licensed ESRD facilities shall meet the requirements for Existing Ambulatory Health Care Occupancies contained in Chapter 21 of the 2000 edition of the National Fire Protection Association 101, Life Safety Code, (NFPA 101), the ESRD Standards/Rules (1996, 1999, or 2006 editions as amended), and the ESRD rules under which the buildings or sections of buildings were constructed. All documents published by NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101 or (800) 344-3555.

(3) In lieu of meeting the requirements in paragraph (1) of this subsection, an existing licensed ESRD facility may, instead, comply with National Fire Protection Association (NFPA) 101, Life Safety Code 2003 Edition (NFPA 101) Chapter 21, Existing Ambulatory Health Care Occupancies.

(b) All major remodeling, renovations, additions and alterations to an existing ESRD facility shall be done in accordance with the requirements for new construction in §117.102 of this title (relating to Construction Requirements for a New End Stage Renal Disease Facility). All areas of an existing ESRD facility that are not part of a major remodel, renovation, addition or alteration to the ESRD facility, are not required to meet these new construction requirements as long as the existing portion of the facility met the rules and codes that were in effect when it was originally constructed and licensed. When existing conditions make such changes impractical, the department may grant a conditional approval of minor deviations from the requirements of §117.102 of this title, if the intent of the requirements is met and if the care, safety and welfare of patients will not be jeopardized. The operation of the ESRD facility, accessibility of individuals with disabilities, and safety of the patients shall not be jeopardized by a condition(s) which is not in compliance with §117.102 of this title and this section.

(1) Any alteration, modification, replacement, or any installation of new building equipment, such as mechanical, electrical, emergency power equipment, energy/utility management, conveying systems, plumbing, fire protection, or other equipment with a primary function of building service that affects life safety, infection control, changes the functional operation, or the health, safety and welfare of patients or staff shall comply with the requirements for new construction and shall not be replaced, materially altered, or extended in an existing ESRD facility until complete plans and specifications have been submitted to the department, and the department has reviewed and approved the plans and specifications in accordance with §117.104 of this title (relating to Preparation, Submittal, Review and Approval of Plans, and Retention of Records).

(2) Minor remodeling or alterations within an existing ESRD facility which do not involve alterations to load bearing members and partitions, change functional operation, affect fire safety, or involve any of the major changes listed in paragraph (1) of this subsection are considered to be minor projects and require evaluation and approval by the department. An ESRD facility shall submit by mail or fax a written request and floor plan for evaluation, a brief description of the proposed changes, and sketches of the area being remodeled. Based on such submittal, the department shall evaluate and determine whether any additional submittals or inspections are required. The department shall notify the ESRD facility of its decision. The patching, restoration, or painting of materials, elements, equipment, or fixtures for the purpose of maintaining such materials,

elements, equipment, or fixtures in good or sound condition would not require submission to the department for approval.

(3) All remodeling or alterations which involve alterations to load bearing members or partitions, change functional operation, add treatment stations, or affect fire safety are considered major projects. An ESRD facility shall comply with this section prior to beginning construction of major projects.

(A) Plans shall be submitted in accordance with §117.104 of this title for all major remodeling or alterations.

(B) As of February 9, 2009, all new facilities or increasing the number of in-center dialysis treatment stations in existing facilities shall have an isolation room or be granted a waiver by Center for Medicare and Medicaid Services. The waiver shall demonstrate that there is sufficient capacity in the geographic area for isolation rooms for hepatitis B positive patients. A written request for waiver shall be made through the Texas Department of State Health Services, Health Facility Compliance Group, Mail Code 1979, P.O. Box 149347, Austin, Texas, 78714-9347 for transmission to CMS.

(C) Phasing of construction in existing facilities.

(i) Projects involving alterations of or additions to existing buildings shall be programmed and phased so that on-site construction shall minimize disruptions of existing functions.

(ii) Access, exit access, and fire protection shall be maintained so that the safety of the occupants shall not be jeopardized during construction.

(iii) A noncombustible or limited combustible dust and vapor barrier shall be provided to separate areas undergoing demolition and construction from occupied areas. When a fire retardant plastic material is used for temporary daily usage, it shall be removed at the end of each day.

(iv) The air inside the construction area shall be protected by mechanical filtration that recirculates inside the space or is exhausted directly to the exterior.

(v) The area shall be properly ventilated and maintained. The area under construction shall have a negative air pressure differential to the adjoining areas and shall continue to operate as long as construction dust and odors are present.

(vi) Temporary sound barriers shall be provided where intense prolonged construction noises will disturb patients or staff in the occupied portions of the building during patient treatment times.

(vii) When construction is done after hours or on weekends, the facility shall assure that all areas of construction are cleaned thoroughly and a clean safe environment is provided before patients are treated. All fire safety protection and building systems are in place and working properly.

(c) A previously licensed ESRD facility which has been vacated or used for other purposes shall comply with all the requirements for new construction contained in §117.102 of this title in order to be licensed.

§117.102. Construction Requirements for a New End Stage Renal Disease Facility.

(a) Any proposed new ESRD facility shall be easily accessible to the community and to service vehicles such as delivery trucks, ambulances, and fire protection apparatus. No building may be converted for use as an ESRD facility which, because of its location, physical condition, state of repair, or arrangement of facilities, would be hazardous to the health and safety of the patients.

(1) An ESRD facility shall have at least two exits remotely located in accordance with National Fire Protection Association (NFPA) 101, Life Safety Code, 2003 Edition (NFPA 101), §20.2.4.1. When a required means of egress from the ESRD facility is through another portion of the building, that means of egress shall comply with the requirements of NFPA 101 which are applicable to the occupancy of that other building. Such means of egress shall be open, available, unlocked, unrestricted, and lighted at all times during the ESRD facility hours of operation. All documents published by National Fire Protection Association (NFPA) as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101 or (800) 344-3555.

(2) Hazardous locations.

(A) A new ESRD facility or an addition to an existing ESRD facility shall not be constructed within 150 feet of easement boundaries or setbacks of hazardous underground locations including but not limited to liquid butane or propane, liquid petroleum or natural gas transmission lines, high pressure lines, and not within the easement of high voltage electrical lines. Municipality's main natural gas lines in right-of-ways serving dwellings and gas lines on property servicing gas meter(s) under this provision are not consider natural high pressure lines.

(B) A new ESRD facility and an addition to an existing ESRD facility shall not be built within 300 feet of above ground or underground storage tanks containing liquid petroleum or other flammable liquids used in connection with a bulk plant, marine terminal, aircraft refueling, bottling plant of a liquefied petroleum gas installation, or near other hazardous or hazard producing plants.

(3) Undesirable locations.

(A) In lieu of local codes, a new ESRD facility shall not be located closer than 1500 feet to nuisance producing industrial sites, feed lots, sanitary landfills, or manufacturing plants producing excessive noise or air pollution.

(B) Flood plains.

(i) When a new ESRD facility is constructed in a designated 100-year flood plain, the building finished floor elevation shall be one foot above the set base flood plain elevation. The building shall meet all local flood code ordinances and local flood control requirements.

(ii) To obtain a license as an ESRD facility, a previously licensed ESRD facility and an existing building or a portion of an existing building located in a designated 100-year flood plain shall meet the requirement of clause (i) of this subparagraph.

(iii) ESRD facility required functional components shall be constructed above the designated flood plain in a new addition to an existing ESRD facility located in a designated 100-year flood plain. The new addition shall meet the requirement of clause (i) of this subparagraph.

(iv) Currently licensed ESRD facilities located within a designated 100-year flood plain are exempt from these requirements for renovations and repairs.

(b) The ESRD facility site shall include paved roads, walkways, and parking in accordance with the requirements set out in this subsection.

(1) Paved roads and walkways.

(A) Paved roads shall be provided within lot lines for access from public roads to the main entrance and to service entrances.

(B) Finished surface walkways shall be provided for pedestrians. When public transportation or walkways serve the site, finished surface walkways or paved roads shall extend from the public conveyance to the building entrance.

(2) Parking and disability requirements.

(A) Off-street parking shall be available for visitors, employees, and staff. Parking structures directly accessible from an ESRD facility shall be separated with two-hour fire rated noncombustible construction. When used as required means of egress for ESRD facility occupants, parking structures shall comply with National Fire Protection Association 88A, Standard for Parking Structures, 2002 edition. This requirement does not apply to freestanding parking structures. All documents published by National Fire Protection Association (NFPA) as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101 or (800) 344-3555.

(B) In the absence of local code, one parking space shall be provided for each staff member on duty, plus one space for each four treatment stations, and one visitor's space for every five treatment stations. This ratio may be reduced in an area convenient to a public transportation system or to public parking facilities. Parking facilities shall be increased accordingly when the size of existing facilities is increased.

(C) When on-street parking is available and acceptable to the local authorities having jurisdiction, the numbers of parking spaces may be reduced accordingly and shall meet the requirement of subparagraph (B) of this paragraph.

(D) Special considerations benefiting disabled staff, visitors, and patients shall be provided. Each ESRD facility shall comply with the Americans with Disabilities Act (ADA) of 1990, Public Law 101 - 336, 42 United States Code, Chapter 126, and Title 36 Code of Federal Regulations, Part 1191, Appendix A, Accessibility Guidelines for Buildings and Facilities or 16 Texas Administrative Code, Part 4, Chapter 68, §68.20 (relating to Buildings and Facilities Subject to Compliance with the Texas Accessibility Standards), Texas Accessibility Standards (TAS), April 1, 1994 edition, issued by the Texas Department of Licensing and Regulation, under the Texas Architectural Barriers Act, Texas Government Code, Chapter 469.

(c) Every building and every portion thereof shall be designed and constructed to sustain all dead and live loads in accordance with accepted engineering practices and standards and the local governing building codes. Where there is no local governing building code, the ESRD facility shall be constructed in accordance with the International Building Code, 2003 edition, published by the International Code Council, 500 New Jersey Avenue, Northwest, 6th Floor, Washington, District of Columbia 20001-2070, (800) 344-3555.

(1) All new construction, including conversion of an existing building to an ESRD facility or establishing a separately licensed ESRD facility within another existing building, shall comply with NFPA 101, Chapter 20, New Ambulatory Health Care Occupancies, of the National Fire Protection Association 101, Life Safety Code, 2003 edition (NFPA 101), and subchapters G and H of this chapter (relating to Fire Prevention and Safety Requirements, and Physical Plant and Construction Requirements, respectively). Construction documents shall be submitted to the department in accordance with §117.104 of this title (relating to Preparation, Submittal, Review and Approval of Plans, and Retention of Records).

(A) Construction types for multiple building occupancy.

(i) When an ESRD facility is part of a larger building which complies with NFPA 101, §20.1.6, Minimum Construction Requirements for (fire resistance) construction type, the designated ESRD facility shall be separated from the remainder of the building with a minimum of one-hour fire rated construction.

(ii) When an ESRD facility is located in a multistory building of two or more stories, the entire building shall meet the construction requirements of NFPA 101, §20.1.6.3. An ESRD facility shall not be located in a multistory building which does not comply with the minimum construction requirements of NFPA 101, §20.1.6.3.

(iii) When an ESRD facility is part of a one-story building that does not comply with the construction requirements of NFPA 101, §20.1.6.2, the ESRD facility shall be separated from the remainder of the building with a 2-hour fire rated construction. The designated ESRD facility portion shall have the construction type upgraded to comply with NFPA 101, §20.1.6.2.

(B) Special provisions shall be made in the design of a facility if located in a region where local experience shows loss of life or extensive damage to buildings resulting from hurricanes, tornadoes, or floods.

(2) A physical environment that protects the health and safety of patients, personnel, and the public shall be provided in each facility. The physical premises of the facility and those areas of the facility's physical structure that are used by the patients (including all stairwells, corridors, and passageways) shall meet the local building and fire safety codes and the requirements of this chapter.

(3) The more stringent standard, code or requirement shall apply when a difference in requirements for construction exists.

(4) Nothing in this subchapter shall be construed to prohibit a better type of building construction, more exits, or otherwise safer conditions than the minimum requirements specified in this subchapter.

(5) Nothing in this subchapter is intended to prevent the use of systems, methods, or devices of equivalent or superior quality, strength, fire resistance, effectiveness, durability, safety to health and welfare of individuals, and safety to those prescribed by this subchapter, provided technical documentation which demonstrates equivalency is submitted to the department for approval.

(6) Separate freestanding buildings for nonpatient use such as the heating plant, boiler plant, laundry, repair workshops, or general storage may be of unprotected noncombustible construction, protected noncombustible construction, or fire-resistive construction and be designed and constructed in accordance with other occupancy classifications requirements listed in NFPA 101.

(d) Spatial requirements.

(1) Administration and public areas.

(A) Patient entrances shall be located at grade level, be accessible to individuals with disabilities, and provide exterior covered protection against inclement weather. The minimum exterior protection covering shall be no smaller than 4 feet by 6 feet wide. A covered area for patients in wheelchairs shall be provided next to the opening area of the door swing and door swing shall not interfere within this area. When an ESRD is located on a floor above grade level, elevators shall be accessible and shall meet the requirements of §117.103 of this title (relating to Elevators, Escalators, and Conveyors).

(B) A waiting area or lobby shall be provided within the ESRD facility and include having the following rooms and items:

(i) public toilet facilities; and

(ii) telephone(s) for public use.

(C) A designated reception area with desk or counter shall be provided.

(D) Space shall be provided for private interviews for family members relating to social services, credit, or admission.

(E) An office(s) shall be provided for business transactions, records, and administrative and professional staff.

(F) The facility shall provide an area for storage of clinical records which is separate from all patient treatment areas, and shall be secured from unauthorized access. The facility shall store the active clinical record of each patient currently treated by the facility on site.

(G) A general storage room with a minimum of 2 square feet per treatment station shall be provided. General storage may be located in one or more rooms or closets, and shall be located outside of the patient treatment areas.

(H) Storage space for wheelchairs shall be provided, and shall be out of the direct line of traffic.

(2) Equipment rooms with adequate space shall be provided for mechanical and electrical equipment. These areas shall be separate from public, patient, and staff areas.

(3) An exam room shall be provided for medical examinations. The room shall have a minimum clear floor space of 80 square feet area exclusive of fixed cabinets and shelves and contain a counter for writing and a hand washing sink with hands-free operable controls.

(4) When a patient is hepatitis B positive, the treatment shall be in a separated dedicated isolation room. All treatment in the isolation room shall be for hepatitis B patients only.

(A) A single hepatitis B patient isolation room shall be a minimum of 120 square feet clear area exclusive of fixed and movable cabinets and shelves.

(B) When multiple-treatment stations for hepatitis B patients are treated in a single isolation room, each individual patient treatment area shall be 80 square feet with a minimum of 8 feet clear dimension exclusive of fixed or wall mounted cabinets and built-in shelves. The clearance between the side of a station/chair and a wall/partition shall be a minimum of 3 feet. The clearance between sides of stations/chairs shall be a minimum of 4 feet.

(C) The isolation treatment room shall include a work counter and a hand washing sink with hands-free operable controls, and space for patient care supplies and equipment. The fixed and moveable cabinets and shelves shall not encroach upon the patient treatment station/chair clear floor space/area.

(D) The isolation treatment room shall have viewing panels in doors and/or walls for continuous direct visual monitoring of the patient in the room.

(E) The dialysis equipment shall be designated, reserved, and used for hepatitis B positive patients only.

(F) Disinfection of dialysis equipment shall occur in the hepatitis B treatment isolation room and shall meet the requirements of §117.33(d)(2)(C) of this title (relating to Sanitary Conditions and Hygienic Practices).

(G) As of February 9, 2009, all new facilities or increasing the number of in-center dialysis treatment stations in existing facilities shall have an isolation room or be granted a waiver by Centers for Medicare and Medicaid Services. The waiver shall demonstrate that there is sufficient capacity in the geographic area for isolation rooms for hepatitis B positive patients. A written request for waiver shall be made through the Texas Department of State Health Services, Health Facility Compliance Group, Mail Code 1979, P.O. Box 149347, Austin, Texas, 78714-9347 for transmission to CMS.

(5) When home training is provided in the facility, a private treatment area of at least 120 square feet exclusive of fixed and movable cabinets and shelves shall be provided. This room shall contain a work counter, a hand washing sink with hands-free operable controls, and a separate drain for fluid disposal.

(6) A sufficient number of janitor's closets shall be provided throughout the facility to maintain a clean and sanitary environment. The closet shall contain a floor receptor or service sink and storage space for housekeeping supplies and equipment.

(7) When laboratory services are provided on site the following shall be provided and meet the requirements of §117.45(l) of this title (relating to Provision and Coordination of Treatment and Services).

(A) The laboratory workroom/area shall include a counter and a sink with hands-free operable controls. Laboratory services and medication preparation and dispensing shall not be done within the same designated space.

(B) Cabinets or closets shall be provided for supplies and equipment used in obtaining samples for testing.

(C) Refrigerated specimen storage shall be provided for specimens waiting for transfer to off-site testing. The refrigerators shall be maintained with documentation of the appropriate temperature for such storage.

(8) When laundry and linen is provided, processing may be done within the center or off site at a commercial laundry.

(A) When on-site linen processing is provided, soiled and clean processing operations shall be separated and arranged to provide a one-way traffic pattern from soiled to clean areas. The following rooms and items shall be provided:

(i) a soiled linen processing room which includes areas for receiving, holding, sorting, and washing;

(ii) a clean linen processing room which includes areas for drying, sorting, folding, and holding prior to distribution;

(iii) supply storage cabinets in the soiled and clean linen processing rooms;

(iv) hand washing sink within the soiled linen processing room; and

(v) a storage room for clean linen. Clean linen storage may be combined with the clean work room.

(B) When linen is processed off site, the following areas shall be provided:

(i) clean linen shall be stored within the clean supply area; and

(ii) soiled linen shall be stored in a designated space in the facility.

(9) Space shall be provided for the safe storage and disposal of waste as appropriate for the material being handled and in compliance with all applicable rules and regulations.

(10) At a minimum, the medication area shall include a counter, a refrigerator, and a hand washing sink with hands-free operable controls. Storage and preparation of medication shall be done

from a medication area and shall be under visual control of nursing staff. Medication preparation, dispensing and laboratory services shall not be done within the same designated areas. The refrigerators used for storage of medications shall be maintained with documentation of the appropriate temperatures for such storage.

(11) When peritoneal dialysis (PD) training is provided within the ESRD facility, a patient treatment training room shall have a minimum of 120 square feet of clear floor area exclusive of fixed and movable cabinets and shelves.

(A) The PD treatment room shall contain cabinets, a work counter, and a hand washing sink with hands-free operable controls.

(B) An additional clinical sink or equivalent flushing rim sink with hands-free operable controls shall be provided. The clinical sink or equivalent flushing rim sink and the hand washing sink shall have a minimum separation of 6 feet.

(C) A physical partition between the clinical sink or equivalent flushing rim sink and the hand washing sink may be constructed in-lieu-of the 6 foot separation. The partition shall be a minimum of 5 feet in height from the finished floor and 2 feet in width from the wall or from the wall to the front edge of the countertop whichever is greater.

(12) When a reuse room is provided, the room shall be sufficiently sized to house dialyzers reprocessing area, breakdown area, a storage area/room and work area. All fixed and moveable equipment shall require a minimum of three feet of clear and unobstructed working space on all sides of fixed or moveable equipment that require access for staff. The reuse room shall include a work counter, deep utility service sink and separate hand washing sink with hands-free operable controls, refrigerator and storage space and shall meet the requirements of §117.32(d) of this title (relating to Water Treatment, Dialysate Concentrates, and Reuse).

(A) Dialyzers reprocessing area shall be arranged for the one-way movement from soiled dialyzers and materials to cleaning and storage.

(B) Breakdown of dialyzers shall be processed in the soiled processing area of the reprocessing area. The deep utility service sink with hands-free operable controls shall be located within the soiled processing area. There shall be adequate storage space to store the soiled/used dialyzers before processing occurs. The minimum depth of the utility sink shall not be less than 14 inches.

(C) The reuse room shall provide either a separate storage room or within the reuse room storage space to store all reprocessed cleaned dialyzers. There shall be a definitive separation between storing used and reprocessed dialyzers, and the temperature in the storage areas shall be maintained in accordance with the manufacturer's direction for use.

(13) The treatment area(s) or rooms shall be separate from the administrative area(s).

(A) When individual hemodialysis patient treatment room(s) is provided, the room shall have a minimum of 120 square feet of clear floor area exclusive of fixed and movable cabinets and shelves. The patient treatment room shall contain cabinets, work counter, and a hand washing sink with hands-free operable controls.

(B) In multiple-treatment stations, each individual patient treatment area shall be 80 square feet exclusive of fixed or wall mounted cabinets and built-in shelves. A minimum of 8 feet width shall be provided for the head wall for each station. The clearance between the side of a chair and a wall shall be a minimum of 3 feet, and the back of the extended chair and a wall shall be a minimum of 1 foot. A clear unobstructed width of 3 feet 8 inches shall be available at the foot of each treatment area(s) outside of the 80 square feet treatment area for passage of equipment, gurneys, and personnel.

(C) The multiple-treatment station area shall contain cabinets, work counters, and hand washing sinks with hands-free operable controls. The fixed and moveable cabinets and shelves shall not encroach upon the patient treatment station.

(D) A nurse station shall be located within the dialysis treatment area(s) and designed to provide visual observation of all patient stations. The nurse station shall have counters for storage and access to a hand washing sink(s) with hands-free operable controls.

(E) One hand washing sink with hands-free operable controls shall be provided for every six stations. Sinks shall be uniformly distributed.

(F) When required or requested, privacy shall be provided for each patient in the open treatment area with portable moveable screens.

(e) Service areas.

(1) A clean storage room or closet shall be provided for patient care items, clean and sterile supplies.

(2) Emergency eyewash shall be provided conveniently for staff use and comply with ANSI Z358.1.

(3) Dialysis solutions may be processed from a central batch delivery system or prepared in an on-site mixing room. When provided, a mixing room shall include a sink, storage space, and holding tanks.

(4) Patient toilet rooms shall be located within the treatment area(s) and include hand washing sink(s) with hands-free operable controls. Patient toilet room shall be at a ratio of 1 toilet room for every 40 treatment stations or fraction thereof.

(5) Staff toilet room(s) shall be provided and include hand washing sink(s) with hands-free operable controls. The toilet room shall be outside the treatment area but convenient for staff use only.

(6) The water treatment and equipment for the dialysis shall be located in a room not accessible to unauthorized persons. The water room shall be designed and house the water treatment system and meet the requirements of §117.32(b) of this title.

(f) Details and finishes in new construction projects, including additions and alterations, shall be in compliance with this subsection, with NFPA 101, Chapter 20, and with local building codes.

(1) General detail requirements.

(A) Fire safety features, including compartmentation, means of egress, automatic extinguishing systems, inspections, smoking regulations, and other details relating to fire prevention and fire protection shall comply with §117.101 of this title (relating to Construction Requirements for an Existing End Stage Renal Disease Facility), and NFPA 101, Chapter 20. The Fire Safety Evaluation System for Health Care Occupancies contained in the National Fire Protection Association 101A, Alternative Approaches to Life Safety, 2001 Edition, Chapter 4, shall not be used in new building construction, renovations or additions to existing ESRD facilities.

(B) Exits, corridors and doors.

(i) A facility shall provide two exits remote from each other in accordance with NFPA 101, §20.2.4.1. At least one exit

door shall be accessible by an ambulance from the outside. This door may also serve as an entry for loading or receiving goods.

(ii) Corridors providing access to all patient treatment area(s) and exits shall be at least three feet eight inches in clear and unobstructed width, not less than seven feet six inches in height, and constructed in accordance with requirements listed in NFPA 101, §20.2.1.

(iii) Items such as drinking fountains and vending machines shall be so located as to not project into and restrict exit corridor traffic or reduce the exit corridor width below the required minimum. Portable equipment shall not be stored so as to project into and restrict exit corridor traffic or reduce the exit corridor width below the required minimum.

(iv) Doors at all openings between corridors and rooms or spaces subject to occupancy shall be swing type. Elevator doors are excluded from this requirement.

(v) Doors, except doors to spaces such as small closets which are not subject to occupancy, shall not swing into corridors in a manner that might obstruct traffic flow or reduce the required corridor width. Large walk-in type closets are considered as occupiable spaces.

(vi) All doors in the means of egress shall be not less than 36 inches in clear width.

(vii) The minimum width of doors for patient access to treatment, examination, and consultation areas/rooms shall be 36 inches in clear width.

(viii) Rooms containing a toilet, intended for patient use, shall be provided with at least one door having hardware which will permit access from the outside in any emergency.

(ix) Horizontal sliding doors serving an occupant load of fewer than 10 shall be permitted. The area served by the door shall have no high hazard contents. The door shall be readily operable from either side without special knowledge or effort. The force required to operate the door in the direction of door travel shall be not more than 30 pounds per foot to set the door in motion, and shall be not more than 15 pounds per foot to close the door or open in the minimum required width. The door assembly shall comply with any required fire protection rating, and, where rated, shall be self-closing or automatic closing. The sliding doors opening to the egress corridor doors shall have a latch or other mechanism that ensures that the doors will not rebound into a partially open position if forcefully closed. The sliding doors may have breakaway provisions and shall be installed to resist passage of smoke. The latching sliding panel shall have a minimum clear opening of 36 inches in the fully open position. The fixed panels may have recessed tracks.

(x) Doors shall not open immediately onto a stair without a landing. The landing shall be 44 inches deep or have a depth at least equal to the door width, whichever is greater.

(xi) All fire doors shall be listed by an independent testing laboratory and shall meet the construction requirements for fire doors in National Fire Protection Association 80, Standard for Fire Doors and Fire Windows, 1999 Edition. Reference to a labeled door shall be construed to include labeled frame and hardware.

(C) Glass doors, lights, sidelights, borrowed lights, and windows located within 12 inches of a door jamb or with a bottom-frame height of less than 18 inches and a top-frame height of more than 36 inches above the finished floor which may be broken accidentally by pedestrian traffic shall be glazed with safety glass or plastic glazing material that will resist breaking and will not create dangerous cutting edges when broken. Similar materials shall be used for wall openings in activity areas such as recreation and exercise rooms, unless otherwise required for fire safety. Safety glass, tempered or plastic glazing materials shall be used for shower doors and bath enclosures, interior windows and doors. Plastic and similar materials used for glazing shall comply with the flame spread ratings of NFPA 101, §18.3.3.

(D) Grab bars shall be provided at patient toilets and at the weight scales. The bars shall be one and one-half inches in diameter, shall have either one and one-fourth or one and one-half inches clearance to walls, and shall have sufficient strength and anchorage to sustain a concentrated vertical or horizontal load of 250 pounds. Grab bars intended for use by the disabled shall also comply with ADA requirements.

(E) Location and arrangement of fittings for hand washing sinks shall permit their proper use and operation. Hand washing sinks with hands-free operable controls shall be provided within each workroom, examination, treatment room, and toilet room. Hands-free includes blade-type handles, and foot, knee, or sensor operated controls. Particular care shall be given to the clearances required for blade-type operating handles. Lavatories and hand washing sinks shall be securely anchored to withstand an applied vertical load of not less than 250 pounds on the front of the sink. In addition to the specific areas noted, hand washing sinks shall be provided and conveniently located for staff use throughout the ESRD facility where patient care contact occurs and services are provided.

(F) A liquid or foam soap dispenser shall be located at each hand washing sink.

(G) Provisions for hand drying shall be included at all hand washing sinks. There shall be hot air dryers or individual paper towel dispensers enclosed in such a way as to provide protection against dust or soil and ensure single-unit dispensing.

(H) The minimum ceiling height shall be eight feet with the following exceptions.

(i) Boiler rooms shall have ceiling clearances not less than two feet six inches above the main boiler header and connecting piping.

(ii) Rooms containing ceiling-mounted equipment shall have the ceiling height clearance increased to accommodate the equipment or fixtures.

(iii) Suspended tracks, rails, pipes, signs, lights, door closers, exit signs, and other fixtures that protrude into the path of normal traffic shall not be less than six feet eight inches above the finished floor.

(I) The dialysis facility shall not be located directly under recreation rooms, exercise rooms, and similar spaces where impact noises may be generated unless special provisions are made to minimize noise.

(J) Rooms containing heat-producing equipment such as heater rooms, laundries, etc. shall be insulated and ventilated to prevent any occupied floor surface above from exceeding a temperature differential of 10 degrees Fahrenheit above the ambient room temperature.

(K) Thresholds and expansion joint covers shall be flush or not more than one-half inch above the floor surface to facilitate the use of wheelchairs and carts. Expansion and seismic joints shall be constructed to restrict the passage of smoke and fire and shall be listed by a nationally recognized testing laboratory.

(2) General finish requirements.

(A) Portable privacy screens shall be provided to assure patient privacy when required or requested by a patient. When not in use the screens shall be stored conveniently within the treatment area for immediate use.

(B) Flame spread and smoke developed limitations of interior finishes shall comply with NFPA 101, §10.2. The use of materials known to produce large or concentrated amounts of noxious or toxic gases shall not be used in exit accesses or in patient areas. Copies of laboratory test reports for installed materials tested in accordance with National Fire Protection Association 255, Standard Method of Test of Surface Burning Characteristics of Building Materials, 2000 Edition, and National Fire Protection Association 258, Standard Research Test Method for Determining Smoke Generation of Solid Materials, 2001 Edition, shall be provided.

(C) Flooring shall be easy to clean and have wear resistance appropriate for the location involved. Floors that are subject to traffic while wet shall have a nonslip surface. In all areas frequently subject to wet cleaning methods, floor materials shall not be physically affected by germicidal and cleaning solutions. The following are acceptable floor finishes:

(i) painted concrete for water treatment areas, mechanical, electrical, janitor's closets and general storage;

(ii) exposed concrete shall be sealed for water treatment areas, mechanical, electrical, janitor's closets and general storage;

(iii) vinyl sheets and vinyl composition tiles for offices, lobbies, administrative areas, storage, toilet rooms, treatment areas/rooms, isolation treatment room, exam rooms, training room, reprocessing rooms, support spaces and nontreatment areas;

(iv) when monolithic or seamless flooring is installed it shall be impervious to water, coved and installed integral with the base, tightly sealed to the wall, and without voids that can harbor insects or retain dirt particles. The base shall not be less than six inches in height. Welded joint flooring is acceptable;

(v) marble, ceramic and quarry tile for offices, lobbies, waiting, toilet rooms, administrative areas, wet areas, and similar spaces;

(vi) carpet flooring for offices, administrative areas, and similar spaces; and

(vii) terrazzo for offices, lobbies, administrative areas, and similar spaces.

(D) Wall finishes shall be smooth, washable, moisture resistant, and cleanable.

(i) Wall finishes shall be water-resistant in the immediate area of plumbing fixtures.

(ii) Wall finishes subject to frequent wet cleaning methods shall be impervious to water, tightly sealed and without voids.

(E) Ceilings which are a part of a rated roof/ceiling assembly or a floor/ceiling assembly shall be constructed of listed components and installed in accordance with the listing. Three types of ceilings that are required in various areas of the ESRD facility are:

(i) ordinary ceilings are required in all areas or rooms in the ESRD facility unless a requirement requires a specific type of ceiling for such space. This includes ceilings such as acoustical tiles installed in a metal grid which are dry cleanable with equipment used in daily housekeeping activities such as dusters and vacuum cleaners;

(ii) washable ceilings are ceilings that are made of washable, smooth, moisture impervious materials such as painted lay-in gypsum wallboard or vinyl faced acoustic tile in a metal grid when installed in the water treatment room and reuse room;

(iii) monolithic ceilings which are monolithic from wall to wall (painted solid gypsum wallboard), smooth and without fissures, open joints, or crevices and with a washable and moisture impervious finish shall be provided for the isolation room and reuse room; and

(iv) no finished ceiling is required in mechanical, electrical, general storage, and water treatment rooms.

(F) Floor, wall and ceiling penetrations by pipes, ducts, and conduits, or any direct openings shall be tightly sealed to minimize entry of dirt particles, rodents and insects. Joints of structural elements shall be similarly sealed.

(G) Materials known to produce noxious gases when burned shall not be used for mattresses, upholstery, and wall finishes.

(H) A sign shall be posted at the entrance to each toilet/restroom to identify the facility for public, staff or patient use.

(I) When vinyl sheets and vinyl composition tiles are used for toilet rooms, treatment areas/rooms, isolation treatment rooms, exam rooms, training rooms, and reprocessing rooms the joints shall be sealed to prevent moisture and blood from seeping into the joints and under the tile.

(g) This subsection contains common requirements for mechanical systems; steam and hot and cold water systems; air conditioning, heating and ventilating systems; and thermal and acoustical insulation.

(1) When mechanical equipment is exposed to weather, it shall be protected by weatherproof construction or weather protected.

(2) Mechanical equipment shall be mounted on vibration isolators as required to prevent unacceptable structure-borne vibration. Ducts, pipes, etc. connected to mechanical equipment which is a source of vibration shall be isolated from the equipment with vibration isolators.

(3) Prior to completion and acceptance of the facility, all mechanical systems shall be tested, balanced, and operated to demonstrate to the design engineer or his representative that the installation and performance of these systems conform to the requirements of the plans and specifications.

(A) Upon acceptance of the mechanical system, the owner shall be provided with parts lists and procurement information with numbers and description for each piece of equipment.

(B) Upon acceptance of the mechanical system, the owner shall be provided with instructions in the operational use of systems and equipment as required.

(4) All heating, ventilating and air conditioning (HVAC) systems shall comply with and shall be installed in accordance with the requirements of National Fire Protection Association 90A, Standard for the Installation of Air Conditioning and Ventilating Systems, 2002 edition (NFPA 90A), NFPA 99, Chapter 6 and the requirements contained in this subsection.

(5) All rooms and areas in the ESRD facility shall have provision for positive ventilation. Fans serving exhaust systems shall be located at the discharge end and shall be conveniently accessible for service. Exhaust systems may be combined, unless otherwise noted, for efficient use of recovery devices required for energy conservation.

Supply air to the building and exhaust air from the building shall be regulated to provide a positive pressure within the building with respect to the exterior.

(A) The systems serving all treatment areas/rooms, exam rooms, and isolation rooms, shall be capable of maintaining a temperature range between 68 and 78 degrees Fahrenheit and a relative humidity range between 45% and 60%.

(B) The indoor design temperature in all other areas shall be between 68 and 75 degrees Fahrenheit with relative humidity of not less than 30%.

(6) Ventilation systems for the reuse room and airborne isolation room shall be connected to an air exhaust system to the outdoors which is separate from the building exhaust system, have an exhaust fan located at the discharge end of the system, and have an exhaust duct system of noncombustible corrosion-resistant material as needed to meet the planned usage of the system.

(A) The bottoms of wall-mounted return and exhaust air openings shall be at least six inches above the floor. All exhaust air openings and return air openings located higher than six inches but less than seven feet above the floor shall be protected with grilles or screens having openings through which a one-half inch sphere will not pass.

(B) Exhaust outlets shall be above the roof level and arranged to minimize recirculation of exhaust air into the building. Exhaust outlets shall be located at least 25 feet from any fresh air intake of ventilating systems. (Prevailing winds and proximity to other structures may require more stringent requirements.) Plumbing and vacuum vents that terminate five feet above the level of the top of the air intake may be located as close as 10 feet.

(C) If applicable, the reuse room and the airborne isolation room exhaust systems shall be connected to the emergency electrical system and shall meet the requirements of paragraph (10) of this subsection.

(7) All toilet exhaust ventilation shall be exhausted to the outdoors. Exhaust systems may be combined, unless otherwise noted, for efficient use of recovery devices required for energy conservation.

(8) To reduce utility costs, facility design may utilize energy conserving procedures including recovery devices, variable air volume, load shedding, systems shutdown, or reduction of ventilation rates (when specifically permitted) in certain areas when unoccupied. In no case shall patient care be jeopardized.

(9) Mechanical systems shall be arranged to take advantage of outside air conditions by using an economizer cycle when appropriate to reduce heating and cooling systems loads. Innovative design that provides for additional energy conservation while meeting the intent of this subsection for acceptable patient care may be presented to the department for consideration.

(10) Outside air intakes shall be located at least 25 feet from exhaust outlets of ventilating systems, combustion equipment stacks, plumbing vents, or areas which may collect vehicular exhaust or other noxious fumes. (Prevailing winds and proximity to other structures may require more stringent requirements). Plumbing vents that terminate five feet above the level of the top of the air intake may be located as close as 10 feet.

(11) Fully ducted supply, return and exhaust air for HVAC systems shall be provided for all patient treatment care areas, storage rooms, and where required for fire safety purposes. Combination systems, utilizing both ducts and plenums for movement of air in these areas, shall not be permitted.

(12) Air handling systems shall not be started or operated without 30% or equal minimum efficient rating value (merv) of 8 and the filters installed in place. Ducts shall be cleaned thoroughly and throughout by a certified air duct cleaning contractor when the air handling systems have been operating without the required filters in place. When ducts are determined to be dirty or dusty, the department shall require a written report assuring cleanliness of duct and clean air quality.

(13) Ductwork with duct-mounted humidifiers shall be provided with a means of removing water accumulation. An adjustable high-limit humidistat shall be located downstream of the humidifier to reduce the potential of condensation inside the duct. All duct take-offs shall be sufficiently downstream of the humidifier to ensure complete moisture absorption. Reservoir-type water spray or evaporative pan humidifiers shall not be used.

(14) All central air handling systems shall be equipped with filters having efficiencies 30% or equal to 8 merv. Filter efficiencies shall be average efficiencies tested in accordance with American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE), Inc., Standard 52.2, 1999 edition, Method of Testing General Ventilation Air-Cleaning Devices for Removal Efficiency by Particle Size. All joints between filter segments, and between filter segments and the enclosing ductwork, shall have gaskets and seals to provide a positive seal against air leakage. Air handlers serving more than one room shall be considered as central air handlers. All documents published by ASHRAE as referenced in this section may be obtained by writing or calling the ASHRAE, Inc. at the following address or telephone number: ASHRAE, Inc., 1791 Tullie Circle, Northeast, Atlanta, Georgia 30329; telephone (404) 636-8400.

(A) Filtration requirements for air handling units serving single rooms. Dedicated air handlers serving single rooms shall be equipped with nominal filters installed at the return air system.

(B) A filter bed shall be located upstream of the supply fan. Filter frames shall be durable and constructed to provide an airtight fit with the enclosing ductwork.

(15) Thermal and acoustical insulation for air handling systems. Asbestos insulation shall not be used.

(A) Air ducts and casings with outside surface temperature below ambient dew point or temperature above 80 degrees Fahrenheit shall be provided with thermal insulation.

(B) Linings in air ducts and equipment shall meet the Erosion Test Method described in Underwriters Laboratories (UL), Inc., Standard Number 181 (relating to Factory-Made Duct Materials and Air Duct Connectors), April 4, 1996 edition. This document may be obtained from the Underwriters Laboratories, Inc., 333 Pfingsten Road, Northbrook, Illinois 60062-2096.

(C) Interior and exterior insulation, including finishes and adhesives on the exterior surfaces of ducts and equipment, shall have a flame spread rating of 25 or less and a smoke developed rating of 50 or less as required by NFPA 90A, Chapters 4 and 5.

(D) Insulation of soft and spray-on types shall not be used where it is subject to air currents or mechanical erosion or where loose particles may create a maintenance problem.

(16) Fire dampers shall be located and installed in all ducts at the point of penetration of a required two-hour or higher fire rated wall or floor in accordance with the requirements of NFPA 101, §20.1.

(17) Smoke dampers shall be located and installed in accordance with the requirements of NFPA 101, and NFPA 90A, Chapter 5.

(A) Smoke dampers shall close on activation of the fire alarm system by smoke detectors installed and located as required by National Fire Protection Association 72, National Fire Alarm Code, 2002 Edition (NFPA 72), Chapter 8; NFPA 90A, Chapter 6; and NFPA 101, §18.3.7; the fire sprinkler system; and upon loss of power. Smoke dampers shall not close by fan shutdown alone unless it is a part of an engineered smoke removal system.

(B) Air handling fans and smoke damper controls may be interconnected so that closing of smoke dampers will not damage the ducts.

(C) Use of frangible devices for shutting smoke dampers is not permitted.

(18) Only fire damper and smoke damper assemblies integral with sleeves and listed for the intended purpose shall be acceptable.

(19) Unobstructed access to duct openings in accordance with NFPA 90A, §4.3.4, shall be provided in ducts within reach and sight of every fire damper, smoke damper and smoke detector. Each opening shall be protected by an internally insulated door which shall be labeled externally to indicate the fire protection device located within.

(20) Controls for restarting fans may be installed for convenient fire department use to assist in evacuation of smoke after a fire is controlled, provided that provisions are made to avoid possible damage to the system because of closed dampers. To accomplish this, smoke dampers shall be equipped with remote control devices.

(h) All piping systems and plumbing fixtures shall be designed and installed in accordance with the requirements of the National Standard Plumbing Code Illustrated published by the National Association of Plumbing-Heating-Cooling Contractors (PHCC), 2003 edition, and this paragraph. The National Standard Plumbing Code may be obtained by writing or calling the PHCC at the following address or telephone number: Plumbing-Heating-Cooling Contractors, Post Office Box 6808, Falls Church, Virginia 22046; telephone (800) 533-7694.

(1) Piping systems.

(A) Water service pipe to point of entrance to the building shall be brass pipe, copper tube (not less than type M when buried directly), copper pipe, cast iron water pipe, galvanized steel pipe, or approved plastic pipe. Domestic water distribution system piping within buildings shall be brass pipe, copper pipe, copper tube, or galvanized steel pipe. Piping systems shall be designed to supply water at sufficient pressure to operate all fixtures and equipment during maximum demand.

(i) Each water service main, branch main, riser, and branch to a group of fixtures shall be equipped with accessible and readily identifiable shutoff valves. Stop valves shall be provided at each fixture.

(ii) Backflow preventers (vacuum breakers) shall be installed on hose bibbs, laboratory sinks, janitor sinks, and on all other fixtures to which hoses or tubing can be attached. Backflow preventers are not required for hoses that are directly connected to the dialysis machines.

(iii) Flush valves installed on plumbing fixtures shall be of a quiet operating type, equipped with silencers.

(iv) Hot water distribution systems for patient care areas shall be under constant recirculation to provide continuous hot water at each hot water outlet. Nonrecirculated fixtures branch piping shall not exceed 25 feet in length. Tankless water system may be used at point of use.

(v) Water heating equipment shall have sufficient capacity to supply water for clinical, use.

(vi) Water temperatures shall be measured at hot water point of use, and shall be between 105 - 120 degrees Fahrenheit.

(vii) The domestic hot water system shall make provisions to limit the amount of Legionella bacteria and opportunistic waterborne pathogens.

(viii) Domestic water storage tank(s) shall be fabricated of corrosion-resistant metal or lined with noncorrosive material. When potable water storage tanks (hot and cold) are used, the water shall be used and replenished. Water shall not be stored in tanks for future use unless the water is tested weekly for contaminates/bacteria.

(ix) Purified water distribution system piping shall be task specific and include, but not necessarily be limited to, polypropylene (PP), polyvinylidene fluoride (PVDF) or polyvinyl chloride (PVC) pipe. Final installed purified water system piping assemblies shall be UL approved and fully comply with applicable American Society for Testing and Materials (ASTM) Fire Resistant/Smoke Density requirements. The applicable documents are available from ASTM International, 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, Pennsylvania 19428-2959.

(B) When fire sprinkler systems are required and provided in an ESRD facility, the fire sprinkler systems shall be designed, installed, and maintained in accordance with the requirements of NFPA 13, and shall be certified as required by §117.105(c)(1)(C) of this title (relating to Construction, Inspections, and Approval of Project).

(C) Main storage of medical gases may be outside or inside the ESRD facility in accordance with NFPA 99, §5.1.

(D) Steam and hot water systems.

(i) When boilers are used the boilers shall have the capacity, based upon the net ratings as published in The I-B-R Ratings Book for Boilers, Baseboard Radiation and Finned Tube (commercial) by the Hydronics Institute Division of GAMA, to supply the normal requirements of all systems and equipment. The document published by the Hydronics Institute Division of GAMA as referenced in this rule may be obtained by writing or calling the Hydronics Institute Division of GAMA at 35 Russo Place, P.O. Box 218, Berkeley Heights, New Jersey 07922, telephone (908) 464-8200.

(ii) Boiler feed pumps, heating circulating pumps, condensate return pumps, and fuel oil pumps shall be connected and installed to provide normal and standby service.

(iii) Supply and return mains and risers of cooling, heating, and process steam systems shall be valved to isolate the various sections of each system. Each piece of equipment shall be valved at the supply and return ends except that vacuum condensate returns need not be valved at each piece of equipment.

(E) Drainage systems.

(i) All underground building drains shall be: cast iron soil pipe, hard temper copper tube (drain-waste-vent (DWV) or heavier), acrylonitrile-butodiene-styrene (ABS) plastic pipe (DWV Schedule 40 or heavier), polyvinyl chloride (PVC) plastic pipe (DWV Schedule 40 or heavier), or extra strength vitrified clay pipe (VCP) with compression joints or couplings with at least 12 inches of earth cover.

(ii) Soil stacks, drains, vents, waste lines, and leaders installed above ground within buildings shall be DWV weight or heavier and shall be: copper pipe, copper tube, plastic pipe (DWV scheduled 40 or heavier) cast iron pipe, or galvanized iron pipe.

(iii) Drainage systems for chemical wastes (acids and other corrosive materials) shall be provided. Materials acceptable for chemical waste drainage systems shall include chemically resistant glass pipe, high silicone content cast iron pipe, VCP, CPVC plastic pipe, or plastic lined pipe.

(iv) Thermal insulation for piping systems and equipment shall be provided for the following:

(I) boilers, smoke breeching, and stacks;

(II) steam supply and condensate return piping;

(III) hot water piping and all hot water heaters, generators, converters, and storage tanks;

(IV) chilled water, refrigerant, other process piping, equipment operating with fluid temperatures below ambient dew point, and water supply and drainage piping on which condensation may occur. Insulation on cold surfaces shall include an exterior vapor barrier; and

(V) other piping, ducts, and equipment as necessary to maintain the efficiency of the system.

(v) Flame spread shall not exceed 25 and smoke development rating shall not exceed 50 for pipe insulation as determined by an independent testing laboratory in accordance with National Fire Protection Association 255, Standard Method of Test of Surface Burning Characteristics of Building Materials, 2000 Edition. Smoke development rating for pipe insulation located in environmental air areas shall not exceed 50.

(vi) Asbestos insulation shall not be used.

(2) Plumbing fixtures shall be made of nonabsorptive acid-resistant materials and shall comply with the recommendations of the National Standard Plumbing Code and this paragraph.

(A) All sinks used by medical and nursing staff and all lavatories used by patients shall be trimmed with valves which can be operated without the use of hands. Blade handles used for this purpose shall not be less than four inches in length. Single lever or wrist blade devices may be used.

(B) Clinical sinks shall have an integral trap in which the upper portion of a visible trap seal provides a water surface.

(C) All plumbing fixtures and equipment shall be designed and installed to prevent the back-flow or back-siphonage of any material into the water supply. The over-the-rim type water inlet shall be used wherever possible. Vacuum-breaking devices shall be properly installed when an over-the-rim type water inlet cannot be utilized.

(D) Each drinking fountain shall be designed so that the water issues at an angle from the vertical, the end of the water orifice is above the rim of the bowl, and a guard is located over the orifice to protect it from lip contamination.

(E) All sterilizing equipment shall be designed and installed to prevent not only the contamination of the water supply but also the entrance of contaminating materials into the sterilizing units. Sterilizers shall be designed and installed so that both hot and cold water inlets shall be protected against back-siphonage at maximum water level.

(F) No hose shall be affixed to any faucet if the end of the hose can become submerged in contaminated liquid unless the faucet is equipped with an approved, properly installed vacuum breaker.

(G) The water supply spout for lavatories and sinks required in patient care areas shall be mounted so that its discharge point is a minimum of five inches above the rim of the sink.

(H) Where floor drains or floor sinks are installed, they shall be of a type that can be easily cleaned by removal of the cover. Removable stainless steel mesh shall be provided in addition to grilled drain cover to prevent entry of large particles of waste which might cause stoppages.

(I) Under counter piping and above floor drains shall be arranged (raised) so as not to interfere with cleaning of floor below the equipment.

(J) All ice-making machines used for human consumption shall be of the self-dispensing type. Copper tubing shall be provided for supply connections to ice machines.

(i) This subsection contains common electrical requirements. The ESRD facility shall comply with the requirements of this subsection.

(1) All new electrical material and equipment, including conductors, controls, and signaling devices, shall be installed in compliance with applicable sections of the National Fire Protection Association 70, National Electrical Code, 2002 Edition (NFPA 70), and NFPA 99 and as necessary to provide a complete electrical system. Electrical systems and components shall be listed by nationally recognized listing agencies as complying with available standards and shall be installed in accordance with the listings and with the manufacturer's direction for use.

(A) All fixtures, switches, sockets, and other pieces of apparatus shall be maintained in a safe and working condition.

(B) All electrical heating devices shall be equipped with a pilot light to indicate when the device is in service, unless equipped with a temperature limiting device integral with the heater.

(C) All equipment, fixtures, and appliances shall be properly grounded in accordance with NFPA 70 and NFPA 99, §4.3.2.2.2.

(D) Under counter receptacles and conduits shall be arranged (raised) to not interfere with cleaning of floor below the equipment.

(2) Installation testing and certification.

(A) The electrical installations, including alarm, nurses calling system and communication systems, shall be tested to demonstrate that equipment installation and operation is appropriate and functional.

(B) The grounding system shall be tested as described in NFPA 99, 4.3.3, for patient care areas in new or renovated work. The testing shall be performed by a qualified electrician or their qualified electrical testing agent. The electrical contractor shall provide a letter stating that the grounding system has been tested in accordance with NFPA 99, the testing device use complies with NFPA 99, and whether the grounding system passed the test. The letter shall be signed by the qualified electrical contractor, or their designated qualified electrical testing agent, certifying that the system has been tested and the results of the test are indicated.

(3) Shielded isolation transformers, voltage regulators, filters, surge suppressors, and other safeguards shall be provided as required where power line disturbances are likely to affect fire alarm components, data processing, equipment used for treatment, and automated laboratory diagnostic equipment.

(4) Electrical service and switchboards serving the required ESRD facility components shall be installed above the designated 100-year flood plain. Main switchboards shall be located in a permanently dry location and the electrical switchgear and distribution panels and shall be accessible to authorized persons only. These rooms or spaces shall be ventilated to provide an environment free of corrosive or explosive fumes and gases, or any flammable and combustible materials. When switchboards are installed in a damp or wet location the enclosure shall be installed in a waterproof cabinet. Switchboards shall be located convenient for use and readily accessible for maintenance as required by NFPA 70, Article 408. Overload protective devices shall operate properly in ambient temperatures.

(5) Panelboards serving normal lighting and appliance circuits shall be located on the same floor as the circuits they serve. Panelboards serving critical branch emergency circuits shall be located on each floor that has major users and may also serve the floor above and the floor below. Panelboards serving life safety branch circuits may serve three floors, the floor where the panelboard is located, and the floors above and below.

(6) All conductors for controls, equipment, lighting and power operating at 100 volts or higher shall be installed in accordance with the requirements of NFPA 70, Article 517. All surface mounted wiring operating at less than 100 volts shall be protected from mechanical injury with metal raceways to a height of seven feet above the floor. Conduits and cables shall be supported in accordance with NFPA 70, Article 300.

(7) The wiring of the emergency system shall be mechanically protected by installation in nonflexible metal raceways in accordance with NFPA 70, §517.30(C)(3).

(8) Lighting and receptacles.

(A) Lighting intensity for staff and patient needs shall comply with guidelines for health care facilities set forth in the Illuminating Engineering Society of North America (IESNA) Handbook, 2000 edition, published by the IESNA, 120 Wall Street, Floor 17, New York, New York 10005.

(i) Consideration shall be given to controlling intensity and wavelength to prevent harm to the patient's eyes (i.e., retina damage to cataracts due to ultraviolet light).

(ii) Approaches to buildings and parking lots shall be illuminated. All rooms including storerooms, electrical and mechanical equipment rooms, and all attics shall have sufficient artificial lighting so that all parts of these spaces shall be clearly visible.

(iii) Consideration shall be given to the special needs of the elderly. Excessive contrast in lighting levels that makes effective sight adaptation difficult shall be minimized.

(B) Means of egress and exit sign lighting intensity shall comply with NFPA 101, §§7.8 - 7.10.

(C) Electric lamps, which may be subject to breakage or which are installed in fixtures in confined locations when near woodwork, paper, clothing, or other combustible materials, shall be protected by wire guards, or plastic shields.

(D) Only listed hospital grade single-grounding or duplex-grounding receptacles shall be used in all patient care areas. This does not apply to special purpose receptacles.

(i) Installations of multiple-ganged receptacles shall not be permitted in patient care areas.

(ii) Electrical outlets powered from the emergency system shall be provided in all patient care, procedure, and treatment locations in accordance with NFPA 99, §4.4.2.2.2.3. At least one receptacle at each patient treatment station/room, exam room, or procedure location shall be powered from the emergency electrical system power panel. At least one receptacle at each patient treatment station/room, exam room, or procedure location shall be powered from the normal power panel.

(iii) Replacement of malfunctioning receptacles and installation of new receptacles powered from the emergency system in existing facilities shall be accomplished with receptacles of the same distinct color as the existing receptacles.

(iv) In locations where other equipment requiring special electrical configuration is used, the additional receptacles shall be distinctively marked for the special use.

(v) Each receptacle shall be grounded to the reference grounding point by means of a green insulated copper equipment grounding conductor.

(vi) All emergency system receptacles shall be identified. The face plate for the receptacle(s) shall have a nonremovable label or be engraved indicating the panel and circuit number.

(E) Equipment.

(i) Equipment required for safe operation of the ESRD facility shall be powered from the critical system in accordance with the requirements contained in NFPA 99, §4.5.2.2.3.

(ii) Boiler accessories including feed pumps, heat-circulating pumps, condensate return pumps, fuel oil pumps, and waste heat boilers shall be connected and installed to provide both normal and standby service.

(F) Ground fault circuit interrupters (GFCI) receptacles shall be provided for all general use receptacles located within three feet of a wash basin or sink. When GFCI receptacles are used, they shall be connected to not affect other devices connected to the circuit in the event of a trip. Receptacles connected to the critical branch that may be used for equipment that should not be interrupted do not have to be GFCI protected. Receptacles in wet locations, as defined by NFPA 70, §517.20 and §517.21, shall be GFCI protected regardless of the branch of the electrical system serving the receptacle.

(9) A nurses emergency calling system shall be installed in the patient waiting area, all individual treatment rooms, exam rooms, isolation rooms, hepatitis B rooms, and toilet rooms used by patients to summon nursing staff in an emergency. Activation of the system shall sound a repeating (every 5 seconds or less) distinct audible signal at the nurse station, indicate type and location of call on the system monitor, and activate a distinct visible signal in all areas. The visible and audible signals shall be cancelable only at the patient calling station. A nurses emergency call system shall be accessible to a collapsed patient lying on the floor. Inclusion of a pull cord extending to within 6 inches of the floor will satisfy this requirement.

(10) The ESRD facility shall provide, at submission of construction documents/plans a letter on facility letterhead indicating the method the ESRD facility has chosen for implementation of the emergency contingency plan for the continuity of emergency essential building systems (emergency generator). The contingency plan shall consist of one of the three options as described as follows.

(A) An onsite emergency generator shall be provided with a Type II essential electrical distribution system in accordance with requirements of NFPA 99, §4.5, and National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 2002 Edition.

(i) An emergency generator standby power system(s) shall require an onsite fuel source and enough fuel capacity in the tank for a period of twenty-four hours or more. When a vapor liquefied petroleum gas (LPG) (natural gas) system is used, the twenty-four hour fuel capacity on site is not required. The vapor withdrawal LPG system shall require a dedicated fuel supply.

(ii) The emergency generator shall be installed, tested and maintained in accordance with the National Fire Protection Association 99, §4.5.4, and National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 2002 Edition.

(iii) When the emergency generator(s) and electrical transformer(s) are located within the same area, they shall be located at least 10 feet apart.

(iv) Sufficient quantity of potable water supply shall be on site for the operation of the water treatment system for at least twenty-four hours. A water valve connection shall be provided to allow hook-up for potable water from an outside vendor to supply the water treatment system.

(B) A executed contract with an outside supplier/vendor(s) that will provide a portable emergency generator(s) and potable water on demand.

(i) An electrical transfer switch with plug-in device sized to provide emergency power for the patient care areas and the provisions in NFPA 99, §4.5.2.2.2.

(ii) A water valve connection to allow hook-up for potable water from an outside vendor to supply the water treatment system.

(iii) An alternate source of power (battery power lighting) shall be provided separate and independent from the normal electrical power source that will be effective for a minimum of 1-1/2 hours after loss of the electrical power. The emergency lighting system shall be capable of providing sufficient illumination to allow safe evacuation from the building. The battery pack systems shall be maintained and tested quarterly.

(iv) The facility shall implement the emergency contingency plan upon the loss of electrical power following a natural weather or man-made event when the electrical power may not be restored within 24 hours. The facility shall exercise the contract(s) with the supplier/vendor(s) in order to have portable emergency generator(s) and potable water available within 36 hours after the loss of electrical power.

(C) An executed contract with another licensed ESRD facility within a 100 mile radius to provide emergency contingency care for the patients.

(i) The accepting licensed ESRD facility shall meet the requirements of paragraph (1) of this subsection.

(ii) An alternate source of power shall be provided separate and independent from the normal electrical power source that will be effective for a minimum of 1-1/2 hours after loss of the electrical power. The emergency lighting system shall be capable of providing sufficient illumination to allow safe evacuation from the building. The battery pack systems shall be maintained and tested quarterly.

(11) A fire alarm system, which complies with NFPA 101, §18.3.4, and with NFPA 72, Chapter 6 requirements, shall be provided in each facility. The required fire alarm system components are as follows:

(A) A fire alarm control panel (FACP) shall be installed at a visible central location.

(B) Manual fire alarm pull stations shall be installed in accordance with NFPA 101, §18.3.4.

(C) Smoke detectors for door release service shall be installed on the ceiling at each door opening in the smoke partition in accordance with NFPA 72, §6.15.6, where the doors are held open with electromagnetic devices conforming with NFPA 101, §18.2.2.6.

(D) Smoke detectors shall be installed in air ducts in accordance with NFPA 72, §5.14.4.2 and §5.14.5 and NFPA 90A, §6.4.2.

(E) Smoke detectors shall be installed in return air ducts in accordance with requirements of NFPA 72 §5.14.4.2.2 and §5.14.5 and NFPA 90A, §6.4.2.2.

(F) Fire sprinkler system water flow switches shall be installed in accordance with requirements of NFPA 101, §9.6.2; NFPA 13, §6.9; and NFPA 72, §8.5.3.3.3.4.

(G) Sprinkler system valve supervisory switches shall be installed in accordance with the requirements of NFPA 72, §6.8.5.5.

(H) Audible alarm indicating devices shall be installed in accordance with the requirements of NFPA 101, §18.3.4, and NFPA 72, §7.4.

(I) Visual fire alarm indicating devices, which comply with the requirements of NFPA 72, §7.5, shall be provided.

(J) Devices for transmitting alarm for alerting the local fire brigade or municipal fire department of fire or other emergency shall be provided. The devices shall be listed for the fire alarm service by a nationally recognized laboratory, and be installed in accordance with such listing and the requirements of NFPA 72.

(K) A fire alarm signal notification, which complies with NFPA 101, §9.6.3, shall be provided to alert occupants of fire or other emergency.

(L) Wiring for fire alarm detection circuits and fire alarm notification circuits shall comply with requirements of NFPA 70, Article 760.

(M) Smoke detector(s) for shutdown of air handling units shall be provided. The detectors shall be installed in accordance with NFPA 90A, §6.4.3.

(N) Telecommunications and information systems central equipment shall be installed in a separate location designed for the intended purpose. Special air conditioning and voltage regulation shall be provided as recommended by the manufacturer.

(O) When installed, lightning protection systems shall comply with National Fire Protection Association 780, Standard for the Installation of Lightning Protection Systems, 2000 Edition.

§117.106. Tables.

Table 1. Staffing Levels of Direct Care Staff.
Figure: 25 TAC §117.106

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 157. EMERGENCY MEDICAL CARE

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §157.25, concerning statewide Out-of-Hospital Do Not Resuscitate (OOH-DNR) Order protocol, §157.36, concerning criteria for denial and disciplinary actions for Emergency Medical Services (EMS) personnel, and §157.37, concerning certification and licensure of persons with criminal backgrounds. Sections 157.36 and 157.37 are adopted with changes to the proposed text as published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 1006). Section 157.25 is adopted without changes and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

The amendments to §157.25 are necessary to comply with House Bill (HB) 2585, 81st Legislature, Regular Session, 2009, that amended Health and Safety Code, §§166.002, 166.011, 166.032, 166.082, and 166.083 to authorize digital or electronic signatures for certain signatories for advance directives, including the department's form for an OOH-DNR Order addressed in §157.25; and allows a notary public to acknowledge a declarant's signature in lieu of two witnesses.

The amendments to §157.36 are necessary to incorporate various changes made to the department's crime history rule at §157.37, which was changed to track new requirements in HB 2845, 81st Legislature, Regular Session, 2009.

The amendments to §157.37 are necessary because HB 2845, 81st Legislature, Regular Session, 2009, removes EMS personnel and applicants for EMS certification/licensure from the criminal history review criteria and procedures under Occupations Code, Chapter 53, and creates crime history review criteria under Health and Safety Code, Chapter 773. HB 2845 also amends Health and Safety Code, §773.050, authorizing the department to provide a prescreening criminal history record check of EMS certification candidates prior to their enrollment into a training course. HB 846, 81st Legislature, Regular Session, 2009, adds Health and Safety Code, §773.0415, which allows the department to limit a renewal applicant's requirements to provide any unchanged criminal history information already included in one or more previously filed initial or renewal applications.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 157.25, 157.36, and 157.37 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Amendments to §157.25 provide for expanded signature allowances on the department's form for an OOH-DNR Order specified in the rule. Amendments to the form allow for digital or electronic signatures on the form for declarants, witnesses, and the attending physician. A statement regarding acknowledgment by the notary public was added, along with space for the notary seal. Added to the instructions on the back of the form are references to the allowance of a notary public acknowledgment in lieu of two witnesses signatures; the allowance of digital or electronic signatures in some cases; and a new revision date. Rule text did not change except for clarifications which updated the agency's name and properly adding the phrase "Out-of-Hospital" in front of "DNR Order" to distinguish it from other types of DNR Orders. The OOH-DNR Order form, which is offered as an attached graphic to the rule, was amended to provide prompts in the electronic version of the form for digital or electronic signatures and for notary acknowledgement and seal.

Amendments to §157.36 are necessary to incorporate various revisions made to the department's crime history rule at §157.37, which was changed to meet requirements made to Health and Safety Code, Chapter 773, by HB 2845 of the 81st Legislature, Regular Session, 2009. Also, references to the "bureau chief" was deleted and replaced with the "commissioner or his/her designee" for clarification.

Amendments to §157.37 are necessary to implement changes made by HB 2845 and HB 846. HB 2845 removes EMS personnel from consideration under the Occupations Code, Chapter 53, and places the crime history review criteria under Health and Safety Code, Chapter 773. HB 2845 adds Health and Safety Code, §773.0614, which mandates denial or revocation of an EMS certification or license, if the person is convicted of serious offenses specifically listed in the Code of Criminal Procedure, Article 42.12, §3g(a)(1)(A) - (H), such as murder, capital murder, indecency with a child, kidnapping, aggravated sexual assault, etc. It also sets out criteria for the review of a person's criminal history that does not include these more serious crimes. Pursuant to this legislation, the department has made amendments to §157.37 setting out criteria and guidelines for the department to utilize in prescreening or investigating of persons with criminal backgrounds, that do not contain the more serious crimes listed in the Code of Criminal Procedure, Article 42.12.

Amendments to §157.37, are also adopted to implement a prescreening criminal history record check. Recent legislation amends Health and Safety Code, §773.050, authorizing the department to provide a criminal history prescreening for a person interested in pursuing EMS certification to determine the person's eligibility for EMS certification prior to the person's enrollment into an EMS training course.

HB 846 adds Health and Safety Code, §773.0415, which allows the department to limit the information required for an EMS certification applicant to provide when renewing a certificate or license. Unchanged criminal history information will not have to be continually provided. New criminal history information relevant to the period occurring after the date of the last application must be provided. Proposed rule language will implement this process for certificate renewal.

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

Minor grammatical revisions were incorporated in §157.36(b) to correctly state that a reprimand occurs to a certificant or licensed paramedic and not to the EMS certification or paramedic license; and the date of "on or after September 1, 2009" was added to §157.37(e)(5) so as to conform to and parallel new statutory language in Health and Safety Code, §773.0614(c)(1), which became effective on September 1, 2009.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER B. EMERGENCY MEDICAL SERVICES PROVIDER LICENSES

25 TAC §157.25

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §§166.002, 166.011, 166.032, 166.082, and 166.083 to allow digital or electronic signatures and a notary's acknowledgment for certain signatories on the department's form for an OOH-DNR Order; Health and Safety Code, Chapter 12, which allows the department to set fees in amounts necessary for the department to administer this subchapter; Health and Safety Code, §773.0614, which allows the department to deny eligibility for EMS certification, or deny or revoke EMS certification or licensure based upon a person's criminal history; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration Health and Safety Code, Chapter 1001. Review of the rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003379
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: July 6, 2010
Proposal publication date: February 12, 2010
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. EMERGENCY MEDICAL SERVICES TRAINING AND COURSE APPROVAL

25 TAC §157.36, §157.37

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §§166.002, 166.011, 166.032, 166.082, and 166.083 to allow digital or electronic signatures and a notary's acknowledgment for certain signatories on the department's form for an OOH-DNR Order; Health and Safety Code, Chapter 12, which allows the department to set fees in amounts necessary for the department to administer this subchapter; Health and Safety Code, §773.0614, which allows the department to deny eligibility for EMS certification, or deny or revoke EMS certification or licensure based upon a person's criminal history; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§157.36. Criteria for Denial and Disciplinary Actions for EMS Personnel and Applicants and Voluntary Surrender of a Certificate or License.

(a) Emergency Suspension. The commissioner or his/her designee shall issue an emergency suspension order to any emergency medical services (EMS) certificant or licensee if the commissioner or his/her designee has reasonable cause to believe that the conduct of any certificant or licensee creates an imminent danger to public health or safety.

(1) An emergency suspension issued by the commissioner or designee shall be effective immediately without a hearing on notice to the certificant or licensee. Notice to the certificant or licensee shall be established on the date that a copy of the signed emergency suspension order is sent to the address shown in the current records of the department.

(2) A copy of the emergency suspension order shall be sent to any licensed EMS provider, first responder organization, medical director, institution or facility with which the certificant or licensee is known to be associated, at the address shown in the current records of the department.

(3) If a written request for a hearing is received from the suspended individual within 15 days of the date of suspension, the department shall conduct a hearing not later than the thirtieth day after the date on which a hearing request is received to determine if the emergency suspension is to be continued, modified or rescinded. The hearing and appeal from any disciplinary action related to the hearing shall be governed by the Administrative Procedure Act, Government Code, Chapter 2001.

(b) Disciplinary Action. The department may suspend, revoke, or refuse to renew an EMS certification or paramedic license, or may reprimand a certificant or licensed paramedic for, but not limited to, the following reasons:

(1) violating any provision of the Health and Safety Code, Chapter 773, and/or Title 25 of the Texas Administrative Code (TAC), as well as Federal, State, or local laws, rules or regulations affecting, but not limited to, the practice of EMS;

(2) any conduct which is criminal in nature and/or any conduct which is in violation of any criminal, civil and/or administrative code or statute;

(3) failing to make accurate, complete and/or clearly written patient care reports documenting a patient's condition upon arrival at the scene, the prehospital care provided, and patient's status during transport, including signs, symptoms, and responses during duration of transport;

(4) falsifying any EMS record; patient record or report; or making false or misleading statements in a oral report; or destroying a patient care report;

(5) disclosing confidential information or knowledge concerning a patient except where required or allowed by law;

(6) causing or permitting physical or emotional abuse or injury to a patient or the public, and/or failing to report such abuse or injury to the employer, appropriate legal authority and/or the department;

(7) failure to follow the medical director's protocol, performing advanced level or invasive treatment without medical direction or supervision, or practicing beyond the scope of certification or licensure;

(8) failing to respond to a call while on duty and/or leaving duty assignment without proper authority;

(9) abandoning a patient, turning over the care of a patient or delegating EMS functions to a person who lacks the education, training, experience, knowledge to provide appropriate level of care for the patient;

(10) failing to comply with the terms of a department ordered probation or suspension;

(11) issuing a check to the department which has been returned to the department or its agent unpaid;

(12) discriminating in any way based on real or perceived conditions of national origin, race, color, creed, religion, sex, sexual orientation, age, physical disability, mental disability, or economic status;

(13) misrepresenting level of any certification or licensure;

(14) misappropriating medications, supplies, equipment, personal items, or money belonging to the patient, employer or any other person or entity or failing to take reasonable precautions to prevent such misappropriations;

(15) falsifying or altering, or assisting another in falsifying or altering, any department application, EMS certificate or license; or using or possessing any such altered certificate or license;

(16) committing any offense during the period of a suspension/probation or repeating any offense for which a suspension/probation was imposed within the two-year period immediately following the end of the suspension or probation;

(17) cheating and/or assisting another to cheat on any department examination or the examination of any provider licensed by the department or any institution or entity conducting EMS training or providing an EMS examination;

(18) obtaining or attempting to obtain and/or assisting another in obtaining or attempting to obtain, any advantage, benefit, favor or gain by fraud, forgery, deception, misrepresentation, untruth or subterfuge;

(19) illegally possessing, dispensing, administering or distributing, or attempting to illegally dispense, administer, or distribute controlled substances as defined by the Health and Safety Code, Chapter 481 and/or Chapter 483;

(20) having received disciplinary action relating to an EMS certificate or license or another health provider certificate or license issued in another state or in a U.S. Territory or in another nation, or having received disciplinary action relating to another health provider certificate or license issued in Texas;

(21) failing or refusing to timely give the department full and complete information requested by the department;

(22) failing to notify the department of a change in his or her criminal history within 30 business days of the issuance of a court order, which resulted in him or her being convicted or placed on a deferred adjudication community supervision or deferred disposition for any criminal offense, other than any class C misdemeanor not directly related to EMS or other than any offense noted in §157.37(e)(5) of this title (relating to Certification or Licensure of Persons With Criminal Backgrounds);

(23) failing to notify the department within 10 business days of his or her being arrested, charged or indicted for any criminal offense, other than any class C misdemeanor not directly related to EMS or other than any offense noted in §157.37(e)(5) of this title;

(24) failing to notify the department of a change in his or her criminal history within 2 business days of the issuance of a court order, which resulted in him or her being convicted or placed on deferred adjudication community supervision, or deferred disposition for any offense noted in §157.37(e)(5) of this title;

(25) failing to notify the department within 2 business days of his or her being arrested, charged or indicted for a criminal offense noted in §157.37(e)(5) of this title;

(26) having been convicted or placed on deferred adjudication community supervision, or deferred disposition for a criminal offense that directly relates to the duties and responsibilities of EMS personnel, as determined by the provisions of §157.37 of this title, except that a person's EMS certification or paramedic license shall be revoked if the certificant or licensed paramedic is convicted, or placed on deferred adjudication community supervision or deferred disposition for a criminal offense, noted in §157.37(e)(5) of this title.

(27) failing to timely complete any portion of the criminal history evaluation process, including submission of fingerprints, or timely providing information requested by the department within 60 days of notification to do so, in accordance with provisions in §157.37 of this title;

(28) engaging in any conduct that jeopardizes or has the potential to jeopardize the health or safety of any person;

(29) abusing alcohol or drugs to such an extent that in the opinion of the bureau chief, the health or safety of any persons is, or may be, endangered;

(30) engaging in any activity that betrays the public trust and confidence in EMS; and

(31) failing to maintain a substantial amount of skill, knowledge and/or academic acuity to timely and/or accurately perform the duties or meet the responsibilities required of a certified emergency medical technician or licensed paramedic.

(c) Criteria for Denial of EMS Certification, or Paramedic Licensure. An EMS certification or paramedic license may be denied for, but not limited to, the following reasons:

(1) failing to meet standards as required in this section;

(2) previous conduct of the applicant during the performance of duties that are similar to those required of EMS personnel, whether performed as a volunteer or for compensation, but which such previous conduct that was committed is contrary to accepted standards of conduct as described or required in this section or Health and Safety Code, Chapter 773;

(3) having been convicted or placed on deferred adjudication community supervision, or deferred disposition for a criminal offense that directly relates to the duties and responsibilities of EMS personnel, as determined by the provisions of §157.37 of this title, except

that a person's application for EMS certification or paramedic license shall be denied if the applicant is convicted, or placed on deferred adjudication community supervision or deferred disposition for a criminal offense, described in §157.37(e)(5) of this title;

(4) receiving disciplinary action relating to a certificate or license issued to the applicant in Texas, in another state or in a U.S. territory, or in another nation;

(5) falsifying any Texas application for certification or licensure or falsifying any application or documentation used to acquire registration, certification or licensure;

(6) issuing a check for any reason to the department which has been returned to the department or its agent for any reason;

(7) misrepresenting any requirements for certification, recertification, licensure, or licensure renewal;

(8) staffing an EMS vehicle deemed to be in service while the person's previously issued certification or license is expired, suspended or has been revoked; and/or

(9) failing to maintain a substantial amount of skill, knowledge and/or academic acuity to timely and/or accurately perform the duties or meet the responsibilities required of a certified emergency medical technician or licensed paramedic.

(d) Notification. If the department proposes to suspend, revoke, or not renew an EMS certificate or license, or reprimand a certificant or licensed paramedic, or deny a person's application for an EMS certification or paramedic license, or disqualify a prescreening petition's eligibility to acquire an EMS certification or paramedic license, the certificant, licensed paramedic, applicant or petitioner shall be notified at the address as shown in the current records of the department. The notice must state the alleged facts or conduct to warrant the proposed action and state that the individual may request an appeal hearing.

(e) Appeal Hearing Request.

(1) A request for an appeal hearing shall be in writing and submitted to the department and postmarked within 15 days after the date of the notice. The appeal hearing and any appeal from that hearing shall be conducted pursuant to the Administrative Procedure Act, Government Code, Chapter 2001.

(2) If the applicant, certificant, licensed paramedic, or petitioner does not request a hearing in writing within 15 days after notice, the individual is deemed to have waived the opportunity for an appeal hearing and the department may take the proposed action.

(f) Probation.

(1) The department may probate the suspension of an EMS certification or paramedic license and as a probationary condition may require the certificant or licensee to:

(A) report regularly to the department on matters that are the basis of the probation;

(B) limit practice to the areas prescribed by the department;

(C) continue or review professional education until the person attains a degree of skill satisfactory to the department in those areas that are the basis of the probation; and/or

(D) complete or continue to meet certain requirements or conditions related to the circumstances surrounding the certificant's or licensee's rule violations or background to assure that he or she will continue to meet and maintain general EMS standards.

(2) Because of certain circumstances or conduct in the background of a person making an initial application for an EMS certification or paramedic license, the department may grant the certification or license, but place the person on probation, subject to the person meeting certain probationary conditions during the certification or licensure period to assure that the person will meet and maintain general EMS standards.

(3) Any person, whose EMS certification or paramedic license has been revoked by the department and who later regains certification or licensee under this section, shall be placed on probation for one year and be required to meet certain conditions to assure that he or she will meet and maintain general EMS standards.

(g) Reapplication.

(1) Two years after denial, revocation of a license, or the voluntary surrender of a certificate or license while disciplinary action is pending, an individual may petition the department in writing for reapplication for certification or licensure. Expiration of a certificate or license during the suspension period shall not affect the two-year waiting period required before a petition can be submitted.

(2) The petitioner bears the burden of proving fitness for certification or licensure.

(3) The department may allow the petitioner to file an application for certification or licensure if there is proof that the health, safety, and confidence of the public will be protected.

(4) The department may deny any petitioner if, in the judgement of the commissioner or designee, the reason for the original action continues to exist or if the petitioner has failed to offer sufficient proof that there is no longer a threat to public health, safety, and/or confidence.

(5) If the reapplication is allowed, the petitioner shall be required to meet the requirements for licensure as described in §157.40 of this title (relating to Paramedic Licensure), or certification as described in §157.33 of this title (relating to Certification), §157.43 of this title (relating to Course Coordinator Certification), or §157.44 of this title (relating to Emergency Medical Service Instructor Certification) and in addition shall meet the terms of probation in subsection (f) of this section.

(h) Surrender of a certificate or license. Surrender of a certificate or license shall not deprive the department of jurisdiction in regard to disciplinary action against the certificant or licensee. An individual who wishes to surrender his or her certification or license prior to the expiration of the certificate or license may do so by:

(1) completing a Surrender of Certificate or License statement; and

(2) in the event that a disciplinary action is pending or reasonably imminent, the certificant or licensee must acknowledge that the surrender constitutes a plea of "no contest" to the allegations upon which the disciplinary action is predicated.

(i) Notification of disposition. A copy of the order of final disposition of proposed disciplinary action shall be sent to any licensed EMS provider, first responder organization, medical director, institution or facility with which the certificant or licensee is known to be associated at the address shown in the current records of the department.

§157.37. Certification or Licensure of Persons With Criminal Backgrounds.

(a) Purpose. This section lists guidelines and criteria for establishing the eligibility of persons with criminal backgrounds for

certification or continued certification as emergency medical services (EMS) personnel or licensure or continued licensure as paramedics. The Department of State Health Services (department) will apply the requirements of the Health and Safety Code, Chapter 773, Subchapter C, and will consider and review the criteria listed in the Health and Safety Code, Chapter 773, Subchapter C, §§773.0615, 773.0616, and 773.0617, to determine a person's EMS certification eligibility before enrollment in an EMS education and training course, or to determine whether to deny, suspend or revoke an EMS certification or paramedic license based upon the person's criminal history.

(b) Department Access to Criminal History Record Information.

(1) The department is entitled to obtain criminal history information maintained by the Department of Public Safety, the Federal Bureau of Investigation Identification Division, or any other law enforcement agency to investigate and determine the EMS certification eligibility of a person who has filed a petition for a pre-enrollment criminal history prescreening or an initial application for EMS certification or a reciprocity application for EMS certification or paramedic licensure or the continued certification/licensure eligibility of a certificant or licensed paramedic.

(2) A person who has filed a petition for a pre-enrollment criminal history prescreening or an initial application for EMS certification or a reciprocity application for EMS certification or licensure or an EMS certificant or licensed paramedic who has disclosed a criminal history record or who has a known criminal history record shall timely submit a complete set of his or her fingerprints along with the appropriate processing fee to the Texas Department of Public Safety (DPS), as required under the Government Code, §411.087 and/or §411.110.

(3) With respect to a prescreening petitioner or an applicant for EMS certification or licensure who has a criminal history record, the department is authorized to close a petition or application file and deem that the petition or application is withdrawn when the petitioner or applicant has failed to respond to the department's request(s) for information during its prescreening or investigation within 60 days of said request(s).

(c) Petition for Criminal History Prescreening. The department may provide a prescreening criminal history record check for persons interested in pursuing an EMS certification or licensure to determine the person's eligibility for certification before enrolling in an EMS educational or training program approved by the department. A petition for prescreening is not considered an application for initial or renewal certification or licensure. To request a criminal history prescreening, the petitioner shall:

(1) submit a completed Petition for Criminal History Prescreening form;

(2) submit a nonrefundable fee of $50;

(3) complete and return all Criminal History Prescreening documents provided to the petitioner by the department and timely provide documents and information requested by the department;

(4) submit his or her complete fingerprints along with the appropriate processing fee to the Texas Department of Public Safety, as required under the Government Code, §411.087 and/or §411.110;

(5) submit or arrange for submission of all court documentation to the department, including final court orders noting sentencing information, conditions of probation, releases from probation, revocation of probation, and any other information relating to the petitioner's criminal history, or other information requested by the department;

(6) shall inform the department of any new court actions or petitioner's criminal activities that have developed or become a part of his or her criminal history, to include, but not be limited to, any new arrests, criminal charges or indictments, criminal investigations, motions to revoke probation, etc. since filing the prescreening petition with the department; and/or

(7) be subject to a department criminal history investigation, if and when the petitioner subsequently files an application for EMS certification.

(d) Limitation on Information Required for Certification/License Renewal. For the renewal of an EMS certification or paramedic license, the department:

(1) may not require an applicant to provide any unchanged criminal history information already included in one or more of the applicant's previously filed initial or renewal applications for EMS certification or paramedic licensure; and

(2) may require the applicant to provide only new information relevant to the period occurring since the date of the applicant's last initial or renewal application for EMS certification or paramedic licensure, including information relevant to any new department requirement applicable to the certification or license held by the applicant.

(e) Criminal History Evaluation Criteria.

(1) For a person who has been convicted of, or placed on deferred adjudication community supervision or deferred disposition for any offense, other than those listed under paragraph (5) of this subsection, that relates directly to the duties and responsibilities of EMS personnel, the department may:

(A) deny to the person an initial or renewed EMS certification or paramedic licensure or the person's opportunity to take a certification or paramedic licensure examination;

(B) disqualify the person's eligibility to acquire an EMS certificate or paramedic license; or

(C) revoke or suspend the person's EMS certification or paramedic license.

(2) In determining whether an offense, other than those listed under paragraph (5) of this subsection relates directly to the duties and responsibilities of EMS personnel, the department shall consider and review the following:

(A) the Health and Safety Code, Chapter 773, Subchapter C, §773.0615;

(B) the nature and seriousness of the crime;

(C) the relationship of the crime to the purposes for requiring a certificate or license to engage in the occupation;

(D) the extent to which involvement in EMS would afford a certificant or licensee an opportunity to engage in further criminal activity of the same type as that in which the person previously has been involved; and

(E) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the EMS profession.

(3) In determining the fitness to perform the duties and discharge the responsibilities of emergency medical services personnel for a person who has been convicted of, or placed on deferred adjudication community supervision or deferred disposition for, any offense other than those listed under paragraph (5) of this subsection the department

shall consider, in addition to the factors listed in paragraph (2) of this subsection:

(A) the extent and nature of the person's past criminal activity;

(B) the age of the person when the crime was committed;

(C) the amount of time that has elapsed since the person's last criminal activity;

(D) the conduct and work activity of the person before and after the criminal activity;

(E) evidence of the person's rehabilitation or rehabilitative effort while incarcerated, after release, or since imposition of deferred adjudication community supervision, or receiving deferred disposition; and

(F) other evidence of the person's fitness, including letters of recommendation from:

(i) prosecutors, law enforcement officers, correctional officers, or community supervision officers who prosecuted, arrested, or had custodial or other responsibility for the person;

(ii) the sheriff or chief of police in the community where the person resides; and

(iii) any other person in contact with the person.

(G) the petitioner, applicant, certificant, or licensed paramedic has the responsibility, to the extent possible, to obtain and provide to the department the recommendations of the persons required by subparagraph (F) of this paragraph; and

(H) in addition to providing evidence related to the factors under paragraph (2) of this subsection, the petitioner, applicant, certificant, or licensed paramedic shall furnish proof in the form required by the department that the petitioner, applicant, certificant, or licensed paramedic has:

(i) maintained a record of steady employment;

(ii) supported the applicant's or certificate holder's dependents;

(iii) maintained a record of good conduct; and

(iv) paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the petitioner, applicant, certificant, or licensed paramedic has been convicted, been placed on deferred adjudication community supervision, or received deferred disposition.

(4) The following crimes are considered to directly relate to the certification and licensure of EMS personnel because of their nature and seriousness and because they impact the ability to carry out the duties and responsibilities associated with patient care and public safety and shall be considered and reviewed:

(A) offenses under the Health and Safety Code, Chapter 773;

(B) under the Transportation Code, except offenses for which points are assessed under the Transportation Code, §708.052;

(C) offenses under the Alcoholic Beverage Code;

(D) offenses under the Health and Safety Code, Texas Controlled Substances Act, Chapters 481, 482 and 483, relating to substance abuse;

(E) offenses under Department of Public Safety of the State of Texas, Government Code, Chapter 411, Subchapter H, relating to the license to carry a concealed handgun;

(F) offenses under the following titles of the Texas Penal Code:

(i) Title 4 - offenses of attempting or conspiring to commit any of the offenses in this clause;

(ii) Title 5 - offenses against the person;

(iii) Title 6 - offenses against the family;

(iv) Title 7 - offenses against property;

(v) Title 8 - offenses against public administration;

(vi) Title 9 - offenses against public order and decency;

(vii) Title 10 - offenses against public health, safety, and morals; and/or

(viii) Title 11 - offenses involving organized crime.

(G) Offenses listed in subparagraph (F)(i) - (viii) of this paragraph are not exclusive in that the department may consider similar criminal convictions from other state, federal, foreign or military jurisdictions which, although not listed in subparagraph (F)(i) - (viii) of this paragraph indicate the lack of ability, capacity, or fitness of the individual to perform the duties and responsibilities of EMS personnel.

(5) A person shall be disqualified from eligibility to acquire an EMS certification, or a person's initial or renewal application for EMS certification or paramedic licensure shall be denied, or a person's EMS certification or paramedic license, whether active or inactive, shall be revoked if the petitioner, applicant, certificant, or licensed paramedic is convicted of or placed on deferred adjudication community supervisor or deferred disposition, on or after September 1, 2009, for:

(A) an offense listed in Code of Criminal Procedure, Article 42.12, §3g(a)(1)(A) - (H), as follows:

(i) murder;

(ii) capital murder;

(iii) indecency with a child;

(iv) aggravated kidnapping;

(v) aggravated sexual assault;

(vi) aggravated robbery;

(vii) substance abuse offenses, as described in Health and Safety Code, Chapter 481, for which punishment is increased under:

(I) Health and Safety Code, §481.140, regarding the use of a child in the commission of an offense; or

(II) Health and Safety Code, §481.134(c), (d), (e) or (f), regarding an offense committed within a drug free zone, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under one of those subsections.

(viii) sexual assault;

(B) an offense, other than an offense described by subparagraph (A) of this paragraph, committed on or after September 1, 2009, for which the person is subject to register as a sex offender under Code of Criminal Procedure, Chapter 62.

(f) Documentation Required During Criminal History Prescreening or Investigation. During a criminal history prescreening or investigation, it shall be the responsibility of the prescreening petitioner, applicant for EMS certification or paramedic licensure, or certificant or licensed paramedic to obtain and send to the department for each criminal offense in his or her criminal history the entire court record, including final court orders noting sentencing information, conditions of probation, revocation of or release from probation, and any other information relating to the petitioner's criminal history, or requested by the department, along with any recommendations of the prosecution, and/or law enforcement and/or correctional authorities regarding the offense(s). The petitioner, applicant, certificant, or licensed paramedic shall also furnish documentation acceptable to the department of prior/current employment status, evidence of court-ordered and/or voluntary rehabilitation, evidence of good conduct in their community, and evidence of payment of all outstanding court costs, supervision fees, fines, and restitution as ordered in the criminal cases in which they have been convicted, placed on deferred adjudication community supervision, deferred disposition.

(g) Notice and Appeal Procedures. Notice and appeal procedures in §157.36(d) and (e) of this title (relating to Criteria for Denial and Disciplinary Actions for EMS Personnel and Applicants and Voluntary Surrender of a Certificate or License) applicable for a person that the department proposes disqualification from eligibility to acquire an EMS certification, or denial of an application for EMS certification or paramedic licensure, or suspension or revocation of a EMS certification or paramedic license based on the requirements and/or criteria outlined in this section as it relates to a person's criminal history record for any offense other than those listed under subsection (e)(5) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003382
Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: February 12, 2010
For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 30. OCCUPATIONAL LICENSES AND REGISTRATIONS

SUBCHAPTER A. ADMINISTRATION OF OCCUPATIONAL LICENSES AND REGISTRATIONS

The Texas Commission on Environmental Quality (commission or agency) adopts new §30.13 and §§30.34 - 30.38; amendments to §§30.3, 30.20, 30.30, and 30.33; and the repeal of §30.35 *without changes* to the proposed text as published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 1014) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted rules implement requirements in House Bill (HB) 963 and HB 2808, 81st Legislature, 2009, related to the eligibility of certain applicants for occupational licenses and the authority of the commission to revoke, suspend, or deny a license on the basis of certain criminal proceedings. HB 963 and HB 2808 impact Chapter 30.

This adopted rulemaking allows an individual to request a criminal history evaluation letter from the executive director regarding the individual's eligibility for a license issued by the executive director if the individual is enrolled or planning to enroll in an educational program that prepares an individual for an initial license, or is planning to take an examination for an initial license and has reason to believe that the individual is ineligible for the license because of a conviction or deferred adjudication for a felony or a misdemeanor offense. Additionally, the adopted rules set forth requirements regarding the request and provisions relating to the executive director's power to investigate a request. The adopted rules will also set forth requirements regarding notification to the requestor of the executive director's determination of eligibility and authorizes the agency to charge the requestor a fee to cover administrative costs.

The adopted rules expand the grounds for license suspension or revocation, disqualification for a license, or denial of an opportunity to take a licensing examination to include a conviction of any of the following offenses: an offense that does not directly relate to the duties of the licensed occupation and that was committed less than five years before the date of the person's license application; an offense for which a person is not eligible for judge-ordered community supervision; or a sexually violent offense. Additionally, the adopted rules set forth provisions regarding the licensing of certain applicants with prior criminal convictions.

The commission administers ten occupational licensing programs that include the following licenses and registrations: Backflow Prevention Assembly Testers; Customer Service Inspectors; Landscape Irrigators, Irrigation Technicians and Irrigation Inspectors; Leaking Petroleum Storage Tank Corrective Action Project Managers and Specialists; Municipal Solid Waste Facility Supervisors; On-Site Sewage Facilities Installers, Apprentices, Designated Representatives, Maintenance Providers, Maintenance Technicians and Site Evaluators; Water Treatment Specialists; Underground Storage Tank On-Site Supervisors and Contractors; Wastewater Operators and Operations Companies; and Public Water System Operators and Operations Companies.

The commission adopts administrative changes throughout the rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors. These changes are non-substantive and generally are not specifically discussed in this preamble.

Subchapter A - Administration of Occupational Licenses and Registrations

The adopted amendment to §30.3, Purpose and Applicability, adds maintenance technicians to §30.3(b)(6) as one of the registrations to which this chapter's requirements apply. This amendment is needed because the maintenance technician registration was added to Chapter 30, Subchapter G, On-Site Sewage Facilities Installers, Apprentices, Designated Representatives, Main-

tenance Providers, Maintenance Technicians, and Site Evaluators, effective September 11, 2008. The adopted amendment also removes provision §30.3(c), because effective January 1, 2010, the installer license was no longer valid and was replaced by an irrigation technician license. Therefore, this provision is no longer applicable.

Adopted new §30.13, Eligibility of Certain Applicants for Occupational Licenses or Registrations, creates §30.13(a) - (b) to allow an individual to request a criminal history evaluation letter from the executive director regarding the individual's eligibility for a license issued by the executive director if the individual is enrolled or planning to enroll in an educational program that prepares the individual for an initial license, or is planning to take an examination for an initial license and has reason to believe that the individual is ineligible for the license because of a conviction or deferred adjudication for a felony or misdemeanor offense. Additionally, adopted §30.13(c) sets forth requirements regarding the request and provisions relating to the executive director's power to investigate a request. Adopted §30.13(d) - (g) set forth requirements regarding notification to the requestor of the executive director's determination of eligibility for a license issued by the executive director. The commission adopts this new section to implement the requirements of Texas Occupations Code, §53.102, as amended by HB 963.

The adopted amendment to §30.20, Examinations, adds §30.20(m) to expand the grounds for the denial of an individual's opportunity to take a licensing examination to include a conviction of any of the following offenses: an offense that does not directly relate to the duties of the licensed occupation and that was committed less than five years before the date of the person's license application; an offense for which a person is not eligible for judge-ordered community supervision; or a sexually violent offense. The commission adopts this amendment to implement the requirements of Texas Occupations Code, §53.021(a), as amended by HB 963.

The adopted amendment to §30.30, Terms and Fees for Licenses and Registrations, removes §30.30(b)(1) - (9), which outlined for certain licenses and registration transitional periods that are no longer applicable. The adopted amendment adds §30.30(h) to allow the agency to charge individuals requesting a criminal history evaluation letter from the executive director regarding the individual's eligibility for a license a fee to cover administrative costs associate to conducting the criminal history evaluation. Additionally, changes in the lettering to this subsection in this section are adopted where necessary to reflect the changes. The commission adopts this amendment to implement the requirements of Texas Occupations Code, §53.105, as amended by HB 963.

The adopted amendment to §30.33, License or Registration Denial, Warning, Suspension, or Revocation, adds §30.33(a)(2)(H) to expand the grounds for the denial of a license application to include a conviction of certain criminal offenses. In addition, the adopted amendment adds §30.33(d), which allows the commission to suspend or revoke a license or registration on the grounds the individual has been convicted of certain criminal offenses. The adopted amendment also adds §30.33(e), which allows the commission to revoke the license or registration upon an individual's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision. The adopted amendment also adds §30.33(f), which directs the executive director, regardless of the statutory authorization, not to consider an individual to have been convicted of an offense under certain circumstances, except as provided by §30.33(g), notwithstanding any other law. The adopted amendment also adds §30.33(g), that allows the executive director to consider an individual to have been convicted of certain offenses regardless of whether the proceedings were dismissed and the individual was discharged as described by subsection (f) if, after consideration of the factors described by Texas Occupations Code, §53.022 and §53.023(a), the executive director determines that the individual has an opportunity to repeat the prohibited conduct. Changes in the lettering to the subsections in this section are also adopted where necessary to reflect the changes. The commission adopts this amendment to implement the requirements of Texas Occupations Code, §53.021(a), as amended by HB 963.

Adopted new §30.34, Factors in Determining Whether Conviction Relates to Occupation, adds §30.34(a) - (d), which outlines factors to be considered in determining whether a criminal conviction directly relates to an occupation and the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a person who has been convicted of a crime. The commission adopts this new section to implement the requirements of Texas Occupations Code, §53.022 and §53.023. The requirements of the adopted addition were not previously included in the agency's rules, but would ensure that the agency's rules are up to date and consistent with statutory standards included by the required implementation of HB 963 and HB 2808 and would help to ensure that the rules are effective.

The commission adopted the repeal of §30.35, Hearings, and adopted it as new §30.38, Hearings. In addition, the commission adopted new §30.35, Guidelines. Adopted new §30.35, Guidelines, would add §30.35(a) - (b), that would require the executive director to file with the secretary of state for publication in the *Texas Register* guidelines stating the reasons a particular crime is considered to relate to a particular license and any other criterion that affects the decisions of the commission. The commission adopts this new section to implement the requirements of Texas Occupations Code, §53.025. The requirements of the adopted addition were not previously included in the agency's rules, but would ensure that the agency's rules are up to date and consistent with statutory standards included by the required implementation of the HB 963 and HB 2808 and would help to ensure that the rules are effective.

Adopted new §30.36, Notice, specifically, §30.36(1) - (3), would require the executive director to notify the individual in writing of the intent to suspend or revoke a license or deny the individual a license or the opportunity to be examined for a license because of the individual's prior conviction of a crime and the relationship of the crime to the license. The commission adopts this new section to implement the requirements of Texas Occupations Code, §53.051. The requirements of the adopted addition were not previously included in the agency's rules, but would ensure that the agency's rules are up to date and consistent with statutory standards included by the required implementation of the HB 963 and HB 2808 and would help to ensure that the rules are effective.

Adopted new §30.37, Judicial Review, specifically, §30.37(a) and (b), allows an individual whose license has been suspended or revoked or who has been denied a license or the opportunity to take an examination and has exhausted their administrative appeals to file an action in the district court in Travis County, Texas for review of the evidence presented to the commission and the decision of the commission. The commission adopts this new section to implement the requirements of Texas Oc-

cupations Code, §53.052. The requirements of the adopted addition were not previously included in the agency's rules, but would ensure that the agency's rules are up to date and consistent with statutory standards included by the required implementation of the HB 963 and HB 2808 and would help to ensure that the rules are effective.

Adopted new §30.38, Hearings, which contains the text of the adopted repeal of §30.35, Hearings, regarding requirements for conducting hearings. The commission adopts this new section to implement the requirements of 30 TAC Chapters 70 and 80, concerning Enforcement and Contested Case Hearings.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rules are not subject to that statute. Texas Government Code, §2001.0225 applies only to rules that are specifically intended to protect the environment or reduce risks to human health from environmental exposure. The intent of the adopted rules is to implement requirements in HB 963 and HB 2808, related to the eligibility of certain applicants for occupational licenses and the authority of the commission to revoke, suspend, or deny a license on the basis of certain criminal proceedings. Protection of human health and the environment may be a by-product of the adopted rules, but it is not the specific intent of the rules. Furthermore, the adopted rules implement new regulations for the agency's licensing and registration programs that are necessary to ensure more consistent operation and enforcement among the licensing and registration programs that the agency administers, and would not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the adopted rules generally only apply to individuals who wish to request that the agency issue a criminal evaluation letter regarding the individual's eligibility for a license. Thus, the adopted rules do not meet the definition of "a major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3), and thus, do not require a full regulatory impact analysis.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) is adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards regulating occupational licensing; however, if there were, these rules are specifically required by HB 963 and HB 2808. These rules do not exceed state law requirements, and state law requires their implementation, not federal law. There are no delegation agreements or contracts between the State of Texas and an agency or representative of the federal government to implement a state and federal program regarding occupational licensing. And finally, these rules are being adopted under specific state laws, in addition to the general powers of the agency.

Public comments were solicited and no comments were received regarding the Regulatory Impact Analysis Determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these adopted rules is to ensure consistency between the rules and their applicable statutes, to make grammatical and punctuation corrections, and to modify or add language to improve the readability of Chapter 30 and enhance its enforceability. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do 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 regulations. These adopted rules make non-substantive changes to the existing rules and the adopted new regulations do not affect private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to Actions and Rules Subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (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 the rulemaking is editorial, administrative, and procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies. Public comments were solicited and no comments were received regarding consistency with the CMP.

PUBLIC COMMENT

The commission received no comments relating to this rulemaking.

30 TAC §§30.3, 30.13, 30.20, 30.30, 30.33 - 30.38

STATUTORY AUTHORITY

These amendments and new sections are adopted under Texas Water Code (TWC), §5.013, concerning the General Jurisdiction of the Commission; TWC, §5.102, concerning General Powers; and TWC, §5.103, concerning Rules. These amendments and new sections are also adopted under TWC, §26.0301, concerning Wastewater Operations Company Registrations and Operator Licensing; TWC, §26.346, concerning Registration Requirements; TWC, §26.452, concerning Underground Storage Tank Contractor; TWC, §26.456, concerning Underground Storage Tank On-Site Supervisor Licensing; and TWC, §26.3573, concerning Petroleum Storage Tank Remediation Account. These amendments and new sections are also adopted under TWC, §§37.001 - 37.015, concerning: Definitions; Rules; License or Registration Required; Qualifications; Issuance and Denial of Licenses and Registrations; Renewal of License or Registration; Licensing Examinations; Training; Continuing Education; Fees; Advertising; Complaints;

Compliance Information; Practice of Occupation; Roster of License Holders and Registrants; and Power to Contract. These amendments and new sections are also adopted under Texas Occupations Code, §1903.251, concerning License Required. These amendments and new sections are also adopted under Texas Health and Safety Code (THSC), §341.033, concerning Protection of Public Water Supplies; THSC, §341.034, concerning Licensing and Registration of Persons who Perform Duties Relating to Public Water Supplies; Texas Occupations Code, §1904.051, concerning Water Treatment Specialist Certification Program; THSC, §361.002, concerning Policy; Findings; THSC, §361.011, concerning Commission's Jurisdiction; Municipal Solid Waste; THSC, §361.022, concerning Public Policy Concerning Municipal Solid Waste and Sludge; THSC, §361.024, concerning Rules and Standards; and THSC, §361.027, concerning Licensure of Solid Waste Facility Supervisors. These amendments and new sections are also adopted under THSC, §363.021, concerning Commission Rulemaking Authority; and THSC, §363.022, concerning Commission Powers and Duties. Finally, these amendments and new sections are adopted under THSC, §366.011, concerning General Supervision and Authority; THSC, §366.012, concerning Rules Concerning On-Site Sewage Disposal Systems; and THSC, §366.071 concerning Occupational Licensing and Registration.

The adopted amendments and new sections implement THSC, §§341.033, 341.034, 361.002, 361.011, 361.022, 361.024, 361.027, 363.021, 363.022, 366.011, 366.012, and 366.071; Texas Occupations Code, §§53.021, 53.022, 53.025, 53.051, 53.102, 53.103, 53.104, 53.105, 53.0211, 1903.251, and 1904.051; and TWC, §§5.013, 5.102, 5.103, 26.0301, 26.346, 26.452, 26.456, 26.3573, and 37.001 - 37.015.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003429
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 8, 2010
Proposal publication date: February 12, 2010
For further information, please call: (512) 239-6090

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30 TAC §30.35

STATUTORY AUTHORITY

The repeal of this section is adopted under Texas Water Code (TWC), §5.013, concerning the General Jurisdiction of the Commission; TWC, §5.102, concerning General Powers; and TWC, §5.103, concerning Rules. The repeal is also adopted under TWC, §26.0301, concerning Wastewater Operations Company Registrations and Operator Licensing; TWC, §26.346, concerning Registration Requirements; TWC, §26.452, concerning Underground Storage Tank Contractor; TWC, §26.456, concerning Underground Storage Tank On-Site Supervisor Licensing; and TWC, §26.3573, concerning Petroleum Storage Tank Remediation Account. The repeal is also adopted under TWC, §§37.001 - 37.015, concerning: Definitions; Rules; License or Registration Required; Qualifications; Issuance and Denial of Licenses and Registrations; Renewal of License or Registration; Licensing Examinations; Training; Continuing Education; Fees; Advertising; Complaints; Compliance Information; Practice of Occupation; Roster of License Holders and Registrants; and Power to Contract. The repeal is also adopted under Texas Occupations Code, §1903.251, concerning License Required. The repeal is also adopted under Texas Health and Safety Code (THSC), §341.033, concerning Protection of Public Water Supplies; THSC, §341.034, concerning Licensing and Registration of Persons who Perform Duties Relating to Public Water Supplies; Texas Occupations Code, §1904.051, concerning Water Treatment Specialist Certification Program; THSC, §361.002, concerning Policy; Findings; THSC, §361.011, concerning Commission's Jurisdiction; Municipal Solid Waste; THSC, §361.022, concerning Public Policy Concerning Municipal Solid Waste and Sludge; THSC, §361.024, concerning Rules and Standards; and THSC, §361.027, concerning Licensure of Solid Waste Facility Supervisors. The repeal is also adopted under THSC, §363.021, concerning Commission Rulemaking Authority; and THSC, §363.022, concerning Commission Powers and Duties. Finally, the repeal is adopted under THSC, §366.011, concerning General Supervision and Authority; THSC, §366.012, concerning Rules Concerning On-Site Sewage Disposal Systems; and THSC, §366.071 concerning Occupational Licensing and Registration.

The adopted repeal implements THSC, §§341.033, 341.034, 361.002, 361.011, 361.022, 361.024, 361.027, 363.021, 363.022, 366.011, 366.012 and 366.071; Texas Occupations Code, §§53.021, 53.022, 53.025, 53.051, 53.102, 53.103, 53.104, 53.105, 53.0211, 1903.251, and 1904.051; and TWC, §§5.013, 5.102, 5.103, 26.0301, 26.346, 26.452, 26.456, 26.3573, and 37.001 - 37.015.

This agency 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
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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

The Texas Water Development Board (Board) adopts amendments to Chapter 363, Financial Assistance Programs, Subchapter J, State Participation Program, §363.1007, and Subchapter L, Water Infrastructure Fund, §363.1207 and §363.1208, pertaining to the prioritization criteria for projects funded through the State Participation Account of the Texas Water Development Fund and through the Water Infrastructure

Fund. The amendments are adopted without changes to the proposed text as published in the May 14, 2010, issue of the *Texas Register* (35 TexReg 3798).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE AMENDMENTS.

The Board adopts amendments to §§363.1007, 363.1207, and 363.1208 making technical corrections, deleting unnecessary prioritization criteria, and clarifying the prioritization criteria regarding conservation achieved by the projects.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Section 363.1007. The amendment to §363.1007(b)(2) deletes the criteria regarding priority for those projects that result in the development of a new, usable supply of water because this criteria generally applies to every State Participation project and is therefore unhelpful in the prioritization process. The remaining paragraphs in subsection (b) have been renumbered accordingly.

The amendment to §363.1007(b)(4) clarifies that conservation savings that are already demonstrated will be determined by comparing the highest rolling five-year average gallons per capita per day since 1980 to the average gallons per capita per day for the most recent four-year period, and conservation savings to be achieved will be determined by comparing the conservation to be achieved by the project with the average gallons per capita per day for the most recent four-year period.

Section 363.1207. The amendment to §363.1207(a) makes a technical correction to indicate that the executive administrator will provide the prioritization to the Board for approval in March and September each year, instead of March and October each year. This amendment makes §363.1207(a) consistent with §363.1006(a), which also provides that the executive administrator will take the prioritization to the Board in March and September each year.

Section 363.1208. The amendment to §363.1208(b)(1) deletes the criteria regarding priority for those projects that result in the development of a new, usable supply of water because this criteria generally applies to every Water Infrastructure Fund project and is therefore unhelpful in the prioritization process. The remaining paragraphs in subsection (b) have been renumbered accordingly.

The amendment to §363.1208(b)(3) clarifies that conservation savings that are already demonstrated will be determined by comparing the highest rolling five-year average gallons per capita per day since 1980 to the average gallons per capita per day for the most recent four-year period, and conservation savings to be achieved will be determined by comparing the conservation to be achieved by the project with the average gallons per capita per day for the most recent four-year period.

PUBLIC COMMENTS.

No comments were received regarding the proposed amendments.

SUBCHAPTER J. STATE PARTICIPATION PROGRAM

31 TAC §363.1007

STATUTORY AUTHORITY

The amendments are adopted under the authority of Texas 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 June 21, 2010.

TRD-201003534
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: July 11, 2010
Proposal publication date: May 14, 2010
For further information, please call: (512) 463-8061

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SUBCHAPTER L. WATER INFRASTRUCTURE FUND

31 TAC §363.1207, §363.1208

STATUTORY AUTHORITY

The amendments are adopted under the authority of Texas 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.

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TRD-201003541
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: July 11, 2010
Proposal publication date: May 14, 2010
For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 11. OFFICE OF THE FIRE FIGHTERS' PENSION COMMISSIONER

CHAPTER 306. CREDITABLE SERVICE FOR MEMBERS OF THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §306.1

The State Board of Trustees of the Texas Emergency Services Retirement System (System) adopted, without changes, an amendment to 34 TAC §306.1, regarding prior service credit for members of participating departments, at a formal meeting

on May 13, 2010, after the proposal had been published in the March 12, 2010, issue of the *Texas Register* (35 TexReg 2128).

The amended rule allows participating departments that are merging or have merged an existing pension plan into the System to choose to purchase service credit for prior service performed by persons who did not become members of the System on the date of departmental participation but who are members at the time of purchase.

No comments were received regarding the proposed amendment.

The amended rule is adopted under the statutory authority of Title 8, Government Code, Subtitle H, Texas Emergency Services Retirement System, §865.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003478
Lisa Ivie Miller
Commissioner
Office of the Fire Fighters' Pension Commissioner
Effective date: July 11, 2010
Proposal publication date: March 12, 2010
For further information, please call: (512) 299-4528

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CHAPTER 308. BENEFITS FROM THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §308.4

The State Board of Trustees of the Texas Emergency Services Retirement System (System) adopted, without changes, an amendment to 34 TAC §308.4, regarding death benefits payable by the System, at a formal meeting on May 13, 2010, after the proposal had been published in the March 12, 2010, issue of the *Texas Register* (35 TexReg 2129).

The amended rule adds to the list of death benefits stated in the rules the benefit provided by statute for survivors of deceased retirees of the System. It also completes the list of requirements for receiving death benefits by stating that the surviving spouse of a deceased member is not entitled to an annuity before the later of the date of the spouse's application for the benefit or the date the decedent would have attained the age of 55.

No comments were received regarding the proposed amendment.

The amended rule is adopted under the statutory authority of Title 8, Government Code, Subtitle H, Texas Emergency Services Retirement System, §865.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003479
Lisa Ivie Miller
Commissioner
Office of the Fire Fighters' Pension Commissioner
Effective date: July 11, 2010
Proposal publication date: March 12, 2010
For further information, please call: (512) 299-4528

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER R. ACCOUNTING PROCEDURES

37 TAC §1.231

The Texas Department of Public Safety (the department) adopts amendments to §1.231, concerning Procedures for Vendor Protests of Procurements, without changes to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 3015).

The amendments are necessary to change the title of the department individual to whom a solicitation, evaluation, or award of a contract may formally be protested.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §2155.076, which requires the department to develop and adopt protest procedures for resolving vendor protests relating to purchasing issues.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003482
Stuart Platt
General Counsel
Texas Department of Public Safety
Effective date: July 11, 2010
Proposal publication date: April 16, 2010
For further information, please call: (512) 424-5848

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CHAPTER 15. DRIVER LICENSE RULES

SUBCHAPTER D. DRIVER IMPROVEMENT

37 TAC §15.89

The Texas Department of Public Safety (the department) adopts amendments to §15.89, concerning Moving Violations, without

changes to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 3016).

The 81st Legislature, 2009, enacted House Bill 3389, creating Code of Criminal Procedure, §102.022, requiring Texas state and local courts to assess a fine of ten cents for any moving violation conviction defined by Texas Transportation Code, §708.052. Section 15.89 was originally published in the April 16, 2004, issue of the *Texas Register* (29 TexReg 3776) to provide a definition of a moving violation and identify by rule a listing of moving violations applicable to the Driver Responsibility Program.

The department adopts these amendments to remove discontinued moving violations and to incorporate new moving violations that result in a driver being assigned points under the Driver Responsibility Program, as defined by Texas Transportation Code, §708.052.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and along with Texas Transportation Code, §708.052, which requires the department to designate offenses that constitute moving violation of the traffic law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003483
Stuart Platt
General Counsel
Texas Department of Public Safety
Effective date: July 11, 2010
Proposal publication date: April 16, 2010
For further information, please call: (512) 424-5848

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CHAPTER 28. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES SUBCHAPTER K. PRESERVATION OF BIOLOGICAL EVIDENCE

37 TAC §§28.171 - 28.175

The Texas Department of Public Safety (the department) adopts the repeal of §§28.171 - 28.175, concerning Preservation of Biological Evidence, without changes to the proposal as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 3017).

Repeal of these sections is necessary due to the addition of new Subchapter E and subsequent renumbering to leave room for later expansion within Chapter 28. The repealed rules are renumbered as new §§28.181 - 28.185 in a simultaneous filing. New §28.181 and §28.184 (former §28.171 and §28.174) are adopted with nonsubstantive changes to the text of the original sections and new §§28.182, 28.183, and 28.185 (former §§28.172, 28.173, and 28.175) are adopted without changes to the text of the original sections.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.052, which states the department shall adopt rules relating to the delivery, cataloging, and preservation of evidence stored under these sections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003484
Stuart Platt
General Counsel
Texas Department of Public Safety
Effective date: July 11, 2010
Proposal publication date: April 16, 2010
For further information, please call: (512) 424-5848

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37 TAC §§28.181 - 28.185

The Texas Department of Public Safety (the department) adopts new §§28.181 - 28.185, concerning Preservation of Biological Evidence, without changes to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 3018).

New §§28.181 - 28.185 (former §§28.171 - 28.175) set forth the preservation and transfer of biological evidence as specified in Code of Criminal Procedure, Article 38.43. New §28.181 and §28.184 (former §28.171 and §28.174) are adopted with nonsubstantive changes to the text of the original sections and new §§28.182, 28.183, and 28.185 (former §§28.172, 28.173, and 28.175) are adopted without changes to the text of the original sections.

No comments were received regarding adoption of the new sections.

The new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.052, which states the department shall adopt rules relating to the delivery, cataloging, and preservation of evidence stored under these sections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003485
Stuart Platt
General Counsel
Texas Department of Public Safety
Effective date: July 11, 2010
Proposal publication date: April 16, 2010
For further information, please call: (512) 424-5848

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PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 159. SPECIAL PROGRAMS

37 TAC §159.1

The Texas Board of Criminal Justice (Board) adopts the amendments to §159.1, Substance Abuse Felony Punishment Facilities (SAFPF) Eligibility Criteria, without changes to the proposed text as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3224) and will not be republished.

The amendments are necessary to expand the eligibility criteria to include offenders with misdemeanor detainers, and to clarify existing eligibility criteria for pretrial detainees and those sentenced to prison and ordered to participate in the Substance Abuse Felony Punishment Facilities program as a condition of community supervision.

One comment was received from a director of a community supervision and corrections department. The director requested an exception that would allow some sex offenders to be placed in the program. Examples included offenders who manifest deviant behavior during episodes of drug use or who were convicted solely on the basis of the age of the victim.

Response: The agency is unwilling to make an exception for sex offenders at this time.

The amendments are adopted under Texas Government Code §493.009 and Texas Code of Criminal Procedure Article 42.12, §14.

Cross Reference to Statutes: Texas Government Code §492.013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 17, 2010.

TRD-201003416
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: July 7, 2010
Proposal publication date: April 23, 2010
For further information, please call: (936) 437-6003

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37 TAC §159.15

The Texas Board of Criminal Justice (Board) adopts the amendments to §159.15, GO KIDS Initiative, without changes to the proposed text as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3225) and will not be republished.

The amendments are non-substantive revisions.

No comments were received regarding the proposed amendments.

The amendments are adopted under Texas Government Code §492.013.

Cross Reference to Statutes: Texas Government Code §492.001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 17, 2010.

TRD-201003417
Melinda Hoyle Bozarth
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Effective date: July 7, 2010
Proposal publication date: April 23, 2010
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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER I. PRACTICE AND PROCEDURE FOR HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

43 TAC §§215.312, 215.314, 215.315

The Texas Department of Motor Vehicles (department) adopts amendments to §215.312, Discovery, §215.314, Cease and Desist Orders, and §215.315, Statutory Stay, all concerning practice and procedure for hearings conducted by the State Office of Administrative Hearings. The amendments to §215.312 are adopted without changes to the proposed text as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3231) and will not be republished. The amendments to §215.314 and §215.315 are adopted with changes to the proposed text as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3231).

EXPLANATION OF ADOPTED AMENDMENTS

Amendments to Chapter 215 clarify procedures for certain interlocutory matters that occur in cases to be decided by the Board of the Department of Motor Vehicles (Board) relating to the regulation of motor vehicle distribution. Occupations Code, §2301.704 allows administrative law judges (ALJs) with the State Office of Administrative Hearings (SOAH) to hold hearings, issue subpoenas, and issue interlocutory orders including cease and desist orders. The amendments clarify that the Board is directing subpoenas to SOAH, along with the initial hearing on cease and desist orders, but will also allow the parties a choice of venue in an initial hearing on a statutory stay issue.

The department adopts amendments to §215.312, Discovery. Within this section, the word "Board", meaning the Board of the Department of Motor Vehicles, is deleted and replaced with "ALJ" to clarify that discovery matters such as subpoenas or commissions to take deposition shall be presented to the SOAH ALJ that presides over the case from which the matter arises. Allowing SOAH ALJs to issue subpoenas in the cases they hear will

streamline the hearing process, saving time and expense for the participants in a hearing.

Also adopted are amendments to §215.314, Cease and Desist Orders. Under subsection (a), the word "Board" is replaced with "ALJ" to reflect that the requests for cease and desist orders will be directed to a SOAH ALJ who decides whether or not to issue the order. This change will streamline the hearing process for these interlocutory matters because the SOAH ALJ will conduct the hearing rather than the Board. This section is adopted with changes from the proposed version in response to comments received. The words "this chapter" are replaced with "a board rule or order" to clarify that the ALJ may consider violations of the rules and prior orders in whether or not to issue a cease and desist order.

In §215.314(b), the reference to the Occupations Code contains a typographical error, and is corrected to refer to the statutory section governing cease and desist orders.

Amendments to §215.314(c)(3) clarify that the party requesting a cease and desist order without notice to the affected party has the burden of proof in a show cause hearing to determine if such an order issued without notice should remain in effect until final resolution of the case. This clarification is consistent with the Texas Rules of Civil Procedure governing temporary injunctions.

Amendments to §215.314(i) reflect that the SOAH ALJ will issue the written cease and desist order. This change will clarify that the ALJ issues the order after conducting the hearing, rather than the Board. This will decrease the amount of time that parties will have to wait for an order after request, saving time and expense for all parties. Subsection (i) is also amended to remove the time limit an ALJ has to issue the order. This practice will be governed by SOAH's own processes, and thus the time limit is not necessary.

Section 215.314(j) is also amended to insert language clarifying that a party may file an appeal against either the issuance or the denial of a cease and desist order. This language was changed from the proposed version of this subsection as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3231) pursuant to comments received. The remaining subsections are relettered accordingly.

Amendments to §215.315, Statutory Stay, allow a party to file a motion to modify or clarify a statutory stay before either the SOAH ALJ or the board itself. This language is intended to clarify procedure before the Board, and to afford the parties to a case the most efficient way to resolve interlocutory matters that arise, while preserving choice of venue for the motion. The adopted language of this section differs from the proposed version as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3231). In the proposed version, the section allowed the parties to go before the SOAH ALJ on these motions. The Board opts to adopt with changes, allowing it to hear these motions, pursuant to comments received from the Texas Independent Automobile Dealers Association.

COMMENTS

Comments on the proposed amendments were received from the Texas Independent Automobile Dealers Association (TADA) in support of the proposed amendments. Comments on the proposed amendments were received from TADA that support certain amendments, but that offer modifications to other amendments, suggesting alternative language.

Comment:

TADA supports the rules as proposed, and is confident that the board will exercise diligent oversight with regard to the department's handling of these matters.

Response:

The department has no response to this comment.

Comment:

TADA supports the revisions proposed to §215.312.

Response:

The department has no response to this comment.

Comment:

TADA offers non-substantive comments to proposed amendment to §215.314(a), and suggests that the department remove the words "or this chapter" from the rule as an unnecessary reference to the statute.

Response:

The words "or this chapter" are in the existing subsection and were not a part of the proposed amendments. This language is actually a reference to the rules themselves, not the statute. If the words are removed, then the ALJ could not issue a cease and desist order based upon a violation of the rules. However, "this chapter" is really a term of art, and possibly confusing to the reader. Instead, the Board will replace "this chapter" with "or a board rule or order" as set out in Occupations Code, §2301.802(a) to ensure it is clear that an ALJ may issue a cease and desist order for possible violations of either category.

Comment:

TADA offers comments to modify the proposed amendments to §215.314(j). The proposed amendments allow a party who disagrees with the issuance of a cease and desist order the right to appeal that order to the board on an interlocutory basis, but not the right to appeal the denial of a request for a cease and desist order. TADA suggests replacing the proposed §215.314(j) with language stating that a party who disagrees with either the issuance or the denial of a cease and desist order may appeal that decision by the ALJ to the Board.

Response:

The Board agrees with this comment and has modified the proposed language as suggested by TADA.

Comment:

TADA offers comments to modify the proposed amendments to §215.315. The proposed amendments state that a party would request a hearing on a request to modify, vacate, or clarify a statutory stay from a SOAH ALJ. TADA suggests that a party should have the option of choosing to direct a request for hearing on these matters to either the ALJ or the Board itself. TADA proposes language allowing a person affected by a statutory stay under Occupations Code, Chapter 2301 to initiate a proceeding before the Board.

Response:

The Board agrees with this comment and has modified the proposed language of §215 by adding subsection (c).

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the Board with the authority to

establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.155, which authorizes the Board to adopt rules relating to motor vehicle distribution.

CROSS REFERENCE TO STATUTE

Occupations Code, §§2301.153, 2301.704, 2301.802, and 2301.803.

§215.314. Cease and Desist Orders.

(a) Whenever it appears to the ALJ that a person is violating any provision of Occupations Code, Chapter 2301, Transportation Code, Chapter 503, or a board rule or order, the ALJ may enter an order requiring the person to cease and desist from the violation.

(b) If it appears from specific facts shown by affidavit or by verified complaint that one or more of the conditions enumerated in Occupations Code, §2301.802(b) will occur before notice can be served and a hearing held, the order may be issued without notice, otherwise it must be issued subject to a notice of hearing to determine the validity of the order.

(c) A cease and desist order issued without notice must include:

(1) the date and hour of issuance;

(2) a statement of which of the conditions enumerated in Occupations Code, §2301.802(b) will occur before notice can be served and a hearing held; and

(3) a notice of hearing for the earliest date possible to determine the validity of the order and to allow the person who requested the order to show good cause why the order should remain in effect during the pendency of the proceedings.

(d) A cease and desist order issued with or without notice must:

(1) set out the reasons for its issuance; and

(2) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

(e) A cease and desist order shall not be issued unless the person requesting the order presents a petition or complaint to the Board verified by affidavit containing a plain and intelligible statement of the grounds for relief.

(f) A cease and desist order issued without notice expires as provided in the order, but shall not exceed 20 days.

(g) A cease and desist order may be extended for a period equal to the period granted in the original order, if prior to the expiration of the previous order, good cause is shown for the extension or the party against whom the order is directed consents to the extension. No more than one extension may be granted unless subsequent extensions are unopposed.

(h) The person against whom a cease and desist order was issued without notice may request that the scheduled hearing be held earlier than the date set in the order.

(i) After the hearing, the ALJ shall prepare a written order, including a reasoned justification, explaining why the cease and desist order should remain in place during the pendency of the proceeding.

(j) A party may appeal to the Board an order granting or denying a motion for a cease and desist order.

(k) An appeal of the interlocutory decision must be made to the Board before a person may seek judicial review. An interlocutory decision is sufficient for a complaining party to seek judicial review of the matter.

(l) Upon appeal of an order issued under this section to the district court, as provided in the code, the order may be stayed by the Board upon a showing of good cause by a party of interest.

§215.315. Statutory Stay.

(a) In accordance with Occupations Code, §2301.803(c), a person affected by a statutory stay imposed by Occupations Code, Chapter 2301 may request a hearing before an ALJ to modify, vacate, or clarify the extent and application of the statutory stay.

(b) After a hearing on a motion to modify, vacate, or clarify a statutory stay, the ALJ shall expeditiously prepare a written order, including a reasoned justification, explaining why the statutory stay should be modified, vacated, or clarified.

(c) A person affected by a statutory stay imposed by Occupations Code, Chapter 2301, may initiate a proceeding before the board to modify, vacate, or clarify the extent and application of the statutory stay.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003408
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Effective date: July 6, 2010
Proposal publication date: April 23, 2010
For further information, please call: (512) 463-8683

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CHAPTER 217. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §§217.21, 217.22, 217.28, 217.40

The Texas Department of Motor Vehicles (department) adopts amendments to §217.21, Definitions, §217.22, Motor Vehicle Registration, §217.28, Specialty License Plates, Symbols, Tabs, and Other Devices, and §217.40, Marketing of Specialty License Plates through a Private Vendor, all concerning motor vehicle registration. Amendments to §217.21 are adopted without changes to the proposed text as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3233) and will not be republished. The amendments to §217.22, §217.28, and §217.40 are adopted with changes to the proposed text as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3233).

EXPLANATION OF ADOPTED AMENDMENTS

These amendments are necessary to continue the implementation of Transportation Code, Chapter 504, as amended by Senate Bill 1616, 81st Legislature, Regular Session, 2009, concerning the development of new specialty license plates, including the marketing of specialty license plates through a private vendor. These amendments are made to eliminate the specialty license plate committee, to establish a $40 personalized plate fee

for all plates, and to change the pricing for the "T" and generic plates. In addition, the Board of the Department of Motor Vehicles (Board) has elected to consider all applications for new specialty license plates, and new vendor specialty license plates.

Throughout the amended sections "alphanumeric sequence" has been replaced with "alphanumeric pattern" for consistency.

Amendments to §217.21 add the definition of "division" to remove the necessity for restating "Vehicle Titles and Registration Division" in this chapter. The definition of "escrow account" is deleted because escrow accounts are no longer used by the department in this chapter, and the use of such accounts had been deleted previously.

Amendments to §217.22(c)(3)(B) clarify that an alphanumeric pattern will not be approved if it implies a threat of harm as threats are considered suggestions of illegal activities. The term "indecent" is clarified to include a reference to a sex act, an excretory function or material, or sexual body parts. Other minor grammatical changes were made to this subsection.

The Board elected to withdraw a proposed amendment to §217.22(c)(3)(B), upon adoption, that would have prevented the department from issuing an alphanumeric pattern if a similar pattern has been the subject of litigation in Texas or another state because the prohibition did not take into account the results of any such litigation. The Board believes the current criteria, with the other proposed amendments, will prevent the department from issuing an alphanumeric pattern on a license plate that is offensive in any way to the public. If the department declines to issue indecent, threatening, or vulgar patterns, it can provide the applicant with an alternative pattern capable of being registered for the full life of the plate. These same criteria are also incorporated into the list of items considered when evaluating new specialty plate designs.

Amendments to §217.28(8)(F) clarify that the fee for a personalized plate is $40. This is not a change from current practice.

Amendments to §217.28(i) delete the specialty license plate committee. The specialty license plate committee was created when the function for approval of plates was part of the Texas Department of Transportation (TxDOT). The committee was formed because motor vehicle related functions were only one of the many functions of TxDOT. The creation of the specialty license plate committee brought in a range of employees from all over the state to incorporate motor vehicle functions into the department. This function is now part of the Texas Department of Motor Vehicles (TxDMV). Since the department's focus is motor vehicles, there is no need to incorporate the plate function into a larger agency with many other priorities. Other changes were made upon adoption clarifying that the executive director of the department will approve the application form for non-vendor specialty license plates.

The Board, in the adoption of these sections, has elected to participate in the decision-making process for final decisions regarding specialty plate designs. Therefore, all proposed specialty plate designs brought under either §217.28 or §217.40 will be considered by the Board for final decision. The proposed versions of these sections submitted the final decision on the adoption of new designs to the executive director. The Board thought that the potentially controversial nature of such decisions meant that this task was better suited to the Board than the executive director of the agency. Thus, the adopted versions of these sections replace references to the committee that formerly reviewed specialty plate designs with the Board, rather than with "executive director" as initially proposed.

In order to accommodate for this change, the comment procedures in §217.28 and §217.40 were adjusted somewhat so that the Board could receive comments submitted by Internet, mail, or at an open meeting considering proposed specialty plate designs.

The requirement to consider the number of potential purchasers as a factor in the approval decision has been removed. The applicant must deposit $8,000 with the department unless applications for at least 1,900 plates are submitted. The deposit is not returned until the number of plates identified by that section are sold. The deposit was designed for the department to recoup the start-up and initial cost of issuance of the plates. Either way, the department is made whole. It is up to the applicant to decide whether the return of the deposit is a concern.

A criterion has been added for the division to consider whether a design is similar enough to an existing plate design that it may compete with the existing plate sales. This concept prevents the possibility of a plate design moving from one organization to another when the first organization has made the appropriate deposit and marketing effort for a similar plate design. In addition, §217.28(i) clarifies that when an application is not approved, the applicant may submit the application again if the applicant has additional, required documentation, or the design has been altered to an acceptable degree. This helps ensure the applicant will not resubmit the same design when the same decision would be reached by the Board.

Amendments to §217.40(c) delete the specialty plate committee as it applies to vendor plates, and allows the Board to make the final decision. Notice requirements regarding proposed plate designs were adjusted to allow the Board to receive comment through the Internet, mail, or in an open meeting.

The requirement to consider the projected sales as a factor in the approval decision under §217.40(d)(1) has been removed. By contract, the vendor must deposit an amount with the department to pay for the start-up costs for the vendor specialty plates. This transfers the potential risk of not enough sales to recoup that amount to the vendor.

In accordance with Transportation Code, §504.852, a criterion has been added to §217.40(d) for the division to consider whether a design is similar enough to an existing plate design that it may compete with the existing plate sales. This helps prevent an approved plate design of an existing organization from being duplicated or similarly designed by the vendor when the organization has already made the appropriate deposit and marketing effort for that plate design. In addition, the subsection clarifies that when a design is not approved, the vendor may resubmit if the vendor has additional, required documentation, or the design has been altered to an acceptable degree.

Amendments to §217.40(h)(1) and (3) delete the generic license plate on standard white sheeting from the category of custom license plates. These plates would then fall into the luxury plate category which is anticipated to increase revenue, bringing these plates in line with other similar plates.

Amendments to §217.40(h)(2) increases the fees for issuance of a T-Plate (Premium) for one year from $95 to $155 to increase revenue. The vendor has determined, based on its analysis of the sale of these plates, the pricing is too low. The T-Plates

originally offered a six-character random personalization option, and now a seven-character personalization option is available.

In accordance with Transportation Code, §504.854, §217.40(h)(7) is amended to provide that the vendor may auction alphanumeric patterns for 10 or 25 year terms with options to renew indefinitely, through additional 10 year terms at the current price established for a 10 year luxury category license plate. The auction pattern may be moved from one vendor design plate to another vendor design plate with a restyle fee of $55, and the pattern may be transferred from owner to owner through auction.

BOARD CHANGES TO PROPOSED TEXT

Based upon recommendations from the Board's Projects and Operations subcommittee and general discussion at the Board's May 13, 2010 meeting, the Board is adopting these rules with changes from the proposed text as published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3233). The primary difference between the proposed version of the rules and the adopted rules is that the Board elected to be the departmental entity that authorizes additional vendor and non-vendor specialty plate designs under §217.28 and §217.40. In order to accommodate this change, the language of the proposed versions of these sections was also changed to modify how comments may be received by the Board, as it will now consider the proposed plate designs in a duly-noticed open meeting.

The Board has also opted to withdraw a proposed amendment to §217.22(3)(B)(iv), which would have added a criterion to the list of prohibited types of alphanumeric combinations that appear on a plate that may be issued by the department--a controversial plate pattern that was the subject of litigation in Texas or another state. The Board thought that this category of plate pattern did not need to be prohibited outright, because the remaining criteria offered the department enough prohibited categories of alphanumeric combinations such that it may decline to issue a pattern that is offensive, vulgar, threatening, or otherwise obscene and objectionable. Other changes were made to the proposed text to accommodate *Texas Register* formatting requirements for grammar and form. To ensure extra public notice of the Board's decision to amend the proposal, the Board published a notification of changes that included the text of the amended sections as expected to be adopted in the In Addition section of the May 28, 2010, issue of the *Texas Register* (35 TexReg 4517). The comment deadline was extended to allow for any additional comments as the result of the changes from the proposed language.

COMMENTS

No comments on the proposed amendments or the changes to the proposed amendments as published in the In Addition section of the May 28, 2010, issue of the *Texas Register* were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the Board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§504.702, 504.801, 504.802, and 504.851 - 504.854.

§217.22. Motor Vehicle Registration.

(a) Registration. Unless otherwise exempted by law or this chapter, a vehicle to be used on the public highways of this state must be registered in accordance with Transportation Code, Chapter 502 and the provisions of this section. Transportation Code, Chapter 501, Subchapter E and Subchapter D of this chapter (relating to Non-repairable and Salvage Motor Vehicles) prohibit registration of a vehicle whose owner has been issued a salvage or nonrepairable vehicle title. These vehicles may not be operated on a public roadway.

(b) Initial application for vehicle registration.

(1) An applicant for initial vehicle registration must file an application on a form prescribed by the department. The form will at a minimum require:

(A) the signature of the owner;

(B) the motor vehicle description, including, but not limited to, the motor vehicle's year, make, model, vehicle identification number, body style, manufacturer's rated carrying capacity in tons for commercial motor vehicles, and empty weight;

(C) the license plate number;

(D) the odometer reading, or the word "exempt" if the motor vehicle is exempt from federal and state odometer disclosure requirements;

(E) the name and complete address of the applicant; and

(F) the name, mailing address, and date of any liens.

(2) The application must be accompanied by the following documents:

(A) evidence of vehicle ownership as specified in Transportation Code, §501.030, unless the vehicle has been issued a nonrepairable or salvage vehicle title in accordance with Transportation Code, Chapter 501, Subchapter E;

(B) registration fees prescribed by law;

(C) any local fees or other fees prescribed by law and collected in conjunction with registering a vehicle;

(D) evidence of financial responsibility required by Transportation Code, §502.153, unless otherwise exempted by law; and

(E) any other documents or fees required by law.

(3) An initial application for registration must be filed with the tax assessor-collector of the county in which the owner resides, except that an application for registration as a prerequisite to filing an application for certificate of title may also be filed with the county tax assessor-collector in the county in which the motor vehicle is purchased or encumbered.

(4) The recorded owner of a vehicle that was last registered or titled in another jurisdiction and is subject to registration in this state may apply for registration if the owner cannot or does not wish to relinquish the negotiable out-of-state evidence of ownership to obtain a Texas certificate of title. On receipt of a form prescribed by the department and payment of the statutory fee for a title application and any other applicable fees, the department will issue a registration receipt to the applicant.

(A) Registration receipt. The receipt issued at the time of application may serve as proof of registration and evidences title to a motor vehicle for registration purposes only, but may not be used to transfer any interest or ownership in a motor vehicle or to establish a lien.

(B) Information to be included on the form. The form will include the:

(i) out-of-state title number, if applicable;

(ii) out-of-state license plate number, if applicable;

(iii) state or country that issued the out-of-state title or license plate;

(iv) lienholder name and address as shown on the out-of-state evidence, if applicable;

(v) statement that negotiable evidence of ownership is not being surrendered; and

(vi) signature of the applicant or authorized agent of the applicant.

(C) Accompanying documentation. An application for registration under this paragraph must be supported, at a minimum, by:

(i) a completed application for registration, as specified in paragraph (1) of this subsection;

(ii) presentation, but not surrender of, evidence from another jurisdiction demonstrating that legal evidence of ownership has been issued to the applicant as the motor vehicle's owner, such as a validated title or registration verification from the other jurisdiction, a registration receipt, a non-negotiable title, or written verification from the other jurisdiction; and

(iii) any other documents or fees required by law.

(D) Assignment. In instances in which the title or registration receipt is assigned to the applicant, an application for registration purposes only will not be processed. The applicant must apply for a certificate of title under Transportation Code, Chapter 501.

(c) Vehicle registration insignia.

(1) On receipt of a complete initial application for registration with the accompanying documents and fees, the department will issue vehicle registration insignia to be displayed on the vehicle for which the registration was issued for the current registration period.

(A) If the vehicle has a windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the inside lower left corner of the vehicle's front windshield within six inches of the vehicle inspection sticker in a manner that will not obstruct the vision of the driver.

(B) If the vehicle has no windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the rear license plate.

(C) If the vehicle is registered as a former military vehicle as prescribed by Transportation Code, §504.502, the vehicle's registration number shall be displayed instead of displaying a symbol, tab, or license plate.

(i) Former military vehicle registration numbers shall be displayed on a prominent location on the vehicle in numbers and letters of at least two inches in height.

(ii) To the extent possible, the location and design of the former military vehicle registration number must conform to the vehicle's original military registration number.

(2) Unless otherwise prescribed by law, each vehicle registered under this subchapter must display two license plates, one at the front and one at the rear of the vehicle.

(3) In accordance with Transportation Code, §502.052 and §502.180(e), the department will cancel or not issue any license plate containing an alpha-numeric pattern that meets one or more of the following criteria.

(A) The alpha-numeric pattern conflicts with the department's current or proposed regular license plate numbering system.

(B) The executive director finds that the alpha-numeric pattern may be considered objectionable or misleading, including that the pattern may be viewed as, directly or indirectly:

(i) indecent (defined as including a reference to a sex act, an excretory function or material, or sexual body parts);

(ii) a vulgarity (defined as curse words);

(iii) derogatory (defined as an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions);

(iv) a reference to illegal activities or substances, or implied threats of harm; or

(v) a misrepresentation of law enforcement or other governmental entities and their titles.

(C) The alpha-numeric pattern is currently issued to another owner.

(4) The provisions of paragraph (1) of this subsection do not apply to vehicles registered with annual license plates issued by the department.

(d) Vehicle registration renewal.

(1) To renew vehicle registration, a vehicle owner must apply, prior to the expiration of the vehicle's registration, to the tax assessor-collector of the county in which the owner resides.

(2) The department will mail a license plate renewal notice, indicating the proper registration fee and the month and year the registration expires, to each vehicle owner approximately six to eight weeks prior to the expiration of the vehicle's registration.

(3) The license plate renewal notice should be returned by the vehicle owner to the appropriate county tax assessor-collector or to the tax assessor-collector's deputy, either in person or by mail. The registration renewal notice may be used in connection with the renewal of registration at selected county tax assessor-collector offices via the Internet. The renewal notice must be accompanied by the following documents and fees:

(A) registration renewal fees prescribed by law;

(B) any local fees or other fees prescribed by law and collected in conjunction with registration renewal; and

(C) evidence of financial responsibility required by Transportation Code, §502.153, unless otherwise exempted by law.

(4) If a renewal notice is lost, destroyed, or not received by the vehicle owner, the vehicle may be registered if the owner presents personal identification acceptable to the tax assessor-collector. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(5) Renewal of expired vehicle registrations.

(A) In accordance with Transportation Code, §502.407, a vehicle with an expired registration may not be operated on the highways of the state after the fifth working day after the date a vehicle registration expires.

(B) A 20 percent delinquency penalty is due when registration is renewed if the owner has been arrested or cited for operating the vehicle without valid registration.

(C) If the county tax assessor-collector determines that a registrant has a valid reason for being delinquent in registration, the vehicle owner will be required to pay for twelve months' registration. Renewal will establish a new registration expiration month that will end on the last day of the eleventh month following the month of registration renewal.

(D) If the county tax assessor-collector determines that a registrant does not have a valid reason for being delinquent in registration, the full annual fee will be collected and the vehicle registration expiration month will remain the same.

(E) If a vehicle is registered in accordance with Transportation Code, §§502.164, 502.167, 502.188, 502.203, 504.315, 504.401, 504.405, 504.411, or 504.505, and if the vehicle's registration is renewed more than one month after expiration of the previous registration, the registration fee will be prorated.

(F) Any delinquent registration submitted directly to the department for processing will be evaluated to verify the reason for delinquency. If the department determines that a registrant has a valid reason for being delinquent in registration, the vehicle owner will be required to pay for 12 months' registration. Renewal will establish a new registration expiration month that will end on the last day of the 11th month following the month of registration. If the department determines that a registrant does not have a valid reason for being delinquent in registration, the full annual fee will be collected and the vehicle registration expiration month will remain the same. Valid reasons for delinquency include those reasons set forth in Transportation Code, §502.176(e).

(6) Refusal to renew registration for delinquent child support.

(A) Placement of denial flag. On receipt of a final order issued under Family Code, Chapter 232 for the suspension or nonrenewal of a motor vehicle registration, the department will place a registration denial flag on the motor vehicle record of the child support obligor as reported by the final order.

(B) Refusal to renew registration. While a motor vehicle record is flagged, the county tax-assessor collector shall refuse to renew the registration of the associated motor vehicle.

(C) Removal of denial flag. On receipt of an order issued under Family Code, Chapter 232 vacating or staying an order for the suspension or nonrenewal of a motor vehicle registration, the department will remove the registration denial flag from the motor vehicle record.

(7) License plate reissuance program. The county tax assessor-collectors shall issue new multi-year license plates at no additional charge at the time of registration renewal provided the current plates are over seven years old from the date of issuance.

(e) Replacement of license plates, symbols, tabs, and other devices.

(1) When a license plate, symbol, tab, or other registration device is lost, stolen, or mutilated, a replacement may be obtained from any county tax assessor-collector upon:

(A) the payment of the statutory replacement fee prescribed by Transportation Code, §502.184; and

(B) the provision of a signed statement, on a form prescribed by the department, that states:

(i) the license plate, symbol, tab, or other registration device furnished for the described vehicle has been lost, stolen, or mutilated, and if recovered, will not be used on any other vehicle; and

(ii) the replaced license plate, symbol, tab, or other device will only be used on the vehicle to which it was issued.

(2) If the owner remains in possession of any part of the lost, stolen, or mutilated license plate, symbol, tab, or other registration device, that remaining part must be removed and surrendered to the department on issuance of the replacement and request by the county tax assessor-collector.

(f) Out-of-state vehicles. A vehicle brought to Texas from out-of-state must be registered within 30 days of the date on which the owner establishes residence or secures gainful employment, except as provided by Transportation Code, §502.0025. Accompanying a completed application, an applicant must provide:

(1) an application for certificate of title as required by Transportation Code, Chapter 501, if the vehicle to be registered has not been previously titled in this state; and

(2) any other documents or fees required by law.

(g) The owner of an electric personal assistive mobility device, as defined by Transportation Code, §551.201, is not required to register it. The device may only be operated on a residential street, roadway, or public highway in accordance with Transportation Code, §551.202.

(h) A neighborhood electric vehicle, as defined in §217.3(a)(3) of this chapter (relating to Motor Vehicle Certificates of Title):

(1) is required to be titled in accordance with Transportation Code, §502.152 in order to be registered for operation on public roads;

(2) may be operated on a residential street, roadway, or public highway in accordance with Transportation Code, §551.303;

(3) must comply with the evidence of financial responsibility requirements established in Transportation Code, §502.153;

(4) must meet the definition of a "slow-moving vehicle" and must display a slow-moving-vehicle emblem as described in Transportation Code, §547.001; and

(5) is subject to all traffic and other laws applicable to motor vehicles.

(i) Enforcement of traffic warrant. A municipality may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of the vehicle is a person for whom a warrant of arrest is outstanding for failure to appear or who has failed to pay a fine on a complaint involving a violation of a traffic law. In accordance with Transportation Code, §702.003, a county tax assessor-collector may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle. A municipality is responsible for obtaining the agreement of the county in which the municipality is located to refuse to register motor vehicles for failure to pay civil penalties imposed by the municipality.

(j) Refusal to register due to traffic signal violation. A local authority, as defined in Transportation Code, §541.002, that operates a traffic signal enforcement program authorized under Transportation Code, Chapter 707 may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of a motor vehicle has failed to pay the civil penalty for a violation of the local authority's traffic signal enforcement system involving that motor vehicle. In accordance with Trans-

portation Code, §707.017, a county tax assessor-collector may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle. The local authority is responsible for obtaining the agreement of the county in which the local authority is located to refuse to register motor vehicles for failure to pay civil penalties imposed by the local authority.

(k) Refusal to register vehicle in certain counties. A county may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of the vehicle has failed to pay a fine, fee, or tax that is past due. In accordance with Transportation Code, §502.185, a county tax assessor-collector may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle.

(l) Record notation. A contract between the department and a county, municipality, or local authority entered into under Transportation Code, §502.185, Transportation Code, §702.003, or Transportation Code, §707.017 will contain the terms set out in this subsection.

(1) To place or remove a registration denial flag on a vehicle record, the contracting entity must submit a magnetic tape or other acceptable submission medium as determined by the department in a format prescribed by the department.

(2) The information submitted by the contracting entity will include, at a minimum, the vehicle identification number and the license plate number of the affected vehicle.

(3) If the contracting entity data submission contains bad or corrupted data, the submission medium will be returned to the contracting entity with no further action by the department.

(4) The magnetic tape or other submission medium must be submitted to the department from a single source within the contracting entity.

(5) The submission of a magnetic tape or other submission medium to the department by a contracting entity constitutes a certification by that entity that it has complied with all applicable laws.

§217.28. Specialty License Plates, Symbols, Tabs, and Other Devices.

(a) Purpose and Scope. Transportation Code, Chapter 504 charges the department with the responsibility of issuing a plate or plates, symbols, tabs, or other devices that, when attached to a vehicle as prescribed by the department, act as the legal registration insignia for the period issued. In addition, Transportation Code, Chapter 504 charges the department with providing specialty license plates, symbols, tabs, and other devices. For the department to perform these duties efficiently and effectively, this section prescribes the policies and procedures for the application, issuance, and renewal of specialty license plates, symbols, tabs, and other devices, through the county tax assessor-collectors, and establishes application fees, expiration dates, and registration periods for certain specialty license plates.

(b) Initial application for specialty license plates, symbols, tabs, or other devices.

(1) Application Process.

(A) Procedure. An owner of a vehicle registered as specified in §217.22 of this subchapter (relating to Motor Vehicle Registration) who wishes to apply for a specialty license plate, symbol, tab, or other device must do so on a form prescribed by the director.

(B) Form requirements. The application form shall at a minimum require the name and complete address of the applicant.

(2) Fees and Documentation.

(A) The application must be accompanied by the prescribed registration fee, unless exempted by statute.

(B) The application must be accompanied by the statutorily prescribed specialty license plate fee. In accordance with Acts of the 80th Legislature, Regular Session, 2007, Chapter 1166, Section 14, the fees for Legion of Merit license plates issued under Transportation Code, §504.316 are determined under Transportation Code, §504.3015(a). If a registration period is greater than 12 months, the expiration date of a specialty license plate, symbol, tab, or other device will be aligned with the registration period and the specialty plate fee will be adjusted to yield the appropriate fee. If the statutory annual fee for a specialty license plate is $5.00 or less, it will not be prorated.

(C) Specialty license plate fees will not be refunded after an application is submitted and the department has approved issuance of the license plate.

(D) The application must be accompanied by prescribed local fees or other fees that are collected in conjunction with registering a vehicle, with the exception of vehicles bearing license plates that are exempt by statute from these fees.

(E) The application must include evidence of eligibility for any specialty license plates. The evidence of eligibility may include, but is not limited to:

(i) an official document issued by a governmental entity;

(ii) a letter issued by a governmental entity on that agency's letterhead;

(iii) discharge papers; or

(iv) a death certificate.

(F) Initial applications for license plates for display on Exhibition Vehicles must include a photograph of the completed vehicle.

(3) Place of application. Applications for specialty license plates may be made directly to the county tax assessor-collector, except that applications for the following license plates must be made directly to the department:

(A) Congressional Medal of Honor;

(B) County Judge;

(C) Federal Administrative Law Judge;

(D) State Judge;

(E) State Official;

(F) U.S. Congress--House;

(G) U.S. Congress--Senate;

(H) U.S. Judge; and

(I) Legion of Valor.

(4) Gift plates.

(A) A person may purchase general distribution specialty license plates as a gift for another person if the purchaser submits an application for the specialty license plates that provides:

(i) the name and address of the person who will receive the plates; and

(ii) the vehicle identification number of the vehicle on which the plates will be displayed.

(B) To be valid for use on a motor vehicle, the recipient of the plates must file an application with the county tax assessor-collector and pay the statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502 and this subchapter.

(c) Initial issuance of specialty license plates, symbols, tabs, or other devices.

(1) Issuance. On receipt of a completed initial application for registration, accompanied by the prescribed documentation and fees, the department will issue specialty license plates, symbols, tabs, or other devices to be displayed on the vehicle for which the license plates, symbols, tabs, or other devices were issued for the current registration period. If the vehicle for which the specialty license plates, symbols, tabs, or other devices are issued is currently registered, the owner must surrender the license plates currently displayed on the vehicle, along with the corresponding license receipt, before the specialty license plates may be issued.

(2) Exhibition Vehicle, Classic Motor Vehicle, and Classic Travel Trailer.

(A) License plates. Texas license plates that were issued the same year as the model year of an Exhibition Vehicle, Classic Motor Vehicle, or Classic Travel Trailer, may be displayed on that vehicle under Transportation Code, §§504.501, 504.5011, and 504.502, unless:

(i) the license plate's original use was restricted by statute to another vehicle type; or

(ii) the license plate is a qualifying plate type that originally required the owner to meet one or more eligibility requirements.

(B) Validation stickers and tabs. The department will issue validation stickers and tabs for display on license plates that are displayed as provided by subparagraph (A) of this paragraph.

(3) Number of plates issued.

(A) Two plates. Unless otherwise listed in subparagraph (B) of this paragraph, two specialty license plates, each bearing the same license plate number, will be issued per vehicle.

(B) One plate. One license plate will be issued per vehicle for all motorcycles and for the following specialty license plates:

(i) Antique Vehicle;

(ii) Classic Travel Trailer;

(iii) Cotton Vehicle;

(iv) Disaster Relief;

(v) Forestry Vehicle;

(vi) Golf Cart;

(vii) Log Loader;

(viii) Military Vehicle; and

(ix) Parade.

(C) Registration number. The identification number assigned by the military may be approved as the registration number instead of displaying Military Vehicle license plates on a former military vehicle.

(4) Assignment of plates.

(A) Title holder. Unless otherwise exempted by law or this section, the vehicle on which specialty license plates, symbols, tabs, or other devices is to be displayed shall be titled in the name of the person to whom the specialty license plates, symbols, tabs, or other devices is assigned, or a certificate of title application shall be filed in that person's name at the time the specialty license plates, symbols, tabs, or other devices are issued.

(B) Non-owner vehicle. If the vehicle is titled in a name other than that of the applicant, the applicant must provide evidence of having the legal right of possession and control of the vehicle.

(C) Leased vehicle. In the case of a leased vehicle, the applicant must provide a copy of the lease agreement verifying that the applicant currently leases the vehicle.

(5) Classification of neighborhood electric vehicles. The registration classification of a neighborhood electric vehicle, as defined by §217.3(a)(3) of this chapter (relating to Motor Vehicle Certificates of Title) will be determined by whether it is designed as a 4-wheeled truck or a 4-wheeled passenger vehicle.

(6) Number of vehicles. An owner may obtain specialty license plates, symbols, tabs, or other devices for an unlimited number of vehicles, unless the statute limits the number of vehicles for which the specialty license plate may be issued.

(7) Other classes of vehicle. A specialty license plate design may be varied to accommodate its use on motor vehicles other than passenger cars and light trucks. The department will determine whether a specialty license plate will be made available for one or more classes of vehicles in addition to passenger cars and light trucks and, if so, to which class or classes. In making this determination, the department will consider the cost of redesigning a specialty license plate to accommodate another class of vehicle, the potential demand for that specialty license plate on that class of vehicle, and other factors bearing on the potential cost or benefit to the public of expanding the availability of a specialty license plate.

(8) Personalized plate numbers.

(A) Issuance. The executive director will issue a personalized license plate number subject to the exceptions set forth in this paragraph.

(B) Character limit. A personalized license plate number may contain no more than six alpha or numeric characters or a combination of characters. Depending upon the specialty license plate design and vehicle class, the number of characters may vary. Spaces, hyphens, periods, the International Symbol of Access, or silhouettes of the state of Texas may be used in conjunction with the license plate number.

(C) Personalized plates not approved. A personalized license plate number will not be approved by the executive director if the alpha-numeric pattern:

(i) conflicts with the department's current or proposed regular license plate numbering system;

(ii) would violate §217.22(c)(3) of this subchapter as determined by the executive director; or

(iii) is currently issued to another owner.

(D) Classifications of vehicles eligible for personalized plates. Unless otherwise listed in subparagraph (E) of this paragraph, personalized plates are available for all classifications of vehicles.

(E) Categories of plates for which personalized plates are not available. Personalized license plate numbers are not available for display on the following specialty license plates:

(i) Amateur Radio (other than the official call letters of the vehicle owner);

(ii) Antique Motorcycle;

(iii) Antique Vehicle;

(iv) Apportioned;

(v) Congressional Medal of Honor;

(vi) Cotton Vehicle;

(vii) Disabled Veteran;

(viii) Disaster Relief;

(ix) Farm Trailer (except Go Texan II);

(x) Farm Truck (except Go Texan II);

(xi) Farm Truck Tractor (except Go Texan II);

(xii) Fertilizer;

(xiii) Forestry Vehicle;

(xiv) Log Loader;

(xv) Machinery;

(xvi) Parade;

(xvii) Permit;

(xviii) Rental Trailer;

(xix) Soil Conservation; and

(xx) Texas Guard.

(F) Fee. Unless specified by statute, a personalized license plate fee of $40 will be charged in addition to any prescribed specialty license plate fee.

(G) Priority. Once a personalized license plate number has been assigned to an applicant, the owner shall have priority to that number for succeeding years if a timely renewal application is submitted to the county tax assessor-collector each year in accordance with subsection (d) of this section.

(d) Specialty license plate renewal.

(1) Renewal deadline. If a personalized license plate is not renewed within 60 days after its expiration date, a subsequent renewal application will be treated as an application for new personalized license plates.

(2) Length of validation. With the following exceptions, all specialty license plates, symbols, tabs, or other devices shall be valid for 12 months from the month of issuance or for a prorated period of at least 12 months coinciding with the expiration of registration.

(A) Five year period. The following license plates and registration numbers are issued for a five-year period:

(i) Antique Vehicle and Antique Motorcycle license plates and Antique tabs;

(ii) Military Vehicle license plates and registration numbers;

(iii) Parade license plates; and

(iv) Foreign Organization license plates.

(B) March expiration dates. The following license plates expire each March 31:

(i) Congressional Medal of Honor;

(ii) Cotton Vehicle;

(iii) Disaster Relief.

(C) June expiration dates. Honorary Consul license plates expire each June 30.

(D) September expiration dates. Log Loader license plates expire each September 30.

(E) December expiration dates. The following license plates expire each December 31:

(i) County Judge;

(ii) Federal Administrative Law Judge;

(iii) State Judge;

(iv) State Official;

(v) U.S. Congress--House;

(vi) U.S. Congress--Senate; and

(vii) U.S. Judge.

(F) Except as otherwise provided in this paragraph, if a vehicle's registration period is other than 12 months, the expiration date of the specialty license plate, symbol, tab, or other device will be set to align it with the expiration of registration.

(3) Renewal.

(A) Renewal notice. Approximately 60 days before the expiration date of a specialty license plate, symbol, tab, or other device, the department will send each owner a renewal notice that includes the amount of the specialty plate fee and the registration fee.

(B) Return of notice. The owner must return the fee and any prescribed documentation to the tax assessor-collector of the county in which the owner resides, except that the owner of a vehicle with one of the following license plates must return the documentation and specialty license plate fee directly to the department and submit the registration fee to the county tax assessor-collector:

(i) County Judge;

(ii) Federal Administrative Law Judge;

(iii) State Judge;

(iv) State Official;

(v) U.S. Congress--House;

(vi) U.S. Congress--Senate; and

(vii) U.S. Judge.

(C) Return of documents. The owner of a vehicle with Congressional Medal of Honor license plates must return the documentation and specialty license plate fee, if any, directly to the department.

(D) Expired plate numbers. The department will retain a specialty license plate number for 60 days after the expiration date of the plates if the plates are not renewed on or before their expiration date. After 60 days the number may be reissued to a new applicant. All specialty license plate renewals received after the expiration of the 60 days will be treated as new applications.

(E) Issuance of validation insignia. On receipt of a completed license plate renewal application and prescribed documentation, the department will issue registration validation insignia as specified in §217.22 of this subchapter, except for those plates listed in clauses (i) or (ii) of this subparagraph or unless this section or other law requires the issuance of new license plates to the owner.

(i) New license plates will be issued when the following specialty license plates are renewed:

(I) Antique Motorcycle;

(II) Antique Vehicle;

(III) Congressional Medal of Honor;

(IV) County Judge;

(V) Disaster Relief;

(VI) Federal Administrative Law Judge;

(VII) Military Vehicle;

(VIII) Parade;

(IX) State Judge;

(X) State Official;

(XI) U.S. Congress-House;

(XII) U.S. Congress-Senate; and

(XIII) U.S. Judge.

(ii) New license plates shall be issued at no extra cost every seven years from the date of issuance for specialty license plates and renewed personalized license plates, in accordance with the provisions of §217.22 of this subchapter.

(F) Lost or destroyed renewal notices. If a renewal notice is lost, destroyed, or not received by the vehicle owner, the specialty license plates, symbol, tab, or other device may be renewed if the owner provides acceptable personal identification along with the appropriate fees and documentation. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(e) Transfer of specialty license plates.

(1) Transfer between vehicles.

(A) Transferable between vehicles. The owner of a vehicle with specialty license plates, symbols, tabs, or other devices may transfer the specialty plates between vehicles by filing an application through the county tax assessor-collector if the vehicle to which the plates are transferred:

(i) is titled or leased in the owner's name; and

(ii) meets the vehicle classification requirements for that particular specialty license plate, symbol, tab, or other device.

(B) Non-transferable between vehicles. The following specialty license plates, symbols, tabs, or other devices are non-transferable between vehicles:

(i) Antique Vehicle license plates, Antique Motorcycle license plates, and Antique tabs;

(ii) Military Vehicle license plates and registration numbers;

(iii) Classic Auto, Classic Truck, Classic Motorcycle, and Classic Travel Trailer license plates;

(iv) Parade license plates;

(v) Forestry Vehicle license plates; and

(vi) Log Loader license plates.

(C) New specialty license plates. If the department creates a new specialty license plate under Transportation Code, §504.801, the department will specify at the time of creation whether the license plate may be transferred between vehicles.

(2) Transfer between owners.

(A) Non-transferable between owners. Specialty license plates, symbols, tabs, or other devices issued under Transportation Code, Chapter 504, Subchapters B and G, may not be transferred between persons. Specialty license plates, symbols, tabs, or other devices issued under Transportation Code, Chapter 504, Subchapters C, D, E, and F are not transferable from one person to another except as specifically permitted by statute.

(B) New specialty license plates. If the department creates a new specialty license plate under Transportation Code, §504.801, the department will specify at the time of creation whether the license plate may be transferred between owners.

(3) Simultaneous transfer between owners and vehicles. Specialty license plates, symbols, tabs, or other devices are transferable between owners and vehicles simultaneously only if the owners and vehicles meet all the requirements in both paragraphs (1) and (2) of this subsection.

(f) Replacement.

(1) Application. When specialty license plates, symbols, tabs, or other devices are lost, stolen, or mutilated, the owner shall apply directly to the county tax assessor-collector for the issuance of replacements, except that Log Loader license plates must be reapplied for and accompanied by the prescribed fees and documentation.

(2) Interim replacement tags. If the specialty license plate, symbol, tab, or other device is lost, destroyed, or mutilated to such an extent that it is unusable, and if issuance of a replacement license plate would require that it be remanufactured, the owner must pay the statutory replacement fee, and the department will issue a temporary tag for interim use. The owner's new specialty license plate number will be shown on the temporary tag unless it is a personalized license plate, in which case the same personalized license plate number will be shown.

(3) Stolen specialty license plates. The county tax assessor-collector will not approve the issuance of replacement license plates with the same personalized license plate number when the department's records indicate that the vehicle displaying the personalized license plates, symbols, tabs, or other devices or the license plates, symbols, tabs, or other devices themselves were reported as stolen. On expiration or recovery of the stolen vehicle or license plates, symbols, tabs, or other devices, the department will issue, at the owner's request, replacement license plates, symbols, tabs, or other devices bearing the same personalized number as those that were stolen.

(g) License plates created after January 1, 1999. In accordance with Transportation Code, §504.702, the department will begin to issue specialty license plates authorized by a law enacted after January 1, 1999, only if the sponsoring entity for that license plate submits the following items before the fifth anniversary of the effective date of the law.

(1) The sponsoring entity must submit a written application. The application must be on a form approved by the director and include, at a minimum:

(A) the name of the license plate;

(B) the name and address of the sponsoring entity;

(C) the name and telephone number of a person authorized to act for the sponsoring entity; and

(D) the deposit or license plate fees set forth in paragraph (2) of this subsection.

(2) The written request must be accompanied by:

(A) a deposit in the amount of $8,000 in the form of a single payment, made payable to the Texas Department of Motor Vehicles; or

(B) if the license plates are presold, the prescribed number of properly executed applications for that license plate accompanied by a single payment, made payable to the Texas Department of Motor Vehicles, in an amount equal to the prescribed fees for issuance of those license plates; or

(C) if the sponsoring entity submits less than the prescribed number of properly executed applications for that license plate accompanied by a single payment, a deposit made payable to the Texas Department of Motor Vehicles, that consists of:

(i) the prescribed license plate fees for those applications submitted; and

(ii) a deposit equal to $8,000 less the prescribed portion of those license plate fees to be retained by the department, and deposited to the State Highway Fund, for issuance of the license plates for which applications are submitted.

(3) The deposit submitted to the department under paragraph (2)(A) or (C) of this subsection will be returned to the sponsoring entity only if the prescribed number of sets of the applicable license are issued or presold.

(4) A sponsoring entity is not an agent of the department and does not act for the department in any matter, and the department does not assume any responsibility for fees or applications collected by a sponsoring entity.

(h) Assignment procedures for state, federal, and county officials.

(1) State Officials. State Official license plates contain the prefix "SO" and are assigned in the following order:

(A) Governor;

(B) Lieutenant Governor;

(C) Speaker of the House;

(D) Attorney General;

(E) Comptroller;

(F) Land Commissioner;

(G) Agriculture Commissioner;

(H) Secretary of State;

(I) Railroad Commission Presiding Officer followed by the remaining members based on their seniority;

(J) Supreme Court Chief Justice followed by the remaining justices based on their seniority;

(K) Criminal Court of Appeals Presiding Judge followed by the remaining judges based on their seniority;

(L) Members of the State Legislature, with Senators assigned in order of district number followed by Representatives assigned in order of district number, except that in the event of redistricting, license plates will be reassigned; and

(M) Board of Education Presiding Officer followed by the remaining members assigned in district number order, except that in the event of redistricting, license plates will be reassigned.

(2) Members of the U.S. Congress.

(A) U.S. Senate license plates contain the prefix "Senate" and are assigned by seniority; and

(B) U.S. House license plates contain the prefix "House" and are assigned in order of district number, except that in the event of redistricting, license plates will be reassigned.

(3) Federal Judge.

(A) Federal Judge license plates contain the prefix "USA" and are assigned on a seniority basis within each court in the following order:

(i) Judges of the Fifth Circuit Court of Appeals;

(ii) Judges of the United States District Courts;

(iii) United States Bankruptcy Judges; and

(iv) United States Magistrates.

(B) Federal Administrative Law Judge plates contain the prefix "US" and are assigned in the order in which applications are received.

(C) A federal judge who retired on or before August 31, 2003, and who held license plates expiring in March 2004 may continue to receive federal judge plates. A federal judge who retired after August 31, 2003, is not eligible for U.S. Judge license plates.

(4) State Judge.

(A) State Judge license plates contain the prefix "TX" and are assigned sequentially in the following order:

(i) Appellate District Courts;

(ii) Presiding Judges of Administrative Regions;

(iii) Judicial District Courts;

(iv) Criminal District Courts; and

(v) Family District Courts and County Statutory Courts.

(B) A particular alpha-numeric combination will always be assigned to a judge of the same court to which it was originally assigned.

(C) A state judge who retired on or before August 31, 2003, and who held license plates expiring in March 2004 may continue to receive state judge plates. A state judge who retired after August 31, 2003, is not eligible for State Judge license plates.

(5) County Judge license plates contain the prefix "CJ" and are assigned by county number.

(6) In the event of redistricting or other plate reallocation, the department may allow a state official to retain that official's plate number if the official has had the number for five or more consecutive years.

(i) Development of new specialty license plates.

(1) Procedure. The following procedure governs the process of authorizing new specialty license plates under Transportation Code, §504.801 whether the new license plate originated as a result of an application or as a department initiative.

(2) Applications for the creation of new specialty license plates. An applicant for the creation of a new specialty license plate, other than a vendor specialty plate under §217.40 of this subchapter (relating to Marketing of Specialty License Plates through a Private Vendor), must submit a written application on a form approved by the executive director. The application must include:

(A) the applicant's name, address, telephone number, and other identifying information as directed on the form;

(B) certification on Internal Revenue Service letterhead stating that the applicant is a not-for-profit entity, and that the applicant's non-profit status is current at the time of application;

(C) a draft design of the specialty license plate;

(D) projected sales of the plate, including an explanation of how the projected figure was established;

(E) a marketing plan for the plate, including a description of the target market;

(F) a licensing agreement from the appropriate third party for any intellectual property design or design element;

(G) a letter from the executive director of the sponsoring state agency stating that the agency agrees to receive and distribute revenue from the sale of the specialty license plate and that the use of the funds will not violate a statute or constitutional provision; and

(H) other information necessary for the Board to reach a decision regarding approval of the requested specialty plate.

(3) Review process. The Board:

(A) will not consider incomplete applications;

(B) may request additional information from an applicant if necessary for a decision; and

(C) will consider specialty license plate applications that are restricted by law to certain individuals or groups of individuals (qualifying plates) using the same procedures as applications submitted for plates that are available to everyone (non-qualifying plates).

(4) Request for additional information. If the Board determines that additional information is needed, the applicant must return the requested information not later than the requested due date. If the additional information is not received by that date, the Board will return the application as incomplete unless the Board:

(A) determines that the additional requested information is not critical for consideration and approval of the application; and

(B) approves the application, pending receipt of the additional information by a specified due date.

(5) Board decision. The Board's decision will be based on:

(A) compliance with Transportation Code, §504.801;

(B) the proposed license plate design, including:

(i) whether the design appears to meet the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness; and

(iii) other information provided during the application process;

(iv) the criteria designated in §217.22(c)(3)(B) of this subchapter (relating to Motor Vehicle Registration) as applied to the design; and

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and

(C) the applicant's ability to comply with Transportation Code, §504.702 relating to the required deposit or application that must be provided before the manufacture of a new specialty license plate.

(6) Public comment on proposed design. All proposed plate designs will be considered by the Board as an agenda item at a regularly or specially called open meeting. Notice of consideration of proposed plate designs will be posted in accordance with Office of the Secretary of State meeting notice requirements. Notice of each license plate design will be posted on the department's Internet web site to receive public comment at least 20 days in advance of the meeting at which it will be considered. The department will notify all other specialty plate organizations and the sponsoring agencies who administer specialty license plates issued in accordance with Transportation Code, Chapter 504, Subchapter G, of the posting. A comment on the proposed design can be submitted in writing through the mechanism provided on the department's Internet website for submission of comments. Written comments are welcome and must be received by the department at least 7 days in advance of the meeting. Public comment will be received at the Board's meeting.

(7) Final approval.

(A) Approval. The Board will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter at an open meeting.

(B) Application not approved. If the application is not approved under subparagraph (A) of this paragraph, the applicant may submit a new application and supporting documentation for the design to be considered again by the Board if:

(i) the applicant has additional, required documentation; or

(ii) the design has been altered to an acceptable degree.

(8) Issuance of specialty plates.

(A) If the specialty license plate is approved, the applicant must comply with Transportation Code, §504.702 before any further processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The Board has final approval authority of all specialty license plate designs and may adjust or reconfigure the submitted draft design to comply with the format or license plate specifications.

(C) If the Board, in consultation with the applicant, adjusts or reconfigures the design, the adjusted or reconfigured design will not be posted on the department's website for additional comments.

(9) Redesign of specialty license plate.

(A) Upon receipt of a written request from the applicant, the department will allow redesign of a specialty license plate.

(B) A request for a redesign must meet all application requirements and proceed through the approval process of a new specialty plate as required by this subsection.

(C) An approved license plate redesign does not require the deposit required by Transportation Code, §504.702, but the applicant must pay a redesign cost to cover administrative expenses.

§217.40. Marketing of Specialty License Plates through a Private Vendor.

(a) Purpose and scope. The department will enter into a contract with a private vendor to market department-approved specialty license plates in accordance with Transportation Code, §§504.851-504.852. This section sets out the procedure for approval of the design, purchase, and replacement of vendor specialty license plates. In this section, the license plates marketed by the vendor are referred to as vendor specialty license plates.

(b) Application for approval of vendor specialty license plate designs.

(1) Approval required. The vendor shall obtain the approval of the Board for each license plate design the vendor proposes to market in accordance with this section and the contract entered into between the vendor and the department.

(2) Application. The vendor must submit a written application on a form approved by the executive director to the department for approval of each license plate design the vendor proposes to market. The application must include:

(A) a draft design of the specialty license plate;

(B) projected sales of the plate, including an explanation of how the projected figure was determined;

(C) a marketing plan for the plate including a description of the target market;

(D) a licensing agreement from the appropriate third party for any design or design element that is intellectual property; and

(E) other information necessary for the Board to reach a decision regarding approval of the requested vendor specialty plate.

(c) Review and approval process. The Board will review vendor specialty license plate applications. The Board:

(1) will not consider incomplete applications; and

(2) may request additional information from the vendor to reach a decision.

(d) Board decision.

(1) Decision. The decision of the Board will be based on:

(A) compliance with Transportation Code, §504.851 and §504.852;

(B) the proposed license plate design, including:

(i) whether the design meets the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness to ensure that the proposed plate complies with Transportation Code, §504.852(c);

(iii) whether the license plate design can accommodate the International Symbol of Access (ISA) as required by Transportation Code, §504.201(h);

(iv) the criteria designated in §217.22(c)(3)(B) of this subchapter (relating to Motor Vehicle Registration) as applied to the design; and

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and

(vi) other information provided during the application process.

(2) Public comment on proposed design. All proposed plate designs will be considered by the Board as an agenda item at a regularly or specially called open meeting. Notice of consideration of proposed plate designs will be posted in accordance with Office of the Secretary of State meeting notice requirements. Notice of each license plate design will be posted on the department's Internet web site to receive public comment at least 20 days in advance of the meeting at which it will be considered. The department will notify all specialty plate organizations and the sponsoring agencies who administer specialty license plates issued in accordance with Transportation Code, Chapter 504, Subchapter G, of the posting. A comment on the proposed design can be submitted in writing through the mechanism provided on the department's Internet web site for submission of comments. Written comments are welcome and must be received by the department at least 7 days in advance of the meeting. Public comment will be received at the Board's meeting.

(e) Final approval and specialty license plate issuance.

(1) Approval. The Board will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter in an open meeting.

(2) Application not approved. If the application is not approved, the applicant may submit a new application and supporting documentation for the design to be considered again by the Board if:

(A) the applicant has additional, required documentation; or

(B) the design has been altered to an acceptable degree.

(3) Issuance of approved specialty plates.

(A) If the vendor's specialty license plate is approved, the vendor must submit the non-refundable start-up fee before any further design and processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The Board has final approval of all specialty license plate designs and will provide guidance on the submitted draft design to ensure compliance with the format and license plate specifications.

(f) Redesign of vendor specialty license plates.

(1) On receipt of a written request from the vendor, the department will allow a redesign of a vendor specialty license plate.

(2) The vendor must pay the redesign administrative costs as provided in the contract between the vendor and the department.

(g) Multi-year vendor specialty license plates. Purchasers will have the option of purchasing vendor specialty license plates for a one-year, five-year, or ten-year period.

(h) License plate categories and associated fees. The categories and the associated fees for vendor specialty plates are set out in this subsection.

(1) Custom license plates. The fees for issuance of custom license plates are $85 for one year, $225 for five years, and $325 for ten years. Custom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with either three alpha and two or three numeric characters or two or three numeric and three alpha characters.

(2) T-Plates (Premium) license plates. T-Plates (Premium) license plates may be personalized with up to seven alphanumeric char-

acters on colored backgrounds or designs approved by the department. T-Plates (Premium) license plates will be made available to coincide with extraordinary events of public interest to Texas registrants. The fees for issuance of T-Plates (Premium) license plates are $155 for one year, $395 for five years, and $495 for ten years.

(3) Luxury license plates. Luxury license plates may be personalized with up to six alphanumeric characters on colored backgrounds or designs approved by the department. The fees for issuance of luxury license plates are $195 for one year, $495 for five years, and $595 for ten years.

(4) Freedom license plates. Freedom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with up to seven alphanumeric characters. The fees for issuance of freedom license plates are $395 for one year, $695 for five years, and $795 for ten years.

(5) Background only license plates. Background only license plates include non-personalized license plates with a variety of pre-approved background and character color combinations. The fees for issuance of background only license plates are $55 for one year, $195 for five years, and $295 for ten years.

(6) Vendor souvenir license plates. Vendor souvenir license plates are replicas of vendor specialty license plate designs that may be personalized with up to twenty-four alphanumeric characters. Vendor souvenir license plates are not street legal or legitimate insignias of vehicle registration. The fee for issuance of souvenir license plates is $40.

(7) Auction of alphanumeric patterns. The vendor may auction alphanumeric patterns for 10 or 25 year terms with options to renew indefinitely, through 10 year terms, at the current price established for a 10 year luxury category license plate. The purchaser of the auction pattern may select from the vendor background designs at no additional charge at the time of initial issuance. The auction pattern may be moved from one vendor design plate to another vendor design plate as provided in subsection (n)(1) of this section. The auction pattern may be transferred from owner to owner as provided in subsection (l)(2) of this section.

(8) Personalization of license plates.

(A) The fee for the personalization of license plates applied for prior to November 19, 2009 is $40 if the plates are renewed annually.

(B) The personalization fee for plates applied for after November 19, 2009 is $40 if the plates are issued pursuant to Transportation Code, Subchapters G and I.

(i) Payment of fees.

(1) Payment of specialty license plate fees. The fees for issuance of vendor specialty license plates will be paid directly to the vendor for the license plate category and period selected by the purchaser. A person who purchases a multi-year vendor specialty license plate must pay upon purchase the full fee which includes the renewal fees.

(2) Payment of statutory registration fees. To be valid for use on a motor vehicle, the license plate owner is required to pay, in addition to the vendor specialty license plate fees, any statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502, and this subchapter.

(j) Refunds. Fees for vendor specialty license plate fees will not be refunded after an application is submitted to the vendor and the department has approved issuance of the license plate.

(k) Replacement.

(1) Application. An owner must apply directly to the county tax assessor-collector for the issuance of replacement vendor specialty license plates and must pay the fee described in paragraphs (2), (3), or (4) of this subsection, whichever applies.

(2) Lost or mutilated vendor specialty license plates. To replace vendor specialty license plates that are lost or mutilated, the owner must pay the statutory replacement fee provided in Transportation Code, §502.184.

(3) No-charge replacement. The owner of vendor specialty license plates will receive at no charge replacement license plates as follows:

(A) one set of replacement license plates on or after the seventh anniversary after the date of initial issuance; and

(B) one set of replacement license plates seven years after the date the set of license plates were issued in accordance with subparagraph (A) of this paragraph.

(4) Optional replacements. An owner of a vendor specialty license plate may replace vendor specialty license plates before the seventh anniversary after the date of issuance by submitting a request to the county tax assessor-collector accompanied by the payment of a $30 fee.

(5) Interim replacement tags. If the vendor specialty license plates are lost or mutilated to such an extent that they are unusable, replacement license plates will need to be remanufactured. The county tax assessor-collector will issue interim replacement tags for use until the replacements are available. The owner's vendor specialty license plate number will be shown on the interim replacement tags.

(6) Stolen vendor specialty license plates. The county tax assessor-collector will not approve the issuance of replacement vendor specialty license plates with the same license plate number if the department's records indicate that the vehicle displaying that license plate number was reported stolen or the license plates themselves were reported stolen.

(l) Transfer of vendor specialty license plates.

(1) Transfer between vehicles. The owner of a vehicle with vendor specialty license plates may transfer the license plates between vehicles by filing an application through the county tax assessor-collector if the vehicle to which the plates are transferred:

(A) is titled or leased in the owner's name; and

(B) meets the vehicle classification requirements for that particular specialty license plate.

(2) Transfer between owners. Vendor specialty license plates may not be transferred between persons except through auction as provided in subsection (h)(7) of this section. An auctioned alphanumeric pattern may be transferred as a specialty license plate or as a virtual pattern to be manufactured on a new background as provided under the restyle option in subsection (n)(1) of this section. In addition to the fee paid at auction, the new owner of an auctioned alphanumeric pattern or plate will pay the department a fee of $25 and complete the department's prescribed application at the time of transfer.

(m) Gift plates.

(1) A person may purchase plates as a gift for another person if the purchaser submits a statement that provides:

(A) the purchaser's name and address;

(B) the name and address of the person who will receive the plates; and

(C) the vehicle identification number of the vehicle on which the plates will be displayed or a statement that the plates will not be displayed on a vehicle.

(2) To be valid for use on a motor vehicle, the recipient of the plates must file an application with the county tax assessor-collector and pay the statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502, and this subchapter.

(n) Restyled vendor specialty license plates. A person who has purchased a multi-year vendor specialty license plate may request a restyled license plate at any time during the term of the plate.

(1) For the purposes of this subsection, "restyled license plate" is a vendor specialty license plate that has a different style from the originally purchased vendor specialty license plate but:

(A) is within the same price category, except if the pattern is an auction pattern; and

(B) has the same alpha-numeric characters and expiration date as the previously issued multi-year license plates.

(2) The fee for each restyled license plate is $55.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003409
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Effective date: July 6, 2010
Proposal publication date: April 23, 2010
For further information, please call: (512) 463-8683

♦ ♦ ♦

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice (TBCJ) files this notice of intent to review §159.17, Employment Referral Services for Offenders--Memorandum of Understanding, which authorizes the Texas Department of Criminal Justice (TDCJ) to adopt a memorandum of understanding between the TDCJ, the Texas Workforce Commission, and the Texas Youth Commission. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-201003419
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: June 18, 2010

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Texas Water Development Board

Title 31, Part 10

The Texas Water Development Board will review 31 Texas Administrative Code, Part 10, Chapter 377, Hydrographic Survey Program, in accordance with Texas Government Code §2001.039.

The Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 377 continues to exist. The comment period will end at 5:00 p.m., 30 days after this notice is published in the *Texas Register.*

Comments regarding this rule review may be submitted by email to *rulescomments@twdb.state.tx.us,* by fax: at (512) 475-2053 or by mail: Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

TRD-201003525
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: June 21, 2010

♦ ♦ ♦

The Texas Water Development Board will review 31 Texas Administrative Code, Part 10, Chapter 384, Rural Water Assistance Fund, in accordance with Texas Government Code §2001.039.

The Board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 384 continues to exist. The comment period will end at 5:00 p.m., 30 days after this notice is published in the *Texas Register.*

Comments regarding this rule review may be submitted by email to *rulescomments@twdb.state.tx.us,* by fax: at (512) 475-2053 or by mail: Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231.

TRD-201003526
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: June 21, 2010

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Adopted Rule Reviews

Credit Union Department

Title 7, Part 6

The Credit Union Commission (Commission) has completed the review of Texas Administrative Code, Title 7, §§91.705, Home Improvement Loans; 91.706, Home Equity Loans; 91.707, Reverse Mortgages; 91.709, Member Business Loans; 91.712, Plastic Cards; 91.714, Leasing; 91.715, Exceptions to the General Lending Policies; 91.716, Prohibited Fees; 91.717, More Stringent Restrictions; and 91.718, Charging Off or Setting Up Reserves; as published in the March 12, 2010, issue of the *Texas Register* (35 TexReg 2209).

The rules were reviewed as a result of the Credit Union Department (Department)'s general rule review.

The Commission received no comments with respect to these rules. The Department believes that the reasons for initially adopting these rules continue to exist. The Commission finds that the reasons for initially adopting §§91.705, 91.706, 91.707, 91.709, 91.712, 91.714, 91.715, 91.716, 91.717, and 91.718 continue to exist and readopts these rules without changes pursuant to the requirements of Government Code, §2001.039.

TRD-201003554
Harold E. Feeney
Commissioner
Credit Union Department
Filed: June 21, 2010

♦ ♦ ♦

Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice (Board) has completed its review of §152.71, Acceptance of Gifts and Grants Related to Buildings for Religious and Programmatic Purposes, in accordance with the requirements of Texas Government Code §2001.039. The Board has determined the reasons for initially adopting §152.71 continue to exist, and it readopts this section.

Notice of the review was published in the December 25, 2009, issue of the *Texas Register* (34 TexReg 9489). No comments were received as a result of that notice.

As a result of the rule review, the Texas Department of Criminal Justice published proposed amendments to §152.71 in the December 25, 2009, issue of the *Texas Register* (34 TexReg 9383). The Board adopted the amended rule on February 11, 2010, and the adoption notice was published in the February 26, 2010, issue of the *Texas Register* (35 TexReg 1760).

TRD-201003420
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: June 18, 2010

♦ ♦ ♦

The Texas Board of Criminal Justice (Board) has completed its review of §159.1, Substance Abuse Felony Punishment Facilities (SAFPF) Eligibility Criteria, in accordance with the requirements of Texas Government Code §2001.039. The Board has determined the reasons for initially adopting §159.1 continue to exist, and it readopts this section.

Notice of the review was published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3297). One comment was received as a result of that notice. A director of a community supervision and corrections department requested an exception that would allow some sex offenders to be placed in the program. Examples included offenders who manifest deviant behavior during episodes of drug use or who were convicted solely on the basis of the age of the victim. Response: the agency is unwilling to make an exception for sex offenders at this time.

As a result of the rule review, the Texas Department of Criminal Justice published proposed amendments to §159.1 in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3224). The Board adopted the amended rule on June 17, 2010, and the adoption notice is published in this issue of the *Texas Register.*

TRD-201003422
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: June 18, 2010

♦ ♦ ♦

The Texas Board of Criminal Justice (Board) has completed its review of §159.15, GO KIDS Initiative, in accordance with the requirements of Texas Government Code §2001.039. The Board has determined the reasons for initially adopting §159.15 continue to exist, and it readopts this section.

Notice of the review was published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3297). No comments were received as a result of that notice.

As a result of the rule review, the Texas Department of Criminal Justice published proposed nonsubstantive amendments to §159.15 in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3225). The Board adopted the amended rule on June 17, 2010, and the adoption notice is published in this issue of the *Texas Register.*

TRD-201003421
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: June 18, 2010

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Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 7 TAC §90.603(b)(14)

"ASSIGNMENT

This lien is transferred and assigned to _(third party lender)_____.

_____.
Contractor

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20___ by _(name of contractor)_____.

_____
Notary Public

(Seal)"

Figure: 7 TAC §90.603(d)(22)

"ASSIGNMENT

This lien is transferred and assigned to _____ (third party lender)_____.

_____
Contractor

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20___ by _____ (name of contractor)_____.

_____
Notary Public

(Seal)"

Figure: 7 TAC §90.603(f)(34)

"BY SIGNING BELOW, I accept and agree to the terms and promises contained in the Loan Agreement and in any rider I sign which is recorded with it.
(DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. I MUST RECEIVE A COPY OF ANY DOCUMENT I SIGN.)

IN WITNESS WHEREOF, Borrower and Contractor have executed this Deed of Trust and Assignment of Contractor's Lien.

-Contractor

By:_____

_____ _____(seal)
-Borrower

Printed Name:_____
(Please Complete)

_____(seal)
-Borrower

_____

Printed Name:_____
(Please Complete)

_____(seal)
-Borrower

_____(seal)
-Borrower

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 _____ by (name of owner)_____.

_____
Notary Public

(Seal)

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 _____ by (name of contractor)_____.

_____
Notary Public

(Seal)"

Figure: 7 TAC §90.604(a)(12)

NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS.

TEXAS HOME IMPROVEMENT MECHANIC'S LIEN CONTRACT FOR IMPROVEMENT AND POWER OF SALE

(Second Lien)

DATE_____

ACCOUNT/CONTRACT NO. _____

DEFINITIONS

(A) "Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker. "I" or "me" means the Owner.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies. "You" or "your" means the Contractor.

(C) "Lender" means (name of Lender), whose address is (address of Lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement and Power of Sale.

CONSTRUCTION OF IMPROVEMENTS

You agree to furnish and pay for all labor and material needed to complete the Work within _____ days from the date of this Contract. The Work will be performed on the Property in a good and workmanlike manner.

CONTRACT PRICE

I agree to pay, or cause to be paid, to you, or to your order, the sum of _____dollars (U.S. $_____) when the Work is completed.

TRANSFER OF LIEN

You transfer to Lender all of your rights and interests in this Contract.

COMPLETION BY CONTRACTOR, BUT NOT LENDER

You will complete the Work by the Completion Date. Lender is not responsible for completing the Work. Lender is not a guarantor of your performance. You will indemnify and hold Lender harmless against all claims related to the Work.

PARTIAL LIEN

If you do not complete the Work by the Completion Date in a good and workmanlike manner, then Lender will have a valid lien for the contract price, less the amount reasonably necessary to complete the Work. As an alternative, Lender may choose to complete the Work and the lien will be valid for the contract price.

CHANGES AND EXTRAS

All labor or material furnished outside of this Contract must be agreed upon in writing or it will be considered as performed under the original Contract and you will receive no extra money.

RECEIPTS AND RELEASES

If I ask, you will give me valid receipts and releases for the Work from any subcontractor, worker, and supplier.

NO WORK COMMENCED

This Contract is executed, acknowledged, and delivered before any labor has been performed and any material has been furnished for the Work.

TRUSTEE'S DUTIES

If you ask Trustee to foreclose this lien, Trustee will:

1. give notice of the foreclosure sale as required by the Texas Property Code;

2. sell and grant all or part of the Property "AS IS":

    a. to the highest bidder for cash;
    b. subject to prior liens and exceptions to conveyance and warranty; and
    c. without representation or warranty;

3. pay the proceeds of the sale, in this order:

    a. expenses of foreclosure, including Trustee's reasonable fee;
    b. the unpaid amount of principal, interest, attorneys' fees, and other charges due you;
    c. any amount required by law to be paid; and
    d. any balance to me; and

4. be indemnified by you for all costs, expenses, and liabilities incurred by Trustee in performance of Trustee's duties under this Contract.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Note: The following notice complies with Texas Property Code §41.007. In this notice, the terms "you" and "your" refer to the Owner.

IMPORTANT NOTICE: YOU AND YOUR CONTRACTOR ARE RESPONSIBLE FOR MEETING THE TERMS AND CONDITIONS OF THIS CONTRACT. IF YOU SIGN THIS CONTRACT AND YOU FAIL TO MEET THE TERMS AND CONDITIONS OF THIS CONTRACT, YOU MAY LOSE YOUR LEGAL OWNERSHIP RIGHTS IN YOUR HOME. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

_____
Owner

_____
Owner

_____
Contractor

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by __(name of owner)_____.

_____
Notary Public

(Seal)

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by __(name of contractor)_____.

_____
Notary Public

(Seal)

ASSIGNMENT

This lien is transferred and assigned to __(third party lender)_____.

_____
Contractor

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by __(name of contractor)_____.

_____
Notary Public

(Seal)

Figure: 7 TAC §90.604(a)(14)

NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS.

TEXAS HOME IMPROVEMENT MECHANIC'S LIEN CONTRACT FOR IMPROVEMENT, POWER OF SALE, AND DEED OF TRUST

(Second Lien)

DATE_____
ACCOUNT/CONTRACT NO. _____

DEFINITIONS

(A) "Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker. "I" or "me" means the Owner.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies. "You" or "your" means the Contractor.

(C) "Lender" means (name of Lender), whose address is (address of Lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(I) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest.

(J) "Loan Agreement" means the Note, Contract, and any other related document under which Lender has made a loan to me.

(K) "Applicable Law" means all controlling applicable federal, state, and local law.

(L) "Tenant at Sufferance" means a person who continues to possess the Property with no current right to possess it.

(M) "Forcible Detainer" means a lawsuit to remove a person from the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amount under this Contract.

(O) "Successor in Interest" means any party that has taken title to the Property.

(P) "Lien" means the Mechanic's and Materialman's Lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.

CONSTRUCTION OF IMPROVEMENTS

You agree to furnish and pay for all labor and material needed to complete the Work within _____ days from the date of this Contract. The Work will be performed on the Property in a good and workmanlike manner.

CONTRACT PRICE

I agree to pay, or cause to be paid, to you, or to your order, the sum of _____dollars (U.S. $_____) when the Work is completed.

NOTE PAYABLE TO LENDER

In exchange for money from the Lender to you, I have signed a Note to the Lender in the amount of _____dollars (U.S. $_____).

LIEN TO SECURE NOTE

To secure the amounts Lender provides to you, and the interest payable to Lender, I give you, and you transfer to Lender, the Lien. The Note is secured by a deed of trust, which I will sign. The deed of trust will renew and extend the Lien created by this Contract.

TRANSFER OF LIEN

You transfer to Lender all of your rights and interests in this Contract.

EXCEPTIONS TO CONVEYANCE AND WARRANTY

The exceptions to conveyance and warranty are:

(*List any exceptions to conveyance and warranty.*)

COMPLETION BY CONTRACTOR, BUT NOT LENDER

You will complete the Work by the Completion Date. Lender is not responsible for completing the Work. Lender is not a guarantor of your performance. You will indemnify and hold Lender harmless against all claims related to the Work.

PARTIAL LIEN

If you do not complete the Work by the Completion Date in a good and workmanlike manner, then Lender will have a valid lien for the contract price, less the amount reasonably necessary to complete the Work. As an alternative, Lender may choose to complete the Work and the lien will be valid for the contract price.

CHANGES AND EXTRAS

All labor or material furnished outside of this Contract must be agreed upon in writing or it will be considered as performed under the original Contract and you will receive no extra money.

RECEIPTS AND RELEASES

If I ask, you will give me valid receipts and releases for the Work from any subcontractor, worker, and supplier.

NO WORK COMMENCED

This Contract is executed, acknowledged, and delivered before any labor has been performed and any material has been furnished for the Work.

OWNER'S PROMISES AND RIGHTS

I promise that:

1. I own the Property in "fee simple," subject to the section in this Contract named "Exceptions to Conveyance and Warranty"; and
2. I will provide notice to Lender if I learn of a lien or claim for labor or material on the Property that relates to the Contract.

You agree that I have the following rights:

1. Despite anything to the contrary in this Contract, Lender may keep all amounts under sections 53.101 and 53.081 of the Texas Property Code until thirty days after the Work is completed;
2. I may deduct enough money from payments on the Note to the Lender to pay a lien or claim for labor or material provided to you that you are obligated to pay. I will still owe the amount in the Note; and
3. Without affecting the lien created by this Contract, I may use insurance proceeds to restore destroyed or damaged property for a loss occurring before the Work is completed.

OWNER'S DUTIES

I agree to:

1. pay timely all taxes and assessments on the Property;

2. preserve the lien's priority as it is established in this Contract;
3. pay all prior lien notes that I am responsible to pay and abide by all prior lien instruments;

4. because this Contract is for improvements to the Property, keep the Property other than those improvements in good repair and condition during the Work;

5. except to the extent that you are required to insure the Work during its progress, keep at my cost and expense, and in a form acceptable to you or your transferees, insurance policies having the following coverages issued by an insurance company or companies authorized to engage in the insurance business in Texas with a financial rating acceptable to you or your transferees:

   a. property insurance covering all improvements located on the Property in an amount not more than the actual amount of unpaid debt or the amount of their full replacement cost, whichever is less, containing a standard mortgage clause, provided that the amounts of coverage meet all coinsurance requirements of the policy;

   b. flood insurance, if the property is located in a flood hazard area; and

   c. any other insurance coverage that you or your transferees may reasonably require;

6. deliver the insurance policy to you within ten days of the date of the Contract and deliver renewals to you at least fifteen days before expiration;

7. I MAY PROVIDE THE INSURANCE REQUIRED OF ME BY THIS CONTRACT EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY ME OR THROUGH LIKE COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS;

8. comply with all laws, ordinances, and restrictive covenants applicable to the Property; and

9. keep any buildings occupied as required by the insurance policy.

CONTRACTOR'S DUTIES

You agree that:

1. Until the Work is completed, you will insure the Work against loss or damage. You will insure the Work in the amount of any unpaid debt or the full replacement cost, whichever is less. The parties to this Contract will be beneficiaries of this insurance according to their respective interests. If you do not provide this insurance, you will bear any loss to the Work.

2. If any other lien or claim is filed against the Property, you will pay for its removal or provide a statutory bond.

CONTRACTOR'S RIGHTS

You have the following rights:

1. You may appoint in writing a substitute Trustee.

2. After completing the Work, you may apply any insurance proceeds to either (a) reduce the Note or (b) repair or replace damaged or destroyed improvements.

3. If I fail to carry out any of my duties other than providing insurance, you may carry out the duty. On demand, I will repay you for any amount paid. This amount will include attorneys' fees to an attorney who is not your employee. I will also pay you interest at the contract rate in the Note. If I repay you after the full Note amount is due, I will repay you the after maturity interest rate in the Note. Any amount to be repaid will be secured by this Contract.

4. If I default on the Note or this Lien is foreclosed, I will repay you for reasonable fees to an attorney who is not your employee. I will also repay you for court, collection, and foreclosure costs. The amount to be repaid will be secured by this Contract.

5. After notice of default plus twenty-one days, you may:

   a. declare the unpaid principal balance and earned interest on the Note immediately due;
   b. ask Trustee to foreclose this Lien and to give notice of the foreclosure sale under the Texas Property Code; and
   c. buy the Property at any foreclosure sale and then credit the amount of the bid on the Note.

   Notice of default is given when deposited with the United States Postal Service (certified mail, return receipt requested), addressed to me at my current mailing address or, if my current mailing address is unknown, to my last known address as shown in the records of the holder of the debt.

TRUSTEE'S DUTIES

If you ask Trustee to foreclose this lien, Trustee will:

1. give notice of the foreclosure sale as required by the Texas Property Code;

2. sell and grant all or part of the Property "AS IS":

   a. to the highest bidder for cash;
   b. subject to prior liens and exceptions to conveyance and warranty; and
   c. without representation or warranty;

3. pay the proceeds of the sale, in this order:

   a. expenses of foreclosure, including Trustee's reasonable fee;
   b. the unpaid amount of principal, interest, attorneys' fees, and other charges due you;
   c. any amount required by law to be paid; and
   d. any balance to me; and

4. be indemnified by you for all costs, expenses, and liabilities incurred by Trustee in performance of Trustee's duties under this Contract.

GENERAL PROVISIONS

1. If you are dismissed from the Work, or you do not complete the Work, the Note amount will be reduced by the amount reasonably necessary to complete the Work. If you are not the Note holder, the holder may complete the Work.

2. This Contract is executed, acknowledged, and delivered before any labor has been performed or any material has been furnished for the Work. This Contract is entered into by all Owners with the consent of each Owner's spouse.

3. If any of the Property is sold under this Contract, I will immediately move from the Property. If I fail to do so, I will become a Tenant at Sufferance of the purchaser, subject to Forcible Detainer.

4. Statements in any Trustee's deed conveying the Property are assumed to be true.

5. The Lien is prior to liens created later, even if the Note is extended or part of the Property is released.

6. Payments will be applied first to satisfy any portion of the Note that is not secured by this Contract.

7. I transfer to you all condemnation proceeds. I also transfer to you all proceeds from a private sale in lieu of condemnation. I further transfer to you all damages caused by public works on or near the Property. After deducting any expenses, including attorneys' fees and court and other lawful costs, you will either release any remaining amounts to me or apply them to reduce the Note. I will immediately give you notice of any actual or threatened proceeding for a taking of all or part of the Property.

8. You do not elect remedies by continuing under this Contract, beginning foreclosure, or pursuing any other remedy.

9. As additional security, I assign to you the rents of the Property, provided that you have the right, prior to acceleration or abandonment of the Property, to collect and retain the rents as they become due. Upon acceleration or abandonment, you, by agent or by court-appointed receiver, will be entitled to enter, take possession, manage the Property, and collect due and past due rents. All rents you or the court-appointed receiver collect will be applied first to payment of the costs of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorneys' fees, and then to the sums secured by this Security Document. You and the receiver will be liable to account only for rents received.

10. I do not have to pay interest or other amounts that are more than Applicable Law allows.

11. Where appropriate, singular nouns and pronouns include the plural.

12. The word "may" gives sole discretion without imposing any duty to take action.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Note: The following notice complies with Texas Property Code §41.007. In this notice, the terms "you" and "your" refer to the Owner.

IMPORTANT NOTICE: YOU AND YOUR CONTRACTOR ARE RESPONSIBLE FOR MEETING THE TERMS AND CONDITIONS OF THIS CONTRACT. IF YOU SIGN THIS CONTRACT AND YOU FAIL TO MEET THE TERMS AND CONDITIONS OF THIS CONTRACT, YOU MAY LOSE YOUR LEGAL OWNERSHIP RIGHTS IN YOUR HOME. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

_____
Owner

_____
Owner

_____
Contractor

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by __(name of owner)_____.

_____
Notary Public

(Seal)

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by __(name of contractor)_____.

_____
Notary Public

(Seal)

ASSIGNMENT

This lien is transferred and assigned to (third party lender)_____.

_____
Contractor

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by (name of contractor)_____.

_____
Notary Public

(Seal)

Figure: 7 TAC §90.604(a)(16)

NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS.

TEXAS HOME IMPROVEMENT
DEED OF TRUST
ASSIGNMENT OF CONTRACTOR'S LIEN
(Second Lien)

DEFINITIONS

(A) "Borrower" is _____. Borrower's address is _____.

(B) "Contractor" is _____. Contractor's address is _____.

(C) "Lender" is _____. Lender's address is _____.

(D) "Trustee" is _____. Trustee's address is _____.

(E) "I" or "me" means _____, the grantor under this Deed of Trust and the person who signed the Note ("Borrower").

(F) "Loan Agreement" means the Contract, Note, Security Document, Deed of Trust, any other related document, or any combination of those documents, under which Lender has made a loan to me.

(G) "Deed of Trust" means this document, which is dated _____, together with all riders to this document.

(H) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe Lender is _____ dollars (U.S. $_____) plus interest.

(I) "Property" means the property at (list address of the Property), whose legal description is (list legal description of the Property).

(J) "Applicable Law" means all controlling applicable federal, state, and local law.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or the Property by a condominium association, homeowners association, or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section ___ of this Deed of Trust.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: damage or destruction of the Property; condemnation or other taking of all or any part of the Property; conveyance instead of condemnation; or misrepresentations or omissions related to the value or condition of the Property.

(O) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amounts under this Deed of Trust.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 *et seq.*) and Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Deed of Trust, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest" means any party that has taken title to the Property.

(R) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Deed of Trust. Such an arrangement usually takes the form of a long-term "ground lease."

(S) "Contract" means the Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(T) "Lien" means the Mechanic's and Materialman's Lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.

TRANSFER OF RIGHTS IN THE PROPERTY

I give the Property to Trustee to ensure Lender is repaid the debt evidenced by my Note dated _____ and any renewal or extension, to ensure Lender is repaid any sums (with interest) Lender advances to protect the security of this Deed of Trust, and to guarantee my promises. I give to the Trustee, in trust, with power of sale, the Property located in _____ County at *(Street Address) (City) (State) (Zip Code)* and further described as:

(Legal Description)

The security interest in the Property includes existing and future improvements, easements, fixtures, attachments, replacements and additions to the Property, insurance refunds, and proceeds.

I promise that I own the Property and have the right to grant Lender an interest in it. I also promise that the Property is free of any lien, except liens that are publicly recorded. I promise that I will generally defend the title to the Property. I will be responsible for Lender's losses that result from a conflicting ownership right in the Property. Any default under my agreements with Lender will be a default of this Deed of Trust.

LENDER AND I PROMISE:

PAYMENT OF LATE CHARGES AND PREPAYMENT

I will timely pay the principal, interest, and any other amounts due under the Loan Agreement. I will comply with the requirements of my escrow account under the Loan Agreement. I will make payments in U.S. currency. If any check is returned to Lender unpaid, Lender may select the form of future payments including:

a. cash;
b. money order;
c. certified check, bank check, treasurer's check or cashier's check drawn upon an institution whose deposits are federally insured; or
d. Electronic Funds Transfer.

I will make payments to the location as Lender directs. Lender will apply my payments against the Loan Agreement only when they are received at the designated location. Lender may change the location for payments if Lender gives me notice.

Lender may return any partial payment that does not bring the account current. Lender may accept any payment or partial payment that does not bring the account current without losing Lender's rights to refuse full or partial payments in the future. I will not use any offset or claim against Lender to relieve me from my duty to make payments under the Loan Agreement.

FUNDS FOR ESCROW ITEMS

I will pay Lender an amount ("Funds") for:

a. taxes and assessments and other items that can take priority over Lender's security interest in the Property under the Loan Agreement;
b. leasehold payments or Ground Rents on the Property, if any; and
c. premiums for any insurance Lender requires under the Loan Agreement.

These items are called "Escrow Items." At any time during the term of the Loan Agreement, Lender may require me to pay Community Association Dues, Fees, and Assessments, if any, as an Escrow Item.

I will promptly give Lender all notices of amounts to be paid. I will pay Lender the Funds for Escrow Items unless Lender, at any time, waives my duty to pay Lender. Any escrow waiver must be in writing. If Lender waives my duty to pay Lender the Funds, I will pay, at Lender's direction, the amounts due for waived Escrow Items. If Lender requires, I will give Lender receipts showing timely payment. My duty to make Escrow Item payments and to provide receipts is an independent promise in the Loan Agreement.

If Lender grants me an escrow waiver, Lender may require me to pay the waived Escrow Items. If I fail to directly pay the waived Escrow Items, Lender may use any right given to Lender in the Loan Agreement. Lender may pay waived Escrow Items and require me to repay Lender. Lender may cancel the waiver for Escrow Items at any time by a notice that complies with the Loan Agreement. If Lender cancels the waiver, I will pay Lender all Funds that are then required under this Section.

At any time Lender may collect and hold Funds in an amount:

a. to permit Lender to apply the Funds at the time specified under RESPA; and
b. not to exceed the maximum amount Lender may require under RESPA.

Lender will estimate the amount of Funds due on the basis of current data and reasonable estimates of future expenses for Escrow Items or otherwise, according to Applicable Law. The Funds will be held in an institution whose deposits are federally insured (including Lender, if Lender's deposits are insured) or in any Federal Home Loan Bank.

Lender will timely pay Escrow Items as required by RESPA. Lender will not charge me a fee for maintaining or handling my escrow account. Lender is not required to pay me any interest on the amounts in my escrow account. Lender will give me an annual accounting of the Funds as required by RESPA. If

there is a surplus in my escrow account, Lender will follow RESPA. If there is a shortage or deficiency, as defined by RESPA, Lender will notify me, and I will pay Lender the amount necessary to make up the shortage or deficiency. I will repay the shortage or deficiency in no more than twelve monthly payments. Lender will promptly return to me any Funds after I have paid the Loan Agreement in full.

CHARGES AND LIENS

I will timely pay all taxes, assessments, charges, and fines relating to the Property that can take priority over this Deed of Trust. I also will timely pay leasehold payments or Ground Rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. If these items are Escrow Items, I will pay them as required by the Loan Agreement. I will promptly satisfy any lien that has priority over this Deed of Trust unless I:

a. agree in writing to pay the amount secured by the lien in a manner acceptable to Lender and only so long as I comply with my agreement;
b. contest the lien in good faith by stopping the enforcement of the lien through legal proceedings (this contest must be satisfactory to Lender); or
c. obtain an agreement from the holder of the lien that is satisfactory to Lender.

If Lender determines that any part of the Property is subject to a lien that can take priority over this Deed of Trust, Lender may give me a notice identifying the lien. I will satisfy the lien or take one or more of the actions described above in this Section within 10 days of the date of the notice.

PROPERTY INSURANCE

I WILL INSURE THE CURRENT AND FUTURE IMPROVEMENTS TO THE PROPERTY AGAINST LOSS BY FIRE, HAZARDS INCLUDED WITHIN THE TERM "EXTENDED COVERAGE," AND ANY OTHER HAZARDS INCLUDING EARTHQUAKES AND FLOODS, AS LENDER MAY REQUIRE. I WILL KEEP THIS INSURANCE IN THE AMOUNTS (INCLUDING DEDUCTIBLE LEVELS) AND FOR THE PERIODS THAT LENDER REQUIRES. LENDER MAY CHANGE THESE INSURANCE REQUIREMENTS DURING THE TERM OF THE LOAN AGREEMENT. I HAVE THE RIGHT TO CHOOSE AN INSURANCE CARRIER THAT IS ACCEPTABLE TO LENDER. LENDER WILL EXERCISE LENDER'S RIGHT TO DISAPPROVE REASONABLY. I MAY PROVIDE ANY INSURANCE REQUIRED BY THIS DEED OF TRUST EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY ME OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

I will pay any fee charged by the Federal Emergency Management Agency for the review of any flood zone determination. Lender may require me to pay either:

a. a one-time charge for flood zone determination, certification and tracking services; or
b. a one-time charge for flood zone determination and certification services; and subsequent charges each time re-mappings or similar changes occur that reasonably might affect the determination or certification.

If I do not keep any required insurance, Lender may obtain insurance at Lender's option and at my expense. Lender is not required to purchase any type or amount of insurance. Any insurance Lender buys will always protect Lender, but may not protect me, my equity in the Property, my contents in the Property or protect me from certain hazards or liability. I understand that this insurance may cost significantly more than insurance I can purchase. I will owe Lender for the cost of any insurance that Lender buys under this Section. Interest will be charged on this amount at the interest rate used by the Note. The interest will be charged from the date Lender made the payment. Lender will give me notice of the amounts I owe under this Section.

Lender may disapprove any insurance policy or renewal. Any insurance policy must include a standard mortgage clause, and must name Lender as mortgagee or a loss payee. I will give Lender all insurance premium receipts and renewal notices, if Lender requests. If I obtain any optional insurance to cover damage or destruction of the Property, I will name Lender as a loss payee. In the event of loss, I will give notice to Lender and the insurance company. Lender may file a claim if I do not file one promptly. Lender will apply insurance proceeds to repair or restore the Property unless Lender's interest will be reduced or it will be economically unreasonable to perform the Work. Lender may hold the insurance proceeds until Lender has had an opportunity to inspect the Work and Lender considers the Work to be acceptable. The insurance proceeds may be given in a single payment or multiple payments as the Work is completed. Lender will not pay any interest on the insurance proceeds. If I hire a public adjuster or other third party, I am responsible for the fee. It will not be paid from the insurance proceeds. The insurance proceeds will be applied to the amount I owe if Lender's interest will be reduced or if the Work will be economically unreasonable to perform. Lender will pay me any excess insurance proceeds. Lender will apply insurance proceeds in the order provided by the Loan Agreement.

If I abandon the Property Lender may file, negotiate, and settle any insurance claim. If the insurance company offers to settle a claim and I do not respond within thirty days to a notice from Lender, then Lender may settle the claim. The 30-day period will begin when the notice is given. If I abandon the Property, fail to respond to the offer of settlement, or Lender forecloses on the Property, I assign to Lender:

a. my rights to any insurance proceeds in an amount not greater than what I owe; and
b. any of my other rights under insurance policies covering the Property.

Lender may apply the proceeds to repair or restore the Property or to the amount that I owe.

PRESERVATION, MAINTENANCE, PROTECTION, AND INSPECTION OF THE PROPERTY

I will not destroy, damage, or impair the Property, allow it to deteriorate, or commit waste. Whether or not I live in the Property, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to the Property to avoid further deterioration or damage unless Lender and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring the Property only if Lender releases the insurance or condemnation proceeds for the damage to or the taking of the Property. Lender may release proceeds for the repairs and restoration in a single payment or in a series of payments as the Work is completed. I still am obligated to complete repairs or restoration of the Property even if there are not enough proceeds to complete the Work. If this Deed of Trust secures a unit in a condominium or planned unit development, I will perform all of my obligations under the declaration or covenants creating or governing the condominium or planned unit development, and any other relevant document.

Lender or Lender's agent may inspect the Property. Lender may inspect the interior of the Property with reasonable cause. Lender will give me notice stating reasonable cause when or before the interior inspection occurs.

PROTECTION OF LENDER'S INTEREST IN THE PROPERTY AND RIGHTS UNDER THE DEED OF TRUST

Lender may do whatever is reasonable to protect Lender's interest in the Property, including protecting or assessing the value of the Property, and securing or repairing the Property. Lender may do this when:

a. I fail to perform the promises and agreements contained in the Loan Agreement;
b. a legal proceeding might significantly affect Lender's interest in the Property or rights under the Loan Agreement (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may have priority over the Loan Agreement or to enforce laws or regulations); or
c. I abandon the Property.

In order to protect Lender's interest in the Property, Lender may:

a. pay amounts that are secured by a lien on the Property which has or will have priority over the Loan Agreement;
b. appear in court; or
c. pay reasonable attorneys' fees.

Lender may enter the Property to secure it. To secure the Property, Lender may make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Lender has no duty to secure the Property. Lender is not liable for failing to take any action listed in this Section. Any amounts Lender pays under this Section will become my additional debt secured by the Loan Agreement. These amounts will earn interest at the rate specified in the Loan Agreement. The interest will begin on the date the amounts are paid. Lender will give me notice requesting payment of these amounts. If the Loan Agreement is on a leasehold, I will comply with the lease.

ASSIGNMENT OF MISCELLANEOUS PROCEEDS AND FORFEITURE

Any Miscellaneous Proceeds will be assigned and paid to Lender. If the Property is damaged, Miscellaneous Proceeds will be applied to restore or repair the Property. Lender will only do this if Lender's interest in the Property will not be reduced and if the work will be economically reasonable to perform. Lender will have the right to hold Miscellaneous Proceeds until Lender inspects the Property to ensure the work has been completed to Lender's satisfaction. Lender must make the inspection promptly. Lender may release proceeds for the work in a single payment or in multiple payments as the work is completed. Lender is not required to pay me any interest on the Miscellaneous Proceeds. The Miscellaneous Proceeds will be applied to the amount I owe if Lender's interest in the Property will be reduced or the work will be economically unreasonable to perform. Lender will pay me any excess Miscellaneous Proceeds. Lender will apply Miscellaneous Proceeds in the order provided by the Loan Agreement.

Lender will apply all Miscellaneous Proceeds to the amount I owe in the event of a total taking, destruction, or loss in value of the Property. Lender will apply the Miscellaneous Proceeds even if all payments are current. Lender will give any excess Miscellaneous Proceeds to me.

A partial loss can include a taking, destruction, or loss in value. In the event of a partial loss, the Miscellaneous Proceeds will be applied in one of two ways:

a. If the fair market value of the Property immediately before the partial loss is less than the amount I owe immediately before the partial loss, then Lender will apply all Miscellaneous Proceeds to the amount I owe even if all payments are current.
b. If the fair market value of the Property immediately before the partial loss is equal to or greater than the amount I owe immediately before the partial loss, then Lender will apply Miscellaneous Proceeds to the amount I owe in the following manner:
    1. The amount of Miscellaneous Proceeds multiplied by the result of,
    2. The amount I owe immediately before the partial loss divided by the fair market value of the Property immediately before the partial loss.

Lender and I can agree otherwise in writing. Lender will give any excess Miscellaneous Proceeds to me.

If I abandon the Property, Lender may apply Miscellaneous Proceeds either to restore or repair the Property, or to the amount I owe.

Damage to the Property caused by a third party may result in a civil proceeding. If Lender gives me notice that the third party offers to settle a claim for damages to the Property and I fail to respond to Lender within thirty days, Lender may accept the offer and apply the Miscellaneous Proceeds either to restore or repair the Property or to the amount I owe. If the proceeding results in an award of damages, Lender will apply the Miscellaneous Proceeds according to this Section.

FORBEARANCE NOT A WAIVER

If Lender doesn't enforce Lender's rights every time, Lender can still enforce them later.

JOINT AND SEVERAL LIABILITY, DEED OF TRUST EXECUTION, SUCCESSORS OBLIGATED

I understand that Lender may seek payment from only me without first looking to any other Borrower.

Any person who signs this Deed of Trust, but not the Note:

a. will not have to repay the Note;
b. is not a surety or guarantor; and,
c. only gives a security interest in the Property under this Deed of Trust.

The Lien against the Property is voluntary. Each owner and each owner's spouse consent to the Lien. Lender and I may modify the Loan Agreement in writing. Lender must approve my successor in writing. My successor will receive all of my rights and benefits under the Loan Agreement. I still will be responsible under the Loan Agreement unless Lender releases me in writing. The Loan Agreement will extend to Lender's assigns or successors.

USURY SAVINGS CLAUSE

I do not have to pay interest or other amounts that are more than Applicable Law allows.

MAILING OF NOTICES TO BORROWER

Lender or I may mail or deliver any notice to the address above. Lender or I may change the notice address by giving written notice. Lender's duty to give me notice will be satisfied when Lender mails it.

APPLICATION OF LAW

Federal law and Texas law apply to this Loan Agreement.

RULES OF CONSTRUCTION

As used in the Loan Agreement:

a. words in the singular will mean and include the plural and vice versa; and
b. the word "may" gives discretion without imposing any duty to take action.

LOAN AGREEMENT COPIES

At the time the Loan Agreement is made, Lender will give me copies of all documents I sign.

DUE ON SALE CLAUSE, NOTICE OF INTENT TO ACCELERATE, AND NOTICE OF ACCELERATION

If all or any interest in the Property is sold or transferred without Lender's prior written consent, Lender may require immediate payment in full of all that I owe under this Loan Agreement. Lender will not exercise this option if Applicable Law prohibits.

If Lender exercises this option, Lender will give me notice that Lender is demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, Lender may use any remedy allowed by the Loan Agreement.

LENDER, CONTRACTOR, AND I PROMISE AND AGREE:

ACCELERATION AND REMEDIES

Lender will give me notice prior to acceleration if I am in default under the Loan Agreement. The notice will specify:

a. the default;
b. the action required to cure the default;
c. a date, not less than 21 days from the date Lender gives me notice, to cure the default; and
d. that my failure to cure the default on or before the specified date will result in acceleration of all that I owe under the Loan Agreement and sale of the Property.

Lender will inform me of my right to reinstate after acceleration. If the default is not cured before the specified date, Lender has the option to require immediate payment in full of all I owe. If Lender is not paid all I owe, Lender may sell the Property or seek other remedies allowed by Applicable Law without further notice. Lender may collect Lender's reasonable expenses incurred in seeking the remedies provided in this Section. These expenses may include court costs, attorneys' fees, and costs of title search.

I understand the power of sale is not a confession of judgment or a power of attorney to confess judgment or an appearance by me in a judicial proceeding. If the Property is sold under this Section I or my successors will immediately give possession of the Property to the purchaser. If I do not, I or anyone residing on the Property may be removed by writ of possession.

POWER OF SALE

Lender has a fully enforceable lien on the Property. Lender's remedies for my default include an efficient means of foreclosure under the law. Lender and the Trustee have all powers to conduct a foreclosure. If Lender chooses to use the power of sale, Lender will give me notice of the time, place and terms of the sale by posting and filing notice at least 21 days before the sale as provided by law. Lender will give me notice by mail as required by law. Failure to cure default on or before the date in the notice may result in acceleration of the amount that I owe under this Loan Agreement. The notice will inform me of my right to reinstate after acceleration and assert in court that I am not in default or any other defense to acceleration or sale. If I do not cure the default on or before the date in the notice, Lender, at Lender's option, may declare all that I owe under this Loan Agreement to be immediately due and payable and may invoke the power of sale and any other remedies permitted by Applicable Law. The sale will be conducted at a public place. The sale will be held:

a. on the first Tuesday of a month;
b. at a time stated in the notice or no later than 3 hours after the time; and
c. between 10:00 a.m. and 4:00 p.m.

I allow the Trustee to sell the Property to the highest bidder for cash in one or more pieces and in any order the Trustee determines. Lender may purchase the Property at any sale.

Trustee will give a Trustee's deed to the foreclosure sale purchaser. A Trustee's deed will convey:

a. good title to the Property; and
b. title with promises of general warranty from me.

I will defend the purchaser's title to the Property against all claims and demands. The description of facts contained in the Trustee's deed will be sufficient to legally prove the truth of the statements made in the deed. Trustee will apply the proceeds of the sale in the following order:

a. to all expenses of the sale, including court costs and reasonable Trustee's and attorneys' fees;
b. what I owe; and
c. any excess to the person or persons legally entitled to it.

If the Property is sold through a foreclosure sale governed by this Section, I or any person in possession of the Property through me, will give up possession of the Property without delay. A person who does not give up possession is a holdover and may be removed by a court order.

BORROWER'S RIGHT TO REINSTATE AFTER ACCELERATION

I have the right to stop Lender from enforcing the Loan Agreement any time before the earliest of:

a. 5 days before sale of the Property under any power of sale included in the Loan Agreement;
b. the day required by Applicable Law for the termination of my right to reinstate; or
c. the entry of a judgment enforcing the Loan Agreement.

I can stop the enforcement of the Loan Agreement and reinstate the Loan Agreement if all the following conditions are met:

a. Lender is paid what I owe under the Loan Agreement as if no acceleration had occurred;
b. I cure any default of any promise or agreement;
c. Lender is paid all expenses allowed by Applicable Law, including reasonable attorneys' fees and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under the Loan Agreement;
d. I comply with any reasonable requirement to assure Lender that Lender's interest in the Property will remain intact; and
e. I comply with any reasonable requirement to assure Lender that my ability to pay what I owe will remain intact.

Lender may require me to pay for the reinstatement in one or more of the following forms:

a. cash;
b. money order;
c. certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are federally insured; or
d. Electronic Funds Transfer.

Upon reinstatement, the Loan Agreement will remain effective as if no acceleration had occurred. However, this right to reinstate will not apply if I sell or transfer any interest in the Property without Lender's permission.

ASSIGNMENT OF RENTS, APPOINTMENT OF RECEIVER, LENDER IN POSSESSION

As additional security, I assign to you the rents of the Property, provided that you have the right, prior to acceleration or abandonment of the Property, to collect and retain the rents as they become due. Upon acceleration or abandonment, you, by agent or by court-appointed receiver, will be entitled to enter, take possession, manage the Property, and collect due and past due rents. All rents you or the court-appointed receiver collect will be applied first to payment of the cost of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorneys' fees, and then to the sums secured by this Deed of Trust. You and the receiver will be liable to account only for rents received.

RELEASE

Lender will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the Lien to a Lender that is refinancing the Loan Agreement. I will pay only the cost of recording the release of lien.

TRUSTEES AND TRUSTEE LIABILITY

One or more Trustees acting alone or together may exercise or perform all rights, remedies and duties of the Trustee under the Loan Agreement. Lender may remove or change any Trustee (e.g., add one or more Trustees or appoint a successor Trustee to any Trustee). This removal or change of Trustee must be in writing and may be:

a. at Lender's option;
b. with or without cause; and
c. by power of attorney or otherwise.

The substitute, additional, or successor Trustee will receive the title, rights, remedies, powers, and duties under the Loan Agreement and Applicable Law.

Trustee may rely upon any notice, request, consent, demand, statement, or other document reasonably believed by Trustee to be valid. Trustee will not be liable for any act or omission unless the act or omission is willful.

ASSIGNMENT OF CONTRACTOR'S LIEN, COMMENCEMENT OF WORK

Contractor and I have entered into the Contract for improvements to be made to the Property. I will perform my duties under the Contract. Under the Contract, I gave Contractor a Lien on the Property. Contractor permanently transfers the Lien and any other interest Contractor has in the Property to Lender. As additional security, Contractor also agrees that the lien created by this Deed of Trust has priority over the Lien. The purpose of the Note is to pay in whole or in part the improvements to be made to the Property by the Contractor. Contractor and I agree that the Lien is for Lender's sole benefit. Any other interest Contractor has in the Property will be merged with the Lien, and may be enforced by Lender according to the terms of this Deed of Trust. Contractor and I further agree that no Work was performed or material delivered before the Contract was executed.

SUBROGATION

If I ask, Lender will use proceeds from the Loan Agreement to pay off all valid outstanding liens against the Property. Lender will then own all rights, superior titles, liens, and interests owned or claimed by any owner or holder of an outstanding lien or debt. Lender owns these things whether the lien or debt is transferred to Lender or whether it is released by the holder upon payment.

PARTIAL INVALIDITY

If any portion of the sums secured by this Deed of Trust cannot be lawfully secured, payments minus those sums will be applied first to the portions not secured. If any charge provided for in this Loan Agreement, separately or together with other charges that are considered part of this Loan Agreement, violates Applicable Law, the charge is reduced to the extent necessary to eliminate the violation. Lender will refund the amount of interest or other charges paid to Lender in excess of the amount permitted by Applicable Law. At Lender's option, the amount in excess will either be refunded directly to me or will be applied to reduce the principal of the debt.

RENEWAL AND EXTENSION

The Note secured by this Deed of Trust is renewed and extended, but not in extinguishment of the debt under the Contract identified in the paragraph entitled "Assignment of Contractor's Lien, Commencement of Work" and the Note.

SALE OF NOTE, CHANGE OF LOAN SERVICER, NOTICE OF GRIEVANCE, LENDER'S RIGHT TO COMPLY

A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect my monthly payment and will comply with other servicing conditions required by the Loan Agreement or Applicable Law. In some cases, the company servicing or handling the Loan Agreement may change even if the Loan Agreement is not sold. If the company servicing or handling the Loan Agreement is changed, I will be given written notice of the change. The notice will state the name and address of the new company, the address to which my payments should be made, and any other information required by RESPA.

Any notice of acceleration and opportunity to cure under the Loan Agreement will satisfy the notice and opportunity to address the alleged violation provisions of this Section.

No agreement between Lender and me or any third party will limit Lender's ability to comply with Lender's duties under the Loan Agreement and Applicable Law.

Lender and I are limiting all agreements so that all current or future interest or fees in connection with this Loan Agreement will not be greater than the highest amount allowed by Applicable Law.

Lender and I intend to conform the Loan Agreement to the provisions of Applicable Law. If any part of the Loan Agreement is in conflict with the Applicable Law, then that part will be corrected or removed. This correction will be automatic and will not require any amendment or new document. Lender's right to cure any violation will survive my paying off the Loan Agreement. My right to cure will override any conflicting provision of the Loan Agreement.

Lender's right to comply as provided in this Section will survive the payoff of the Loan Agreement. The provisions of this Section will supersede any inconsistent provision of the Loan Agreement.

HAZARDOUS SUBSTANCES

Hazardous Substances:

a. "Hazardous Substances" means those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials;
b. "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection;
c. "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and
d. "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

I will not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. I will not do, or allow anyone else to do, anything affecting the Property:

a. that is in violation of any Environmental Law;
b. that creates an Environmental Condition; or
c. that, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property.

The presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and for the maintenance of the Property are allowed. This includes Hazardous Substances found in consumer products.

I will promptly give Lender written notice of:

a. any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which I have actual knowledge;
b. any Environmental Condition, including any spilling, leaking, discharge, release or threat of release of any Hazardous Substance; and
c. any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property.

If I learn that, or am notified by any governmental or regulatory authority, or any private party that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, I promptly will take all necessary remedial actions in accordance with Environmental Law. Lender will have no obligation for an Environmental Cleanup.

LENDER'S RIGHTS AND BORROWER'S RESPONSIBILITIES

Lender is entitled to all rights, superior title, liens, and equities owned or claimed by any grantor or holder of any liens and debts due before the signing of the Loan Agreement. Lender may acquire these rights by assignment or the holder may release them upon payment.

Each person who signs the Deed of Trust is responsible for each promise and duty in the Deed of Trust.

Unless prohibited by Applicable Law, this Section will not:

a. impair in any way the Loan Agreement or Lender's right to collect all that I owe under the Loan Agreement;
b. affect Lender's right to any promise or condition of the Loan Agreement.

DEFAULT

Any default of my agreements with Lender will be a default of this Deed of Trust.

REQUEST FOR NOTICE OF DEFAULT
AND FORECLOSURE UNDER SUPERIOR
MORTGAGES OR DEEDS OF TRUST

Lender and I request that the holder of any mortgage, deed of trust or other claim with a lien that has priority over this Deed of Trust give Lender notice, at Lender's address listed on this Deed of Trust, of any default under the superior claim and of any sale or other foreclosure action.

BY SIGNING BELOW, I accept and agree to the terms and promises contained in the Loan Agreement and in any rider I sign which is recorded with it. (DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. I MUST RECEIVE A COPY OF ANY DOCUMENT I SIGN.)

IN WITNESS WHEREOF, Borrower and Contractor have executed this Deed of Trust and Assignment of Contractor's Lien.

-Contractor

By:_____

_____

Printed Name:_____
(Please Complete)

_____

Printed Name:_____
(Please Complete)

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 _____ by __(name of owner)_____.

_____
Notary Public

(Seal)

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 _____ by ___(name of contractor)_____.

_____
Notary Public

(Seal)

Figure: 16 TAC §402.451(h)

Excess Funds as a Percentage of the Operating Capital Limit	Last Day to Disburse Excess Funds
Less than 200%	September 30, 2010
200% - 299%	September 30, 2011
Greater than or equal to 300%	September 30, 2012

Figure: 25 TAC §117.106

Table 1
Staffing Levels of Direct Care Staff

Patients Receiving Treatment	RN	RN or LVN	Direct Care Staff (RN, LVN, or PCT)	Total Clinical Staff
1-7	1		1	2
8	1		2	3
9	1		3	4
10	1		3	4
11	1		3	4
12	1		3	4
13	1	1	4	6
14	1	1	4	6
15	1	1	4	6
16	1	1	4	6
17	1	1	5	7
18	1	1	5	7
19	1	1	5	7
20	1	1	5	7
21	1	1	6	8
Etc.				

Figure: 37 TAC §35.93

VIOLATION	VIOLATION DESCRIPTION	FINE AMOUNT
UNI - Uniform violation	Failed to have last name identification on outermost garment except plastic raingear	$25.00
UNI - Uniform violation	Failed to have the word "Security" on outermost garment except plastic raingear	$50.00
UNI - Uniform violation	Failed to have company name on outermost garment except plastic raingear	$50.00
FPPC- Failure to present pocket card	Failure to present pocket card upon request	$100.00
PCV - Pocket card violation	Failed to have a color photograph affixed to the pocket card	$50.00
PCV - Pocket card violation	Failed to have signature on the back of the pocket card	$25.00
RECV - Employee records violation	Full name of employee	$25.00
RECV - Employee records violation	Position of employee	$25.00
RECV - Employee records violation	Current residence of the security officer as reported by security officer	$25.00
RECV - Employee records violation	Date of employment when performing a regulated service	$25.00
RECV - Employee records violation	Address of employee as reported by employee	$25.00
RECV - Employee records violation	Social security number	$25.00
RECV - Employee records violation	Last date of employment	$25.00
RECV - Employee records violation	Date of birth	$25.00
RECV - Employee records violation	Place of birth	$25.00
RECV - Employee records violation	One color photograph	$25.00
RECV - Employee records violation	Failed to keep employee records two years from termination	$100.00
RECV - Employee records violation	Commission only - current duty assignment and location	$50.00
DT - RECV - Drug testing record violation	Failure to comply with drug free workplace policy within 10 working days of notice from the	$500.00 per quarter
	Private Security Bureau (PSB)	
OPSL - Operating while license suspended	Failure to maintain current insurance	$500.00 every 14 days
OPSI - Operating outside scope insurance	Operating outside the scope of insurance coverage	$500 per violation
OPWI - Operating without insurance	Operating without insurance	$500 per violation
FPPI- Failure to provide proof of insurance	Failure to provide requested proof of insurance within 10 working days of notice from PSB	$100 per day
OPEL -Operating while license expired	Operating with an expired license	$500.00 every 14 days
REG - Registration violation	Failure to register employee within 5 days of employee actually beginning work	$200.00
ADDR - Address change violation	Failure to notify PSB within 14 days of change of address	$350.00
CON - Other contract violation	Licensee failure to provide requested written report within 7 days	$500.00
DISP - Consumer sign violation	Failure to display the consumer sign in a prominent place	$100.00
POST - Failure to post license	Failed to post the license	$100.00
CON - Other contract	Licensee failure to provide requested written contract within 7 days	$500.00
ADV - Advertising violation	Failed to have company name as stated in board records	$100.00
ADV - Advertising violation	Failed to have company address as stated in board records	$100.00
ADV - Advertising violation	Failed to have license number as issued by the board	$100.00
PRNT - Fingerprint violation	Failed to obtain fingerprints prior to placing on post	$250.00
BRNC - Failure to notify establishment of branch office	Failed to notify board within 14 days of opening branch office	$500.00
BRNT - Failure to notify closing of branch office	Failed to notify board within 14 days of closing of branch office	$350.00
CHNG - Failure to notify board of change of license name	Failure to notify board of a change in business name	$500.00
FLAG - Business use of flag of Texas	Licensee using the state flag of Texas	$500.00
MGRQ - Failure to qualify a manager	Failed to qualify a manager within 60 days	$500.00 every 14 days
MGRS - Manager failing to control business	Manager failing to control business	$3,000.00
MGRT - Failing to notify board of manager term within 14 days	Failed to notify board of manager term within 14 days	$500.00
OPS - Failure to notify board of a change of ownership	Failed to notify change of ownership within 14 days	$500.00 every 14 days
SEAL - Using state seal or DPS seal	Using state seal of Texas or DPS seal	$500.00
MGRS - Manager controlling excessive businesses	Manager controlling more than 3 companies and 2 schools	$3,000.00

Figure: 37 TAC §159.17(c)

TEXAS WORKFORCE COMMISSION
MEMORANDUM OF UNDERSTANDING
NONFINANCIAL AGREEMENT

		TWC Contract Number	**2911NFA000**
TITLE	**Project Reintegration of Offenders (Project RIO)**		
Party #1 Information			
Name	**Texas Department of Criminal Justice**	Contact	**Brad Livingston**
Mailing Address	**PO Box 13084**	Contact Title	**Executive Director**
City/State/Zip	**Austin, TX 78711**	Telephone Number	**(512) 463-9776**
Party #2 Information			
Name	**Texas Workforce Commission**	Contact	**Nicole Verver**
Mailing Address	**101 East 15th Street**	Contact Title	**Director, Workforce Policy**
City/State/Zip	**Austin, TX 78778**	Telephone Number	**(512) 936-3160**
Party #3 Information			
Name	**Texas Youth Commission**	Contact	**Connie Simon**
Mailing Address	**PO Box 4260**	Contact Title	**Workforce Development Manager**
City/State/Zip	**Austin, TX 78765**	Telephone Number	**(512) 424-6091**

Agreement Period

Begin Date: **September 1, 2010** End Date: **August 31, 2014**

Purpose

To provide a delineation of responsibilities related to the administration and operation of Project RIO. This Nonfinancial Agreement (Agreement) is developed with the intent to coincide with all contracts, strategic plans, policies, or agreements that affect the structure and scope of the Project RIO program.

Agreement Approval

This Agreement is contingent on all Parties' acceptance of and compliance with the terms and conditions of this Agreement and any referenced attachments.

Each person signing this Agreement on behalf of the Agency and the other Parties hereby warrants that he or she has been fully authorized by his or her organization to:

- **execute this agreement on behalf of the organization; and**
- **validly and legally bind the organization to all of the terms, performances, and provisions of this Agreement.**

Texas Department of Criminal Justice:

Brad Livingston, Executive Director Date
Texas Department of Criminal Justice

Texas Workforce Commission:

Larry E. Temple, Executive Director Date
Texas Workforce Commission

Texas Youth Commission:

Cheryln K. Townsend, Executive Director Date
Texas Youth Commission

TEXAS WORKFORCE COMMISSION
MEMORANDUM OF UNDERSTANDING
AGREEMENT TERMS AND CONDITIONS

Table of Contents

GENERAL TERMS AND CONDITIONS

SECTION 1 - LEGAL AUTHORITY AND PARTIES

This Agreement is undertaken through the authority granted by the Interagency Cooperation Act, Texas Government Code § 771.001, et seq.

The Texas Department of Criminal Justice (TDCJ) manages offenders in state prisons, state jails, and private correctional facilities that contract with TDCJ. TDCJ also provides funding and certain oversight of community supervision (previously known as adult probation) and is responsible for the supervision of offenders released from prison on parole or mandatory supervision.

The Texas Workforce Commission (TWC) is responsible for administering an integrated workforce development system, including job training, employment, employment-related educational programs, and the Unemployment Insurance program, under the authority of Texas Labor Code § 302.021.

The Texas Youth Commission (TYC) is the state's juvenile corrections agency, providing for the care, custody, rehabilitation, and reestablishment in society of Texas' most chronically delinquent or serious juvenile offenders. Texas judges commit these youths to TYC for felony-level offenses that occurred when the youths were at least age 10 and less than age 17. TYC can maintain jurisdiction over these offenders until their nineteenth birthday.

SECTION 2 - PURPOSE

This Agreement sets forth the responsibilities and obligations of the signatory agencies with respect to the provision of Project RIO services. This Agreement is intended to address the requirements of Texas Labor Code §§ 306.004 and 306.005, and Government Code § 501.095.

SECTION 3 - PERFORMANCE

All Parties agree to the provisions, performance, and commitments established within Attachment A - Statement of Work. Such performance shall be provided in compliance with:

- all applicable federal and state laws, regulations, and rules;
- all agency policies and procedures or guidance manuals incorporated within this Agreement herein by specific reference in Attachment A; and
- the terms and conditions of this Agreement.

All Parties agree that Confidentiality Agreements, as shown in Attachment B, will be executed as referenced in Section II (O) of Attachment A.

SECTION 4 - AMENDMENT AND TERMINATION

4.1 This Agreement, not withstanding any separate Interagency Cooperation Contract between TWC, TYC and/or TDCJ, and the local operating agreements referenced in Section IV.B of Attachment A, is the entire agreement between the Parties, relating to the purpose stated in Section 2 of this Agreement. All oral or written agreements between the Parties hereto relating to the subject matter of this Agreement that were made prior to the execution of this Agreement have been reduced to writing and are contained herein.

4.2 Any alterations, additions, or deletions to the terms of this Agreement required by changes in federal or state law or by regulations are automatically incorporated into this Agreement without written amendment hereto, and shall become effective on the date designated by such law or regulation.

4.3 After a period of no less than 30 days subsequent to written notice (unless more rapid implementation is required by law), such formal directives shall have the effect of qualifying the terms of this Agreement and shall be binding upon all Parties as if written herein.

4.4 Except as specifically provided by Subsections 4.1, 4.2, and 4.3 of this Agreement, any additions, alterations, deletions, or extensions to the terms of this Agreement shall be by amendment hereto in writing and executed by all Parties to this Agreement. Any other attempted changes, including oral modifications, written notices that have not been signed by both Parties, or other modifications of any type, shall be invalid.

4.5 If at any time either Party is unable to perform its functions under this Agreement consistent with such Party's statutory and regulatory mandates, the affected Party shall immediately provide written notice to the other Parties to establish a date for resolution of issues.

4.6 The activities conducted pursuant to this Agreement shall be reviewed on a bi-annual basis and the Agreement adjusted as may be deemed appropriate by all signatories.

4.7 This Agreement may be terminated by 30 days written notice by any Party to all other Parties.

SECTION 5 - FINANCIAL

The Parties to this Agreement assume full responsibility for their respective costs associated with their performance of the terms of this Agreement. No property or other legal rights shall accrue or otherwise develop by virtue of the Parties entering into this Agreement.

ATTACHMENT A

STATEMENT OF WORK

I. TDCJ agrees to further the goals of Project RIO by:

A. The Parole Division shall:

1. Administratively support the provision of Project RIO services through the Specialized Programs Section of the Parole Division, where policies and procedures concerning Project RIO services shall be maintained.

2. Assign Project RIO coordinators in each district parole office to act as points of contact for Texas Workforce Centers.

3. Refer to Texas Workforce Centers all unemployed or under employed parolees who are available for work, able to work, willing to seek employment, free of symptomatic evidence of substance abuse, free of outstanding warrants, and not in pre-revocation status.

4. Monitor the participation of referred parolees to ensure that full use of available services is made.

5. Provide offender specific information such as TDCJ commitment histories and employment restrictions to Texas Workforce Centers. Such efforts shall include data interface and elements stipulated in Section 306.008 of the Texas Labor Code.

6. Distribute offender employment documents secured during incarceration by TDCJ Correctional Institutions Division (CID) and the Reentry and Integration Division (RID) at any established releasing unit or site.

7. Maintain and administer security agreements related to TDCJ access and use of The Workforce Information System of Texas (TWIST) and WorkInTexas.com.

8. Assist with the process for documenting and reporting if an offender is placed in a job related to TDCJ training and employment retention.

B. The Community Justice Assistance Division shall:

1. Encourage the referral of qualified offenders on community supervision, including offenders released on shock probation, sentenced to a state jail, or placed in a substance abuse felony punishment facility (SAFPF) or an intermediate sanction facility as a condition of community supervision to

2. Educate local community supervision and corrections departments (CSCD) concerning the existence, eligibility criteria, and benefits of Project RIO services.

C. The Manufacturing and Logistics (M&L) Division shall:

1. Provide a work program designed to provide offenders with marketable skills and work ethic. This undertaking will help reduce recidivism through a coordinated program of:

a. Job skills training – Provide on the job training. Once completed, the offender is given a certificate through the unit Workforce and Reentry Coordinator. Other job skills training in cooperation with Windham School District (WSD) include apprenticeship, short courses, and diversified career preparation. Offenders meeting program requirements will be enrolled in the Work Against Recidivism (WAR) program.

b. Document of work history – Evaluate the offenders assigned to an M&L facility no later than 30 days after the end of the first year and each year thereafter. The document of work history lists the type of work performed and encompasses a twelve item evaluation on the offender's performance. The WAR program includes the WAR Employment Sheet that is submitted to the TWC and to the parole officer in the geographic area of the offender's release. This sheet contains the offender's work history, proficiency on equipment and procedures, all training and certifications completed, and performance evaluation.

2. Convey to TWC's TWIST automated system a data set reflecting participation in M&L and WAR services provided and other elements stipulated in Section 306.008 of the Texas Labor Code.

D. The Reentry and Integration Division shall:

1. Identify and coordinate pre and post release workforce and other support services for offenders eligible for workforce participation.

2. Administer the day to day operations of the reentry coordinators and staff who implement the required services associated with workforce development and services necessary to support employment. Policies and procedures outlining these required activities shall be established, maintained, and revised as needed by the division.

3. Supervise the workforce and reentry case managers through the regional supervisors and unit wardens.

4. Provide pre release workforce employment support for those offenders who meet the following eligibility criteria:

   a) Have an appropriate offender classification status;
   b) Are willing to participate and work on assigned tasks to relieve barriers to employment, and any requirements listed on the Individual Treatment Plans;
   c) Plan to reside in the state of Texas;
   d) Have no verified Immigration and Customs Enforcement (ICE) or felony detainer; and
   e) Are within appropriate priority levels as established by Project RIO program operating procedures.

5. Provide offenders with timely and appropriate reentry services, including:

   a) Identifying and assisting in securing basic services that may serve as barriers to obtaining employment once released to the community;
   b) Recruiting eligible offenders through enhanced outreach;
   c) Assessing activities to determine academic and occupational interest and aptitudes and work histories;
   d) Exploring career opportunities based upon labor market needs specific to the offenders' reentry into the community;
   e) Developing an Individual Reentry Plan (IRP) detailing the specific academic and vocational training, work experience, and reentry elements necessary to achieve the offenders' occupational goals;
   f) Assisting offenders with completion of a WorkInTexas.com employment application;
   g) Coordinating the collection of identification documents necessary for reentry including birth certificates, social security cards, military records (Form DD214), selective service registration and academic and vocational achievement certificates;
   h) Referring and enrolling eligible offenders into academic, vocational, life skills, and behavioral training opportunities available through WSD and local community colleges and universities;
   i) Providing quarterly counseling with participating offenders to case manage progress towards achieving IRP goals;
   j) Conducting exit interviews with releasing offenders to finalize reentry plans and ensure awareness and access to post-release Project RIO services;
   k) Distributing of offenders' identification documents secured during incarceration; and

l) Conveying to TWC's TWIST automated system a data set reflecting prerelease services provided and other elements stipulated in Section 306.008 of the Texas Labor Code.

6. Maintain and administer security agreements related to TDCJ access and use of TWIST and WorkInTexas.com.

7. Provide offenders with information regarding programs and services available through TWC and the Texas Workforce Centers, including the Work Opportunity Tax Credit and Fidelity Bonding.

II. The Texas Workforce Commission (TWC) agrees to further the goals of Project RIO by:

A. Administratively supporting the provision of Project RIO services through TWC's Workforce Development Division, and by developing and maintaining policies governing service provision in Title 40 Texas Administrative Code Chapter 847.

B. Allocating available Project RIO resources to local Workforce Development Boards (Boards) to support the provision of services to offenders and adjudicated youth through Texas Workforce Centers.

C. Supporting Texas Workforce Centers designed to provide employment and training services to:

1. Adults who were sentenced to a TDCJ correctional facility and are:

   a. Within one year after their release from TDCJ incarceration; or
   b. Currently under parole supervision by TDCJ, or within one year of completion of their term of parole supervision.

2. Adjudicated youth ages 16 through 21 who have been under the care or custody of the TYC.

D. Encouraging Boards to prioritize the referral of Project RIO job seekers to employment related to their skills, training, and/or experience acquired while incarcerated.

E. Maintaining a system for continuance of services where Project RIO job seekers have a need for post-employment support, or where employment is secured in a job unrelated to training received during incarceration and/or the goals established in the Individual Employment Plan (IEP).

F. Providing oversight, technical assistance, and support to the Boards in furtherance of services to the eligible offender and adjudicated youth populations.

G. Maintaining previously established linkages, and establishing new linkages with local service providers and resources; including faith based and community organizations.

H. Providing training support to TDCJ, TYC, Boards, Texas Workforce Center personnel, and designated CSCD staff at designated local sites.

I. Annually gathering and documenting follow-up information on a designated sample of participants in Project RIO.

J. Coordinating joint efforts with staff from the various agencies in educating the public as to the goals, progress, and results of Project RIO.

K. Coordinating and participating in the promotion of eligible offenders' use of Project RIO.

L. Providing reports and/or data access available through TWIST and WorkInTexas.com to TDCJ, TYC, and WSD reflecting the status of program participants and completers.

M. Providing TDCJ and TYC staff and offenders with current information regarding the locations and services offered in Texas Workforce Centers.

N. Assisting with the process for documenting and reporting if an offender is placed in a job related to TDCJ or TYC training and employment retention.

O. Ensuring that any information received from TYC, regarding current or former TYC youth, will be protected as confidential under Texas Family Code § 58.005. In furtherance of this assurance, TWC will require that all Texas Workforce Center staff accessing TYC information execute a Confidentiality Agreement. A copy of the Confidentiality Agreement is included as Attachment B to this Agreement.

P. Maintaining security agreements related to the release of criminal histories generated from the Criminal Justice Information System.

III. The Texas Youth Commission (TYC) shall further the goals of Project RIO by:

A. Organizing and administering prerelease Project RIO services within the Education Division. Policies and procedures for prerelease Project RIO services shall be established and maintained within TYC's Workforce Development, a department of the Education Division. Project RIO staff located in secure facilities will be under the direct daily supervision of the TYC campus principals. Program supervision is provided by TYC Central Office Workforce Development Programs staff.

B. Stationing Project RIO staff in TYC-secure facilities, to the extent that resources permit, for the purpose of providing prerelease Project RIO services to adjudicated youth designed to equip them with the knowledge, skills, and attitudes necessary to successfully reintegrate into society and the labor market.

C. Providing prerelease Project RIO services to adjudicated youth, ages 16-19, with appropriate security status, who elect to participate.

D. Providing a TYC Project RIO institutional component with the provision of reentry services to adjudicated youth. Service provision generally will be focused on the last six months of confinement and will include:

1. Outreach, recruitment, and orientation of adjudicated youth;
2. Assessment to determine vocational interests, aptitudes, and needs;
3. Workforce development counseling, career exploration, and the provision of labor market information specific to the adjudicated youth's reentry community;
4. Development of a Workforce Development Plan (WDP) detailing specific vocational goals and the academic and vocational training, work experience, and reentry elements to achieve goals;
5. Refer eligible youth to available work assignments or Prison Industry Enhancement (PIE) employment opportunities that further goals established in an adjudicated youth's WDP;
6. Assistance in securing and compiling documents necessary to secure and retain employment including such items as Texas Department of Public Safety driver license and identification cards, birth certificates, social security cards, and academic and vocational training certificates. Documents secured during confinement will be provided by TYC to an adjudicated youth at the point of release;
7. Post-release referral of adjudicated youth who are in need of workforce services by TYC's Parole Department;

8. Exit interview with releasing adjudicated youth to finalize reentry plans and ensure awareness and access to post-release Project RIO services.

E. Providing a TYC Project RIO institutional component concerning the provision of vocational assessment, workforce development counseling, and workforce development training services to adjudicated youth while committed to TYC facilities.

F. Providing client-specific information such as offense histories and employment restrictions to Project RIO personnel, in accordance with existing Texas statutes and TYC administrative policies.

G. Compiling and transmitting to TWC a data set reflecting the adjudicated youth's WDP, services provided during confinement, and parole referral information, as established by Texas Labor Code § 306.008.

H. Promoting the use of post-release Project RIO services by adjudicated youth through orientation and information sessions conducted within the institutional component, as well as parole and transitional placement facilities.

I. Maintaining and administering security agreements related to TYC access and use of TWIST and WorkInTexas.com.

J. Referring by the TYC Parole Department of all adjudicated youth 16 years and older who are unemployed or under employed and under the supervision of the TYC.

K. Monitoring adjudicated youths' Project RIO participation to ensure that full use is made of all of services.

L. Providing adjudicated youths with information regarding programs and services available through TWC and Texas Workforce Centers including the Work Opportunity Tax Credit and fidelity bonding.

IV. The Parties mutually agree to:

A. Jointly pursue the goals, strategies, and action steps specified in the Project RIO Strategic Plan.

B. Facilitate the development of local operating agreements with Boards to implement this agreement.

ATTACHMENT B

CONFIDENTIALITY AGREEMENT RELATING TO RELEASE OF INFORMATION UNDER THE TEXAS FAMILY CODE

My name is _____. I am over the age of 18 and a resident of _____County, Texas. I am employed at _____ in my position as _____.

I request that the following confidential information to be released to me by the Texas Youth Commission (TYC) pursuant to Texas Family Code § 58.005(a)(5):

- Adjudication History
- Texas Youth Commission Records/Information related to Vocational and Educational Services
- Parole information relevant to securing employment and/or continuance of education

I certify that the requested information is to be used for treatment or services to TYC youth only.

I understand that the above-referenced information is confidential and that release of this information to me does not serve to waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future.

The requested information may not be disclosed outside the requesting entity or within the requesting entity for purposes other than the purpose for which it was received. The information shall be marked "CONFIDENTIAL" and kept in a secure place.

Any copies of the information or any notes taken from the information that implicate the confidential nature of the information will be controlled, with all copies or notes that are not destroyed or returned to TYC remaining confidential and subject to the confidentiality agreement.

Witness my signature this _____ day of _____, 201__

_____
Signature of Declarant

_____
Witness

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Notice of Acceptance of Applications for the Wine Grape Investment Grant Program

The Wine Grape Investment Grant Program (Program) has been established by the Texas Department of Agriculture (TDA) to assist in expanding the number of acres of wine grape production in the state of Texas. This Program is funded by the Wine Industry Development Fund, Texas Agriculture Code §50B.003, which allows for the use of funds to develop the wine industry and, thereby, the economic benefit of the wine industry to Texas. The information provided by Program grantees will also provide valuable insight about the costs of wine grape production and indicators of success in growing wine grapes. From July 6, 2010 through August 12, 2010, TDA will accept applications for the Grant Program from eligible Texas wine grape producers.

Eligibility Criteria

To be eligible for the Wine Grape Investment Grant Program an applicant must meet the following criteria:

1. Applicants must be in the business of growing wine grapes or desire to begin growing wine grapes.

2. The minimum new acreage required per grant will be no less than 5 acres.

3. Each award requires a minimum 2:1 investment match. The investment in new grape acres (as outlined in Section G of the Application) will need to be documented to support the requested grant amount.

Application

1. Applications are available on the TDA web site at www.texasagriculture.gov or available upon request from TDA by calling (512) 463-9932.

2. Applicants must use TDA's prescribed form (RED-200). Completed applications should be submitted to: Texas Department of Agriculture, Rural Economic Development Division,Wine Grape Investment Grant Program, P.O. Box 12847, Austin, TX 78711.

3. All applications must be received by TDA no later than August 12, 2010 to be considered.

4. Applications must be fully complete.

5. TDA staff will review the applications for eligibility and completeness. Applicants may be allowed to correct deficiencies.

6. Acreage and Business Plan for Grant Proposal information as outlined below will be reviewed by an independent review panel of viticulture professionals at the time the application is submitted. The business plan form must include: (A) where the new acreage is to be planted; (B) timeframe of when the new acreage is to be planted; (C) the variety and number of estimated vines per acre to be planted; (D) estimated costs associated with grape planting; (E) source of financing and (F) marketing plan. The Business Plan for Grant Proposal form is available on the TDA website www.texasagriculture.gov under the Wine Grape Investment Grant Program information.

Use of Funds/Reimbursement and Reporting

1. The maximum grant amount that may be awarded per applicant is $25,000. Total funding available for all Program grants is limited to $250,000.

2. Permissible uses of grant funds include, but are not limited to, trellis systems and materials, dirt work, rootstock, irrigation installation, fertilizer and other expenses to plant wine grapes. Expenditures for trellis systems, rootstock, and irrigation are allowable expenses. Capital expenditures such as land, or equipment that costs more than $5,000, are not reimbursable.

3. Applicants will be required to provide acceptable verification of the required investment prior to disbursement of grant monies. For example, if a $25,000 grant amount is awarded, grant recipient must provide documentation of expenditures of $75,000 prior to disbursement of the $25,000 grant amount. Any existing collateral will not be considered towards the required match i.e. existing wine-grape acreage and/or existing equipment will not be allowed in the match calculation.

4. Grant funds will be paid on a reimbursement basis. Receipts, invoices and/or other information to confirm/verify eligible expenditures must be furnished.

5. Grant recipients will be notified on or before September 23, 2010 provided all verification and documentation is complete.

6. Grantees under the Program will be required to enter into a grant agreement with TDA. The grant agreement must be signed and returned to TDA prior to grant funding. The grant will become effective when TDA has executed the grant agreement at which time an executed original will be returned to grantee.

7. Compliance with reporting requirements is necessary if you accept a grant. Each grant recipient will be required to submit a Reporting Requirements form with signed certification indicating the number of acres planted for year one (2012). In years two through five (2013-2016), grant recipient will be required to complete the Reporting Requirements form (attached to the application and to the grant agreement). These reports are due to TDA on or before November 1, annually.

Selection of Grantees

1. Grant recipients will be selected from completed applications received by TDA.

2. Applications will be evaluated based upon information provided in the application and any required attachments.

3. Grant awards and amounts will be determined at the discretion of TDA and based on the scoring criteria published with this notice, and may be subject to limitations in funding.

4. An independent review panel will evaluate and score each Business Plan for Grant Proposal submitted.

General Compliance Information

1. All grant awards are subject to the availability of appropriations and authorizations by the Texas Legislature.

2. Any information or documentation submitted to TDA is subject to disclosure under the Texas Public Information Act.

3. Awarded grant projects must remain in full compliance with state and federal laws and regulations or be subject to termination at the discretion of TDA.

4. Upon grant award, TDA and the Texas State Auditor's Office shall have access to and the right to examine all books, accounts, records, files and other papers or property belonging to or in use by the grantee and pertaining to the grant award. Additionally, these records must remain available and accessible no less than three (3) years after the termination of the grant project.

5. In accordance with Texas Government Code Ann., §783.007, grant awards shall comply in all respects with the Uniform Grant Management Standards (UGMS). Upon grant award, grantees can be provided a copy or it may be downloaded from http://www.governor.state.tx.us/files/state-grant/UGMS062004.doc.

6. Effective September 1, 2007, Texas Government Code §2264.001 *et seq.* requires a business who receives an economic development grant to certify at the time of application that such business, or a branch, division, or department of the business, does not and will not knowingly employ an undocumented worker who, at the time of employment, is not lawfully admitted for permanent residence to the United States or authorized under law to be employed in that manner in the United States. If, after receiving an economic development grant, the business, or a branch, division, or department of the business, is convicted of a violation under 8 U.S.C. 1324a(f), the business shall repay the amount of the grant with interest, at the rate and according to the other terms provided by an agreement under §2264.053 of the Texas Government Code, not later than the 120th day after the date the public agency, state or local taxing jurisdiction, or economic development corporation notifies the business of the violation.

Texas Public Information Act

All proposals shall be deemed, once submitted, to be the property of the TDA and are subject to the Texas Public Information Act, Texas Government Code, Chapter 552.

Further Information

Additional information about the Wine Grape Investment Grant Program and application process can be found on TDA's web site. In addition, grape producers may contact Allen Regehr, Financial Analyst, at (512) 463-9932 or allen.regehr@TexasAgriculture.gov, for more information.

TRD-201003587
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: June 23, 2010

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Request for Proposals: TAFA Financial Advisor

1. Purpose.

The Texas Agricultural Finance Authority (the Authority), a public authority established within the Texas Department of Agriculture (the Department), seeks responses in reply to this Request for Proposals (RFP) from firms with the qualifications and experience required to provide financial advisory services to the Authority. This RFP is issued for the purpose of selecting a financial advisor for all financing matters as described herein.

The Authority reserves the right to select one or more co-financial advisors from firms that respond to this RFP. The Authority's decision to select a co-financial advisor, if any, will be determined by the evaluation of the responses to the RFP. Please indicate in Part 1 of your response whether your firm would like to serve as only a financial advisor, only a co-financial advisor, or either.

2. Background of the Authority

The Authority was created by the Texas Legislature under Chapter 58 of the Texas Agriculture Code (the Code). In 2009, new TAFA programs were created as a result of revisions to Chapter 58 of the Texas Agriculture Code by the 81st legislature of the State of Texas in Senate Bill 1016 (SB 1016). Per SB 1016, the Authority is directed to utilize certain financial programs in order to promote and expand agricultural enterprises in this state. Effective September 1, 2009, the Authority provides financial assistance through the following programs: the Interest Rate Reduction Program, the Agricultural Loan Guarantee program, the Young Farmer Interest Rate Reduction program, and the Young Farmer Grant program. Employees of the Department are designated by the Commissioner of Agriculture to administer the Authority. Prior to September 1, 2009, the Authority provided financing alternatives through instruments including direct loans, loan guaranties, and loan participations.

On or after September 1, 2009, the Texas Public Finance Authority has the exclusive right to act on behalf of the Authority in issuing new debt instruments authorized to be issued on behalf of the Authority. Chapter 58 and Chapter 59 of the Code provide for the issuance by the Authority of revenue bonds and general obligation bonds.

3. Scope of Services.

As a result of the changes to the Authority's programs made by SB 1016, the financial advisor's primary role will be to review and provide advice to the Authority regarding existing financial commitments, at such times as determined by the Authority. However, if requested by the Authority, the financial advisor will also be responsible for all duties and services necessary or advisable to facilitate the issuance of bonds and other obligations, including but not limited to: assisting bond counsel as necessary; preparing such information, as necessary, for the rating agencies and upon Authority approval, assisting in the presentation to such agencies; assisting the Authority in maintaining on-going relationships with the credit rating agencies; advising the Authority concerning the need for credit enhancement and assisting in the negotiations regarding such; assisting in the approval process of the Bond Review Board, the Texas Public Finance Authority, and any other agency as necessary to the issuance of new bonds; assisting in closing details and post-closing duties, including the development of a final report to the Bond Review Board to include a verification of all costs of issuance and preparation of a complete bond transcript; answering questions or requests for additional information from prospective purchasers; evaluating any bids submitted for the purchase of the bonds; advising the Authority with respect to the investment of bonds proceeds and the accounting of arbitrage earnings; assisting the Authority in providing information to various legislators and other state agencies; advising the staff of the Authority and the Board of ongoing developments in the bond industry as they affect the Authority; soliciting bids for, contracting with, and paying on behalf of the Authority, fees associated with the printing of bond offering documents, ratings, trustee and paying agent fees and related services when necessary; monitoring and controlling the costs of fees and expenses incurred in connection with the issuance of the bonds; and all other matters necessary or incidental to the issuance and administration of debt obligations.

In addition, the financial advisor shall advise the Authority on any matters that might have an affect on the Authority or any of its outstanding issues. The Authority will be responsible for allocating duties and tasks between the Financial Advisor and Co-Financial Advisor, if any, commensurate with level of compensations.

The financial advisor and co-financial advisor, if any, will not be permitted to underwrite any portion of an issue or program for the Authority during the term of employment.

4. Form of Response.

a. Overview of the Firm.

Provide a description of the firm, including general experience and history in public finance, date founded, number of offices, location and number of professionals and employees in each office, total number of employees and professionals in the firm, description of specialty practice areas and firm philosophy. Describe structure of firm ownership (e.g., publicly held corporation, partnership, etc.) and any parents, affiliates, or subsidiaries of the firm.

b. Qualifications.

List all experience since January 1, 2000, of the firm and/or professionals proposed to be assigned to the Authority (see number 6 below also), as financial advisor, financial consultant, or senior manager. If listing experience of a professional while at a different firm, please specify the name of the firm. If describing experience in issuing bonds, please include the name of the issuer, title of the bonds, date of the bonds, par amount of the issue, type of sale, and role the firm played. Tabular format is acceptable.

For at least the last ten (10) years, describe the experience of the firm, and each professional proposed to be assigned to the Authority, in reviewing and providing advice to Texas state agencies or other public authorities regarding financial commitments. Indicate the type of financial commitment, the issue(s) or question(s) presented by the financial commitment, and the general categories of advice provided for such financial commitments.

For each of the following categories, please provide experience by Issue Type as follows: State level General Obligation Bonds; State Revenue Bonds; Tax Exempt Commercial Paper; Taxable Commercial Paper.

Please select one transaction from the above list that you feel best demonstrates your ability to serve the Authority and describe in detail the financial issues involved in the transaction and your firm's approach to the analysis. (Please limit your discussion to no more than two pages.)

c. Other Experience.

Please describe any other experience relevant to providing advice to a Texas state agency or other public authority regarding existing financial commitments.

d. Bond Pricing.

Describe the steps your firm would take as financial advisor to ensure the bidding process on competitive sales and the pricing process on negotiated sales renders the lowest true interest cost for the Authority.

Indicate the techniques your firm proposes as the most effective for the state to achieve HUB participation goals on competitive and negotiated transactions.

e. Credit Relations.

Describe your firm's proposed approach to maintaining rating agency relationships for the Authority.

f. Resumes.

Provide brief resumes for those individuals who would be assigned to serve the Authority. Indicate the individual's years of experience in public finance, any relevant license(s), and how any particular area of expertise would benefit the Authority. Specify who would be assigned as the primary day-to-day contact for the Authority. Describe individual responsibilities.

g. Business Practices.

Please describe your firm's previous experience and involvement working with Historically Underutilized Businesses (HUB) certified firms (if your firm is not HUB certified) or as a HUB certified firm, in a co-financial advisor relationship. Please describe your firm's approach to working with co-financial advisor, including level of effort, and division of duties.

Please describe efforts made by your firm to encourage and develop the participation of minorities and women in your firm's provision of financial advisory services or underwriting, if any.

h. Conflict of Interest.

Please disclose any conflicts of interest. Disclose all contractual or informal business arrangement/agreements, including fee arrangements and consulting agreements between your Firm and the Authority, department staff and/or its Board, or any entity that provides services to the Authority.

i. References.

Please provide names, addresses, and phone numbers of at least two references.

j. Fee Structure.

Please provide your fee structure, including if applicable, hourly rates, a per transaction maximum on hourly fees, flat fees, and a per transaction cap on expenses.

5. Term of Agreement.

The contract term is to be for a period beginning November 1, 2010 to August 31, 2011. The Board may renew the contract, at its option, for up two (2) additional terms of one (1) year each. The Board retains the right to terminate the contract for any reason and at any time, upon the payment of then earned fees and expenses.

6. Proposal Modification.

Any proposal may be modified or withdrawn, even after received by the Authority, at any time prior to the proposal due date. No material changes will be allowed after the expiration of the proposed due date; however, non-substantive corrections or deletions may be made with the approval of the Authority. The Authority also reserves the right to make amendments to the RFP by giving written notice to all firms who receive the RFP and publishing notice thereof in the *Texas Register.*

7. Time Schedule.

Proposals are due no later than **5:00 p.m. July 16, 2010.** Proposal responses, modifications or addenda to an original response received by the Authority after the specified time and date for closing will not be considered. Each firm is responsible for ensuring that its response reaches the Authority before the proposed due date. Firms should submit one unbound original and three (3) copies of their proposal to: Mr. Rick Rhodes, Assistant Commissioner for Rural Economic Development, **IN RESPONSE TO RFP: FINANCIAL ADVISOR,** Texas Agricultural Finance Authority, c/o Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, Street, Address: 1700 N. Congress, Stephen F. Austin Bldg., 10th Floor, Austin, Texas 78701.

A duly authorized representative of the firm must execute the submitted RFP response. An unsigned proposal will not be accepted. All proposals become the property of the Authority. Proposals must set forth accurate and complete information as required by this RFP. Oral instruction of offers will not be considered. Contact with Board Mem-

bers regarding this RFP is expressly prohibited and will result in disqualification of your proposal. Questions regarding this RFP should be submitted, in writing, to Mr. Rick Rhodes, Assistant Commissioner for Rural Economic Development, at the address listed above; by e-mail to Rick.Rhodes@TexasAgriculture.gov; or by fax, (888) 216-9867.

8. Basis of Award.

Department staff designated to administer the Authority programs will review the proposals as directed by the Board. The selection will be based on the proposal(s) that provide the best value to the state, including demonstrated competence, experience, knowledge and qualifications, as well as the reasonableness of the proposed fee.

Firms responding are encouraged to maintain a Texas office staffed with personnel who are responsible for providing financial advisory services to the Authority. By this RFP, however, the Authority has not committed itself to employ a financial advisor nor does the suggested scope of service or term of agreement below require that the financial advisor be employed for any or all of those purposes. The Authority reserves the right to make those decisions after receipt of proposals and the Authority's decision on these matters is final.

The Authority reserves the right to negotiate individual elements of any proposal and to reject any and all proposals.

9. Cost Incurred in Responding.

All costs directly or indirectly related to preparation of a response to the RFP or any oral presentation required to supplement and/or clarify the RFP which may be required by the Authority shall be the sole responsibility of, and shall be borne by the applicant.

10. Release of Information and Open Records.

All proposals shall be deemed, once submitted, to be the property of the Authority and subject to the Texas Public Information Act (the Act). Under the Act, information submitted in response to this RFP may not be released by the Authority during the proposal evaluation process or prior to the awarding of a contract. After the evaluation process is completed by the Authority and a contract is awarded, proposals and information included therein may be subject to public disclosure under the Act.

TRD-201003592
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: June 23, 2010

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Office of the Attorney General

Notice of Settlement of a Texas Water Code Enforcement Action

The State of Texas gives notice of the following proposed resolution of an environmental enforcement action under the Texas Water Code. Before the State may enter into a voluntary settlement agreement, pursuant to §7.110 of the Texas Water Code the State shall permit the public to comment in writing. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations indicating that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the law.

Case Title: *United States of America and State of Texas v. Halliburton Energy Services, Inc., et al.*, CA No. 4:07-cv-3795; In the United States District Court for the Southern District of Texas.

Background: During 2001-2003 the United States Environmental Protection Agency ("EPA") conducted cleanups of contaminated sites in Houston, Webster and Odessa, Texas, owned by The GNI Group, Inc., or related entities, known as the "Gulf Nuclear Sites." Pursuant to an agreement with EPA, the Texas Commission on Environmental Quality ("TCEQ") contributed funds for those cleanups. Subsequently the United States and the State of Texas brought actions against various parties to recover their costs, and other matters.

Nature of the Settlement: The action by the State of Texas against GE Healthcare Bio-Sciences Corporation, GE Healthcare Inc. and GE Healthcare Holdings Inc. will be settled by a consent decree in the district court.

Proposed Settlement: The proposed judgment provides for the recovery of response costs and attorneys' fees.

The Office of the Attorney General will accept written comments relating to the proposed judgment for thirty (30) days from the date of publication of this notice. Copies of the proposed judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed judgment may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the judgment, and written comments on the same, should be directed to Thomas H. Edwards, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548; telephone (512) 463-2012, fax (512) 320-0052.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201003571
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: June 22, 2010

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of June 11, 2010, through June 17, 2010. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on June 23, 2010. The public comment period for this project will close at 5:00 p.m. on July 23, 2010.

FEDERAL AGENCY ACTIONS:

Applicant: Henry R. Stevenson, Jr.; Location: The project is located immediately northeast of the intersection of the Neches River and I-10 in Orange County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: TX-BEAUMONT EAST, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 395645.84; Northing: 3330687.38. Project Description: The ap-

plicant proposes to build a permanent berm to gain access to a 42-acre island that is directly adjacent to the Neches River and Baird's Bayou in Orange County, Texas. The berm would be approximately 720 feet long, 80 feet wide, with a height approximately 15 feet above the Ordinary High Water Mark of the Neches River. The top of the berm would have a 30-foot-wide road with a driving surface capped with hard materials including brick, concrete, and asphalt. The northern slope of the berm would be armored with concrete riprap to prevent erosion. The applicant proposes to use clean clay and earthen materials currently being stored just west of the project site on the applicant's land to construct the berm. The creation of this berm would result in placing fill in 0.71 acres of jurisdictional open water which includes an old logging canal and a portion of the Neches River. This project would also place fill in 0.30 acres of jurisdictional wetlands. CMP Project No.: 10-0127-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-00084 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Meritage Development, Inc.; Location: The project is located on Copano Bay, off of State Highway 35, just north of Holiday Beach Subdivision, approximately 10 miles north of Rockport, in Aransas County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Lamar, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 696000; Northing: 3118400. Project Description: The applicant proposes to construct a 702-acre water access and waterfront residential and commercial development. Approximately 3,443,857 cubic yards of material would be excavated for creation of the proposed canals, which would result in impacts to 3.23 acres of palustrine wetlands, and used onsite for fill within the proposed development to raise development areas above the 100-year flood plain elevation. The proposed fill with this material would result in impacts to 8.93 acres of palustrine wetlands and 1.01 acres of estuarine wetlands (including 0.33 acre of smooth cordgrass). All remaining material would be placed in upland areas. A 50-foot wetland buffer would be established between residential lots and estuarine wetlands to be preserved to minimize indirect impact to adjacent wetland resources. CMP Project No.: 10-0128-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00318Rev. is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Port of Bay City Authority of Matagorda County; Location: The project site is located in the Gulf Intracoastal Waterway (GIWW) on South Gulf Road, in Bay City, Matagorda County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Matagorda, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 14; Easting: 798383; Northing: 3178515. Project Description: The applicant proposes to construct a barge terminal and commercial fishing vessel facility. Such activities include a 200-foot-wide entrance channel dredged to a depth of -12 feet (NAVD 88), a jetty platform, bulkhead, haul-out and repair area, stowing area, cold storage, barge and commercial fishing vessel basins, and above-ground storage and supply services. Construction includes site clearing, associated excavation and fill, construction of associated structures for mooring and berthing, construction of a levee along the east side of the property, shoreline and slope stabilization, and temporary construction measures as needed. CMP Project No.: 10-0130-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00284 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: MMKP Exploration, Inc.; Location: The project site is located in State Tracts (STs) 128, 208, 254, and 89 within Galveston Bay, approximately 7 miles northeast of Seabrook, in Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Bacliff, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 315442; Northing: 3277441. Project Description: The applicant proposes to drill ST-128 Well #1, ST-208 Well #1, and ST-208 Well #2, and construct, install, operate, and maintain structures and equipment necessary for oil and gas drilling, production, and transportation activities. Such activities include installation of two proposed 8-inch pipelines by hand-jetting, Option A and B, and 1,267 cubic yards of fill for a drilling pad. Only one of these pipelines will be installed for this project. Option A is proposed from ST-208 northeast approximately 23,387 feet to an existing Davis Petroleum pipeline in ST 89 and will impact 2.7 acres of open bay bottom. Option B is proposed from ST-208 southeast approximately 10,670 feet to an existing Davis Petroleum pipeline in ST-254 and will impact 1.5 acres of open bay bottom. CMP Project No.: 10-0131-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00293 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Denbury Onshore, LLC; Location: The project site is located in Oyster Bayou Oil Field, approximately 12 miles southwest of Winnie, in Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Oyster Bayou, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 353257; Northing: 3285666. Project Description: The applicant proposes to refurbish and maintain several well locations in the Oyster Bayou Oil Field for hydrocarbon production. The proposed activity will consist of the installation and maintenance of seven well locations, all 250' x 250' in size. Upon completion of the drilling operations, the pads will be reduced to 100' x 100' production pads. All components of this activity will be limited to the existing in-field roads and pad sites and the adjacent, previously cultivated agricultural areas which recently lost its Prior Converted designation. A total of 22,498 cubic yards fill material will be used at the sites to provide elevation during the drill operation. The project will temporarily impact 7.49 acres of herbaceous non-tidal wetlands and permanently impact 1.53 acres of herbaceous non-tidal wetlands. CMP Project No.: 10-0132-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00315 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Kenneth L. Berry; Location: The project is located on the southern shoreline of Berry Island, adjacent to the La Quinta Ship Channel, across from Ingleside On-the-Bay, in San Patricio and Nueces Counties, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Ingleside, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 14; Easting: 674296; Northing: 3079810. Project Description: The applicant proposes to construct approximately 300 linear feet of jetty for erosion control. Approximately 168 feet of existing jetty was previously constructed under a previous U.S. Army Corps of Engineers (Corps) permit. The existing jetty was constructed parallel to La Quinta Channel at a distance of 464 feet from channel centerline to centerline of the jetty. The Corpus Christi Ship Channel is approximately 1.5 miles from the proposed jetty location. CMP Project No.: 10-0133-F1. Type of Application: U.S.A.C.E. permit application #SWG-1998-02371 is being evaluated under §10 of the

Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: The Dow Chemical Company; Location: The project is located in Snake Creek, south of Highway 90, near Oyster Creek, in Brazoria County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Clute, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting 270719.6. Northing: 3213711.3; Latitude: 29.0310 degrees; Longitude: -95.35436 degrees. Project Description: The applicant proposes to fill approximately .10 acre of non-tidal wetlands for an780-foot-long, 30-foot-wide access road to Dow Well 18. The purpose of the project is to construct a new brine well to drill into the salt strata to produce chlorine and sodium hydroxide. An additional 0.19 acres of non-tidal wetlands dominated by Chinese tallow, maiden cane and smartweed are proposed to be filled for the proposed well pad. Adjacent upland areas to be impacted by the pad are dominated by live oak, water oak and cedar elm. Fill material will be rock and gravel. To mitigate impacts, the applicant is proposing to conduct a permittee-responsible purchase of moist soil wetland/freshwater marsh credits from the Dow-Texas Parks and Wildlife - Justin Hurst Wildlife Management Area. CMP Project No.: 10-0135-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00400 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy of the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-201003607
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: June 23, 2010

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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 May 2010, as required by Tax Code, §202.058, is $65.28 per barrel for the three-month period beginning on February 1, 2010, and ending April 30, 2010. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of May 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 May 2010, as required by Tax Code, §201.059, is $3.58 per mcf for the three-month period beginning on February 1, 2010, and ending April 30, 2010. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of May 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-201003476
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: June 21, 2010

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Local Sales Tax Rate Changes Effective July 1, 2010

The additional 1/2 percent sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Section **4B** will be **abolished,** effective June 30, 2010 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Mount Enterprise (Rusk Co)	2201043	.015000	.077500

The additional 1/2 percent city sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Section **4A** will be **reduced** to 1/4 percent and the adoption of an additional 1/4 percent sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective July 1, 2010 in the city listed below. There will be no change in the local rate or total rate.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Bellmead (Mclennan Co)	2161050	.015000	.082500

TRD-201003477
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: June 21, 2010

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§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 06/28/10 - 07/04/10 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 06/28/10 - 07/04/10 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 07/01/10 - 07/31/10 is 5.00% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 07/01/10 - 07/31/10 is 5.00% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-201003531
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: June 21, 2010

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Texas Council for Developmental Disabilities

Requests for Proposals #2010-2

Public Policy Collaboration Activities

The mission of the Texas Council for Developmental Disabilities is to create change so that all people with disabilities are fully included in their communities and exercise control over their own lives.

This announces the intention of TCDD to award funds for multiple projects that will assist TCDD to promote and participate in collaborative activities related to public policy. There are no specific funding amounts for projects funded by this RFP; applicants are expected to propose the amount of funds needed. For multiple year proposals (5 year maximum and no minimum), applicants must expect to receive decreasing funds from TCDD each year and to provide an increasing amount of participant funds (match) each year of the project. Funding is not automatic each year and may be terminated at TCDD's discretion.

Funds available for a project funded under this RFP Title are provided by the U.S. Department of Health and Human Services, Administration on Developmental Disabilities, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act.

For questions about this RFP, call Joanna Cordry at (512) 437-5410 or e-mail Joanna.Cordry@tcdd.state.tx.us.

The online application packet specific to this RFP is available on the TCDD Web site at http://www.txddc.state.tx.us/grants_projects/rfp.asp or may be requested in writing by U.S. mail, fax, or e-mail. Send written requests for application packets to Barbara Booker, Texas Council for Developmental Disabilities, 6201 E. Oltorf, Suite 600, Austin, TX 78741-7509; fax (512) 437-5434; or e-mail Barbara.Booker@tcdd.state.tx.us. Application Packets must be requested in writing or downloaded from the Internet. Applicants are limited to those organizations that have primary offices in Texas.

Grant Proposers' Telephone Conferences Dates

TCDD will hold optional telephone conferences (sign up on TCDD website) to help applicants understand the grant application process and this specific RFP. The deadline to submit questions in writing is August 13, 2010 and the answers will be posted on the TCDD Web site.

Background and Project Description

The TCDD State Plan includes objectives for staff to provide input to state-level policymakers on public policy priorities approved by the Council. The Council is committed to promoting and participating in collaborative public policy efforts, and chooses to explore innovative and nationally recognized best practice models that promote public policy collaboration that would also be effective in Texas. Through this RFP, TCDD intends to fund activities that support TCDD's mission; are short-term/low-cost and benefit Texans with developmental disabilities; are collaborative; and have activities with outcome(s) that are measurable.

Deadlines and Submission Process

One hard copy, with original signatures, and one electronic copy must be submitted. Electronic and hand-delivered hard copies must be received by TCDD, not later than 4:00 p.m. Central Time, September 1, 2010. Electronic copies should be provided on a CD in Word format or submitted electronically to Barbara.Booker@tcdd.state.tx.us. If the hard copy is mailed, it must be postmarked prior to midnight on the date specified above to the attention of Barbara Booker. Faxed proposals cannot be accepted. Incomplete proposals and proposals received after the due date/time will not be accepted for review.

TCDD anticipates final consideration of those recommendations at the November 2010 quarterly meetings. Applicants not selected will be notified by mail.

TRD-201003586
Roger Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: June 23, 2010

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Request for Proposals #2010-3

Grants for Outreach and Basic Development

The Texas Council for Developmental Disabilities (TCDD) may award up to ten (10) $10,000 grants for up to one year each to groups made up of people who are African, Hispanic/Latino, Asian, or Native American, for activities that will help their community provide culturally competent support to people who have a disability.

Groups may apply for one of these grants. Grants may be given only to organizations having a Tax ID number; other organizations or individuals may partner with such an organization to receive funds. Money available for these grants is provided to TCDD by the U.S. Department

of Health and Human Services, Administration on Developmental Disabilities.

Background:

More than half of all Texans are individuals who are African, Hispanic/Latino, Asian, or Native American, and these individuals are less likely to be receiving the services and supports their family needs. TCDD seeks to understand the different values, cultures, and customs that exist in Texas, and how cultural issues impact how services should be provided by building relationships with organizations that are working to improve the lives of individuals from ethnic minority cultures.

Requirements of these grants. Projects must:

Hold quarterly public meetings; write a summary about the needs/values of their members who have disabilities; allow TCDD staff to attend at least one meeting to gather information directly from members; assist 1 representative of the group to speak to the Council; provide ideas for actions to increase the diversity of the people who work with TCDD; and, work to make positive changes that will help people with disabilities to have more control over their lives.

Examples of activities that might be funded under this grant include teaching other organizations about your culture, holding culturally-appropriate advocacy training or establishing non-profit status for a group.

Application:

For more information, or for assistance in completing an application, contact Joanna Cordry at (512) 437-5410, joanna.cordry@tcdd.state.tx.us, or see http://www.txddc.state.tx.us/grants_projects/rfp.asp. The Council will review applications in August, November, February, and May. Grants may be given out as long as funds are available.

Terms required of people or organizations that apply:

You must report your progress using TCDD forms; report conflicts of interest with TCDD Council members and staff; receive TCDD approval on written materials developed with this grant before disseminating. Grant applications and ideas may be shared with the public if requested. TCDD can decide NOT to fund any application received under this announcement.

TRD-201003577
Roger Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: June 22, 2010

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East Texas Council of Governments

Request for Proposals

As the administrative unit for the Workforce Solutions East Texas Board, the East Texas Council of Governments (ETCOG) is soliciting proposals for the operation and management of Temporary Assistance for Needy Families Basic Education and Literacy Projects for a period beginning October 1, 2010 and extending through September 30, 2011 with the availability of three, one-year additional options.

The purpose of this Request for Proposals is to provide basic education, literacy services and/or work preparedness for Temporary Assistance for Needy Families (TANF) program participants, former TANF Program participants and/or individuals who are at-risk of becoming TANF participants. Proposers are encouraged to incorporate into their proposals a component offering "work-related soft skills" training in conjunction with basic education and literacy training in partnership with area employer(s).

The mission of the Workforce Solutions East Texas Board is to improve the quality of life in this area through economic development by providing a first-class workforce for present and future businesses. Counties that comprise the East Texas Workforce Development Areas are: Anderson, Camp, Cherokee, Gregg, Harrison, Henderson, Marion, Panola, Rains, Rusk, Smith, Upshur, Van Zandt, and Wood Counties.

The Workforce Solutions East Texas Board is making approximately $201,893 available through this RFP. Proposals are limited to $75,000. The amount of funds available is subject to change.

Persons or organizations wanting to receive a Request for Proposals (RFP) package, should submit a request by letter, fax, or email to the East Texas Council of Governments, 3800 Stone Road, Kilgore, Texas 75662, Attn: Gary Allen ((903) 984-8641 Ext 227). The fax number for ETCOG is (903) 983-1440 or email gary.allen@etcog.org.

The Request for Proposals package will not be released prior to June 16, 2010. The deadline for receipt of proposals is Tuesday, July 27, 2010 at 5:00 p.m. CDT.

Questions concerning the RFP process should be addressed by email or fax to Gary Allen (see above) or Crystal McCoy, Regional Planner I, crystal.mccoy@etcog.org or fax (903) 983-1440. Historically Underutilized Businesses (HUBs) are encouraged to apply. All programs and employers under the auspices of the Workforce Solutions East Texas Board are in compliance with EEO. Auxiliary aids and services are available, upon request, to individuals with disabilities.

TRD-201003442
David Cleveland
Executive Director
East Texas Council of Governments
Filed: June 18, 2010

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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 opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 2, 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 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 August 2, 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: Aqua Utilities, Inc. dba Aqua Texas, Inc.; DOCKET NUMBER: 2010-0398-MWD-E; IDENTIFIER: RN102340841; LOCATION: Spring, Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0012303001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for flow, total suspended solids (TSS), and ammonia nitrogen; PENALTY: $14,130; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Kenny Childers; DOCKET NUMBER: 2010-0964-WOC-E; IDENTIFIER: RN105914352; LOCATION: Gregory, San Patricio County; TYPE OF FACILITY: occupational licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(3) COMPANY: Collin County; DOCKET NUMBER: 2009-1834-PST-E; IDENTIFIER: RN100662949; LOCATION: McKinney, Collin County; TYPE OF FACILITY: fleet refueling station; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; and 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; PENALTY: $3,675; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 425-6010; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2010-0178-AIR-E; IDENTIFIER: RN102495884; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), Flexible Permit Number 9868A/PSDTX102M7, Special Condition (SC) Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §122.143(4) and §122.145(2)(A), Federal Operating Permit (FOP) Number O-01440, Special Terms and Conditions (STC) Number 18, and THSC, §382.085(b), by failing to submit a complete deviation report; 30 TAC §113.1090, 40 Code of Federal Regulations (CFR) §63.6640(a), and THSC, §382.085(b), by failing to maintain Unit 12, Engine 42's catalyst so that the pressure drop across the catalyst does not exceed the limit established during the performance test; 30 TAC §101.20(1) and §122.143(4), FOP Number O-01440, STC Number 1.A., 40 CFR §60.106(j)(1), and THSC, §382.085(b), by failing to collect one fresh feed sulfur sample once per eight-hour period; 30 TAC §101.20(1), 40 CFR §61.357(a), and THSC, §382.085(b), by failing to submit the initial required benzene reports; 30 TAC §101.201(b)(1) and THSC, §382.085(b), by failing to submit a complete final report for emissions event number 124305; and 30 TAC §101.20(3) and §116.715(a), Flexible Permit Number 9868A/PSDTX102M7, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions from the Unit 34 incinerator stack; PENALTY: $47,084; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(5) COMPANY: CONVENIENCE MART, INC. dba Little York Texaco; DOCKET NUMBER: 2010-0329-PST-E; IDENTIFIER: RN101433662; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §345.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases; 30 TAC §334.50(b)(2)(A)(i) and the Code, §26.3475(a), by failing to equip each pressurized line with an automatic line leak detector; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the UST identification number is permanently applied upon or affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube; 30 TAC §334.51(b)(2)(C) and the Code, §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; and 30 TAC §115.242(3)(A), by failing to maintain the Stage II vapor recovery system in proper operating condition; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Del Webb Texas Limited Partnership; DOCKET NUMBER: 2010-0168-MLM-E; IDENTIFIER: RN102930690; LOCATION: Georgetown, Williamson County; TYPE OF FACILITY: residential construction site; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of a Water Pollution Abatement Plan; 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; and 30 TAC §324.6 and 40 CFR §279.22, by failing to clearly mark or label used oil containers with the words "Used Oil"; PENALTY: $30,375; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3100; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(7) COMPANY: EASTWOOD HILLS MOBILE HOME PARK LIMITED PARTNERSHIP; DOCKET NUMBER: 2010-0702-MWD-E; IDENTIFIER: RN102183480; LOCATION: Montgomery County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65 and §305.125(2) and the Code, §26.121(a)(1), by failing to maintain authorization for the discharge of wastewater; PENALTY: $2,080; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: E. I. du Pont de Nemours and Company; DOCKET NUMBER: 2010-0313-AIR-E; IDENTIFIER: RN100225085; LOCATION: La Porte, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 1834, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to timely report Incident Number 130915 within 24 hours after discovery; PENALTY: $10,336; ENFORCEMENT COORDINATOR: Georgena Hawkins, (512) 239-2583; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: E. I. du Pont de Nemours and Company; DOCKET NUMBER: 2010-0379-AIR-E; IDENTIFIER: RN100216035; LOCATION: Nederland, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), Air Permit Number 4351, SC Number 1, FOP Number O-01961, SC Number 16, General Terms and Conditions, and THSC, §382.085(b), by failing to prevent unauthorized emissions;

PENALTY: $30,050; Supplemental Environmental Project (SEP) offset amount of $12,120 applied to Texas Air Quality Research Center at Lamar University - *Flare Speciation and Air Quality Modeling;* ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(10) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2010-0427-AIR-E; IDENTIFIER: RN102212925; LOCATION: Baytown, Harris County; TYPE OF FACILITY: petrochemical manufacturing plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), New Source Review Permit Number 3452 and PSD-TX-302M2, SC Number 1, and THSC, §382.085(b), by failing to comply with permitted emissions limits; PENALTY: $10,000; SEP offset amount of $4,000 applied to Barbers Hill Independent School District-Alternative Fueled Vehicle and Equipment Program; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(11) COMPANY: City of Fredericksburg; DOCKET NUMBER: 2010-0228-MWD-E; IDENTIFIER: RN101917383; LOCATION: Gillespie County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65(a) and §305.125(2) and the Code, §26.121(a), by failing to maintain authorization for the operation of the facility; PENALTY: $13,000; SEP offset amount of $10,400 applied to Texas Association of Resource Conservation and Development Areas, Inc. (RC&D) - Household Hazardous Waste Clean-Up; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(12) COMPANY: Alejandro C. Gonzalez; DOCKET NUMBER: 2010-0204-LII-E; IDENTIFIER: RN105866743; LOCATION: Irving, Dallas County; TYPE OF FACILITY: landscaping business; RULE VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2), by failing to refrain from advertising or representing himself to the public as a holder of a license or registration unless he possesses a current license or registration or unless he employs an individual who holds a current license; PENALTY: $250; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Bharath U. Govindram; DOCKET NUMBER: 2010-0306-PST-E; IDENTIFIER: RN101727089; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: USTs; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding USTs; 30 TAC §334.48, by failing to ensure that the UST system is operated, maintained, and managed in a manner that will prevent releases of regulated substances from the UST system; 30 TAC §334.76, by failing to conduct the required release investigation and corrective action; 30 TAC §334.72 and §334.76(l), by failing to report to the TCEQ a release of regulated substances within 24 hours of discovery; and 30 TAC §37.867 and §334.54(d)(2), by failing to empty the UST system of all regulated substances within 90 days after the termination of the financial assurance; PENALTY: $36,100; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: JUNAID INVESTMENTS, INC.; DOCKET NUMBER: 2010-0319-PST-E; IDENTIFIER: RN101737195; LOCATION: Houston, Harris 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, vapor space manifolding, and dynamic back pressure; PENALTY: $2,558; ENFORCEMENT COORDINATOR: Theresa Hagood, (512) 239-2540; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: KOHETTUR, INC. dba Holland Food Market; DOCKET NUMBER: 2010-0327-PST-E; IDENTIFIER: RN101807188; 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 delivery certificate; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to provide proper release detection; 30 TAC §334.10(b) and §334.51(c)(2), by failing to maintain the required UST records and make them immediately available for inspection; and 30 TAC §334.42(i), by failing to inspect all sumps including the dispenser sumps, manways, overspill containers, or catchment basins associated with the UST system; PENALTY: $6,447; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Ismael Medina; DOCKET NUMBER: 2010-0254-LII-E; IDENTIFIER: RN1015872238; LOCATION: Travis County; TYPE OF FACILITY: landscaping and irrigation service; RULE VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2) and the Code, §37.003, by failing to refrain from advertising or representing oneself to the public as a holder of a license or registration; PENALTY: $563; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 898-3838; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(17) COMPANY: Platinum Plus Enterprises, Inc.; DOCKET NUMBER: 2010-0603-LII-E; IDENTIFIER: RN105865232; LOCATION: Magnolia, Montgomery County; TYPE OF FACILITY: landscape business; RULE VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2) and the Code, §37.003, by failing to refrain from advertising or representing oneself to the public as a holder of a license or registration; PENALTY: $375; ENFORCEMENT COORDINATOR: Todd Huddleson, (512) 239-2541; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: City of Port Arthur; DOCKET NUMBER: 2010-0455-MWD-E; IDENTIFIER: RN101608024; LOCATION: Jefferson County; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010364010, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for flow and TSS; PENALTY: $5,160; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(19) COMPANY: Ross Construction, Inc.; DOCKET NUMBER: 2010-0652-WQ-E; IDENTIFIER: RN105900476; LOCATION: Williamson County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $750; ENFORCEMENT COORDINATOR: Martha Hott, (512) 239-2587; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(20) COMPANY: SHUJAT HOLDING COMPANY; DOCKET NUMBER: 2010-0230-PST-E; IDENTIFIER: RN101877223, RN101734952; LOCATION: Bridge City, Orange County; TYPE OF FACILITY: USTs; RULE VIOLATED: 30 TAC §334.7(d)(3), by

failing to provide an amended registration for any change or additional information regarding the USTs; 30 TAC §334.55(a)(6)(D)(ii), by failing to prepare and submit a release determination report to the TCEQ as part of the required procedure for permanent removal of any UST system from service; 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; 30 TAC §334.54(b)(2), by failing to maintain all piping, pumps, manways, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; 30 TAC §334.54(d)(2), by failing to ensure that any residue from stored regulated substances which remained in the system did not exceed a depth of 2.5 centimeters at the deepest point and did not exceed 0.3% by weight of the system at full capacity; 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding the USTs; 30 TAC §334.55(a)(6)(D)(ii), by failing to prepare and submit a release determination report; 30 TAC §334.54(b)(1), by failing to keep the UST system vent lines open and functioning; and 30 TAC §334.48(a), by failing to ensure the UST system is operated, maintained, and managed in accordance with industry practices to prevent a release of a regulated substance; PENALTY: $17,500; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(21) COMPANY: Skinny's, LLC dba 7-Eleven Store 142; DOCKET NUMBER: 2010-0522-PST-E; IDENTIFIER: RN102766102; LOCATION: San Angelo, Tom Green County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for inspection; 30 TAC §334.54(c)(3)(A) and the Code, §26.3475(d), by failing to ensure the integrity of a UST system by the performance of tank tightness and piping tightness tests before returning the system to service; 30 TAC §334.54(c)(3)(C), by failing to submit a construction notification 30 days prior to returning the temporarily out of service UST system to active service; and 30 TAC §334.46(g)(1)(H), by failing to ensure that the observation well access vault or manhole is equipped with a liquid tight cover and the observation well is properly capped, labeled, and secured or locked to prevent unauthorized access, tampering, and any deliberate or accidental depositing of unauthorized substances; PENALTY: $5,090; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(22) COMPANY: SOUTHWEST SHIPYARD, L.P.; DOCKET NUMBER: 2009-2011-IHW-E; IDENTIFIER: RN100248749; LOCATION: Channelview, Harris County; TYPE OF FACILITY: barge cleaning and repair; RULE VIOLATED: 30 TAC §335.6, by failing to update the facility's notice of registration; 30 TAC §335.13(k) and 40 CFR §262.42, by failing to submit exception reports to the executive director for hazardous waste manifests; 30 TAC §335.9(a)(2), by failing to submit a complete and correct annual waste summary for the year 2008; 30 TAC §335.69(a)(1)(A) and §335.112(a)(8) and 40 CFR §262.34(a)(1)(i) and §265.174, by failing to conduct weekly inspections of hazardous waste containers; 30 TAC §335.474, by failing to prepare a new five-year source reduction and waste minimization plan prior to the expiration of the existing plan; 30 TAC §335.10(c) and 40 CFR §262.20(a)(1), by failing to accurately complete hazardous waste manifests; 30 TAC §335.69(a)(4)(A) and §335.112(a) and 40 CFR §262.52(d), by failing to maintain an updated emergency coordinator list; 30 TAC §335.69(a)(2) and (3) and 40 CFR §262.34(a)(2) and (3), by failing to label hazardous waste containers with the words "Hazardous Waste" or with the beginning date of accumulation; 30 TAC §335.431(c) and 40 CFR §268.7(a), by failing to provide complete information on the land disposal restriction notification form; and 30 TAC §335.2(b), by failing to prevent disposal of hazardous waste at an unauthorized facility; PENALTY: $397,856; SEP offset amount of $159,142 applied to Armand Bayou Nature Center - Coastal Tall Grass Management-Prescribed Burn Program and Prairie Restoration Project; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(23) COMPANY: City of Tatum; DOCKET NUMBER: 2009-1986-MWD-E; IDENTIFIER: RN101918407; LOCATION: Rusk County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010850001, Effluent Limitations and Monitoring Requirements Numbers 1 and 3, and the Code §26.121(a), by failing to comply with permit effluent limits for ph and TSS; and 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0010850001, Reporting and Monitoring Requirements Number 1, by failing to timely submit monitoring results at the intervals specified in the permit; PENALTY: $10,720; SEP offset amount of $8,576 applied to RC&D - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(24) COMPANY: WTG Gas Processing, L.P.; DOCKET NUMBER: 2010-0219-AIR-E; IDENTIFIER: RN100211473; LOCATION: Howard County; TYPE OF FACILITY: gas processing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 20137, SC Number 16F, and THSC, §382.085(b), by failing to conduct stack testing every five years; 30 TAC §106.512(2)(C)(iii) and THSC, §382.085(b), by failing to conduct biennial engine testing on emission point numbers CM-31 and CM-32 for nitrogen oxides and carbon monoxide; and 30 TAC §122.145(2)(A) and THSC, §382.085(b), by failing to report all instances of deviation; PENALTY: $4,850; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

TRD-201003589
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: June 23, 2010

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Executive Director's Report and Recommendation for Action

The Executive Director of the Texas Commission on Environmental Quality (commission or TCEQ) filed its Report and Recommendation for Action in the Matter of Kinney County Groundwater and Conservation District (the "Report"), TCEQ Docket No. 2010-0875-DIS, on June 18, 2010, with the Office of the Chief Clerk. The commission will consider the Report in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas, on a date and time to be determined by the Office of the Chief Clerk. This posting is Notice of Opportunity to Comment on the Report and Recommendation. The comment period will end 30 days from date of this publication. Written public comments should be submitted, no later than 5:00 p.m. on the day on which the comment period ends, to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. All comments should reference TCEQ Docket No. 2010-0875-DIS, Kinney County Groundwater and Conservation District. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201003602

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 23, 2010

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapter 305

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Chapter (TAC) Chapter 305, Consolidated Permits, §305.541, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would adopt by reference and as amended 40 Code of Federal Regulations Part 450, which regulates storm water discharges from regulated construction sites.

The commission will hold a public hearing on this proposal in Austin on July 29, 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.

Written comments may be submitted to Patricia Duron, 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 2010-015-305-OW. The comment period closes August 2, 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 Sherry Smith, Water Quality Division, (512) 239-0571.

TRD-201003423
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 18, 2010

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Notice of Comment Period and Hearing on Draft Air Curtain Incinerator General Operating Permit

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and a notice and comment hearing (hearing) on the draft revisions to Air Curtain Incinerator General Operating Permit (GOP) Number 518. The proposed GOP revisions include: the addition of 30 TAC Chapter 113, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, the addition of 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds, revisions to the existing language for clarification purposes, and requirements for 40 Code of Federal Regulations (CFR) Part 60, Subpart IIII, Compression Ignited Internal Combustion Engines; and 40 CFR Part 60, Subpart JJJJ, Spark Ignited Internal Combustion Engines have been included.

The draft GOP is subject to a 30-day comment period. During the comment period, any person may submit written comments on the draft GOP. A hearing will be held in Austin on August 10, 2010, at 1:30 p.m. in Building C, Room 131E at the commission's central office located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TCEQ staff member will be available to discuss the draft GOP 30 minutes prior to the hearing and will also be available to answer questions after the hearing.

Copies of the draft GOP may be obtained from the TCEQ Web site at *http://www.tceq.state.tx.us/permitting/air/nav/air_genoppermits.html* or by contacting the TCEQ Office of Permitting and Registration, Air Permits Division at (512) 239-1250. Written comments may be mailed to Johnny Bowers, Texas Commission on Environmental Quality, Office of Permitting and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1070. All comments should reference the draft Air Curtain Incinerator GOP. Comments must be received by 5:00 p.m. on August 12, 2010. For further information, contact Mr. Bowers at (512) 239-6770.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact the TCEQ at (512) 239-4000. Requests should be made as far in advance as possible.

TRD-201003569
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 22, 2010

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Notice of District Petition

Notice issued June 10, 2010

TCEQ Internal Control No. 03012010-D02; Petitioner filed a petition for creation of South Port Alto Municipal Utility District of Calhoun County ('District') with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner is the holder of title to a majority in value of the land to be included in the proposed District; (2) there is no other conservation or reclamation district in Calhoun County, Texas with the same name; and (3) the proposed District will contain approximately 56.6 acres located within Calhoun County, Texas. The filed engineer's report states the proposed District is not within the corporate boundaries of any city or within the extraterritorial jurisdiction of any city, town or village in Texas. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $1,890,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691.

Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-201003601
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 23, 2010

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 114 and Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (TCEQ or commission) will conduct public hearings to receive testimony regarding proposed amendments to 30 Texas Administrative Code (TAC) Chapter 114, Control of Air Pollution from Motor Vehicles, §§114.2, 114.51, and 114.64; the repeal of §114.52; and revisions to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The proposed rulemaking would implement House Bill (HB) 715 and HB 1796 from the 81st Texas Legislature, 2009, Regular Session, relating to requiring low-volume vehicle emissions inspection stations to meet the criteria for a low-volume waiver established by the Texas Department of Public Safety and increasing the maximum time allowed from five to ten days that counties will have to reimburse dealerships participating in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Assistance Program, respectively. The proposed rulemaking would also streamline the process for implementing minor non-programmatic modifications to the vehicle emissions inspection analyzer specifications and repeal the Early Participation Incentive Program. (Rule Project Number 2009-027-114-EN)

The proposed SIP revision would implement HB 715 from the 81st Texas Legislature, 2009, Regular Session, related to requiring low-volume vehicle emissions inspection stations to meet the criteria for a low-volume waiver established by the Texas Department of Public Safety. The proposed revision would also streamline the process for implementing minor non-programmatic modifications to the vehicle emissions inspection analyzer specifications and include various non-substantive changes to apply appropriate and consistent use of acronyms, section references, structure, formatting, and certain terminology. (SIP Project Number 2009-035-SIP-NR)

The commission will hold public hearings on these proposals in Fort Worth on July 20, 2010, at 2:00 p.m. at the TCEQ, Region 4 Office, Dallas-Fort Worth Public Meeting Room, 2309 Gravel Road, Fort Worth, TX 76118; in Austin on July 21, 2010, at 10:00 a.m. at the TCEQ, Building E, Room 201S, 12100 Park 35 Circle, Austin, TX 78753; and in Houston on July 22, 2010, at 3:00 p.m. at the Houston-Galveston Area Council, Conference Room A, 3555 Timmons Lane, Houston, TX 77027. The hearings are 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 hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, 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 pertaining to the rulemaking should reference Rule Project Number 2009-027-114-EN. All comments relating to the SIP revision should reference Project Number 2009-035-SIP-NR. The comment period closes July 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.* Copies of the proposed SIP revision and all appendices can be obtained from the TCEQ's Web site at *http://www.tceq.state.tx.us/implementation/air/sip/sipplans.html.* For further information, please contact Edgar J. Gilmore, Jr., Air Quality Planning Section, (512) 239-2069.

TRD-201003438
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 18, 2010

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Notice of Public Hearing on Proposed Revisions To 30 TAC Chapter 116 and Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Chapter (TAC) Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, §§116.13, 116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740, 116.750, and 116.765; and to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The proposed rulemaking would revise the flexible air permit rules to address the EPA's proposed disapproval of the flexible permit program as part of the Texas SIP by EPA. The proposed rules would more clearly identify that federal permitting requirements must be met independently of the flexible permit program; ensure that the flexible permit rules cannot be used to circumvent federalpermitting requirements; address monitoring, recordkeeping, and reporting associated with flexible permits; and implement other changes necessary to obtain SIPapprovalfor the minor new source review flexible permit program.

The commission will hold a public hearing on this proposal in Austin on July 29, 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 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.

Written comments may be submitted to Michael Parrish, 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 2010-007-116-PR. The comment period closes August 2, 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 Mr. Michael Wilhoit, Air Permits Division, at (512) 239-1222.

TRD-201003437
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 18, 2010

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Notice of Water Quality Applications

The following notice was issued on June 11, 2010 through June 18, 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

Douglas Wayne Hall for a new State Permit No. WQ0004908000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate an existing dairy cattle facility at a maximum capacity of 699 head, of which 699 head are milking cows. The facility is located at 400 County Road 4410, Point, in Rains County, Texas.

CALPINE HIDALGO ENERGY CENTER LP BROWNSVILLE PUBLIC UTILITIES BOARD AND CALPINE OPERATING SERVICES COMPANY INC which operates the Calpine Hidalgo Energy Center, a combined cycle electric power generating facility has applied for a major amendment to TPDES Permit No WQ0004138000 to authorize continuous chlorination and associated changes to Item 8 of the Other Requirements section of the existing permit, revisions to chlorine limits in the existing permit, and the addition of an internal outfall to discharge off-line turbine wash water on an intermittent and flow variable basis. The current permit authorizes the discharge of cooling tower blowdown and previously monitored effluents (low volume waste sources) at a daily average flow not to exceed 920,000 gallons per day via Outfall 001. The facility is located at 4005 North Seminary Road, at the northwest corner of the intersection of Monte Cristo Road (Farm-to-Market Road 1925) and Seminary Road in the City of Edinburg, Hidalgo County, Texas 78541.

CITY PUBLIC SERVICE OF SAN ANTONIO which operates V. H. Braunig Steam Electric Station, has applied for a renewal of TPDES Permit No. WQ0001515000, which authorizes the discharge of once-through cooling water, previously monitored effluents, and storm water runoff at a daily average flow not to exceed 1,320,000,000 gallons per day via Outfall 001; the discharge of storm water runoff at an intermittent and flow variable basis via Outfalls 003, 006, 007, 008, 011, 013, and 015; and the discharge of storm water runoff and car wash water at an intermittent and flow variable basis via Outfall 012. The facility is located at 15290 Streich Road, approximately two miles east of Interstate Highway 37 South, adjacent to Braunig Lake, approximately 2.75 miles northwest of the City of Elmendorf and 17 miles southeast of the City of San Antonio, Bexar County, Texas TX 78112.

WRB REFINING LLC which operates Borger Railway Maintenance Center, a railcar cleaning, maintenance, and testing center, has applied for a renewal of TCEQ Permit No. WQ0002326000, which authorizes disposal of boiler blowdown/zeolite regeneration water and steam condensate (not used in cleaning) at a volume not to exceed an annual average flow of 1100 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located 919 Florida Street, west of Spur Road 246 and south of the Atchison, Topeka, and Santa Fe Railway in the City of Borger, Hutchinson County, Texas 79007.

UNITED STATES DEPARTMENT OF THE AIR FORCE which operates the former Kelly Air Force Base groundwater treatment facilities, has applied for a major amendment to TPDES Permit No. WQ0003955000 to authorize the removal of unconstructed Outfall 002, the removal of total PCBs sampling requirements at Outfall 003, and a modification of the irrigation acres from 195 acres to 198 acres. The current permit authorizes the discharge of treated groundwater and rinsate at a daily average flow not to exceed 1,000,000 gallons per day via Outfalls 001, 002, and 003; the discharge of treated groundwater and rinsate at a daily average flow not to exceed 150,000 gallons per day via Outfall 004; and the irrigation of 195 acres of the Lackland Air Force Base with treated groundwater at a hydraulic application rate not to exceed 4.0 acre-feet per acre per year. The facility is located adjacent to the Lackland Air Force Base, south of U.S. Highway 90 and east of the intersection of Leon Creek and Military Drive, in the southwest portion of the City of San Antonio, Bexar County, Texas 78226.

SAN ANTONIO WATER SYSTEM has applied for a renewal of TPDES Permit No. WQ0010137003, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 46,000,000 gallons per day. The existing permit also authorizes composting of sewage sludge, the marketing and distribution of sewage sludge and the land application of Class A sludge on property-owned, leased or under the direct control of the permittee. The facility is located approximately one mile west of the intersection of Mauermann Road and Pleasanton Road in Bexar County, Texas 78221. The sludge

composting facilities are located adjacent to the wastewater treatment plant site.

THE SAN ANTONIO WATER SYSTEM has applied for a renewal of TPDES Permit No. WQ0010137008, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 46,000,000 gallons per day. The facility site is located approximately 1.5 miles south of the intersection of Southton Road and Blue Wing Road in Bexar County, Texas 78221.

THE CITY OF HUNTINGTON has applied for a renewal of TPDES Permit No. WQ0010191001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 420,000 gallons per day. The facility is located approximately 1 mile southeast of the intersection of U.S. Highway 69 and Farm-to-Market Road 1669 between the Southern Pacific Railroad and Shawnee Creek in Angelina County, Texas 75949.

CITY OF PERRYTON has applied for a renewal of TCEQ Permit No. WQ0010248001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 1,400,000 gallons per day via surface irrigation of 570 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located 0.50 mile south of Perryton city limits on U.S. Highway 83 and thence east 1.25 miles to the plant in Ochiltree County, Texas 79070.

CITY OF SAN AUGUSTINE has applied for a renewal of TPDES Permit No. WQ0010268001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility is located approximately 5,000 feet northeast of the intersection of U.S. Highway 96 and Farm-to-Market Road 147 in San Augustine County, Texas 75972.

CITY OF HENRIETTA has applied for a renewal of TPDES Permit No. WQ0010454003, which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 240,000 gallons per day. The facility is located at 1305 North Bridge Street, approximately one mile north of U.S. Highway 82 and 200 yards east of Farm-to-Market Road 1197 in Clay County, Texas 76365.

CITY OF LA FERIA has applied for a renewal of TPDES Permit No. WQ0010697001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 1.7 miles south of the intersection of Farm-to-Market Road 506 with U.S. Highway 83, then west along Dodd Land approximately 1,000 feet in Cameron County, Texas 78559.

CITY OF TENAHA has applied for a renewal of TPDES Permit No. WQ0010818001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 190,000 gallons per day. The facility is located adjacent to Hilliard Creek; approximately 2,400 feet south of U.S. Highway 84 and 3,300 feet east of U.S. Highway 96 in Shelby County, Texas 75974.

WEST CEDAR CREEK MUNICIPAL UTILITY DISTRICT has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0011839002, to authorize the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 250,000 gallons per day. The facility is located at 2182 Mason Lane, approximately 2,500 feet east of the intersection of Highway 274 and Mason Lane, in Tool in Henderson County, Texas 75143.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 189 has applied for a renewal of TPDES Permit No. WQ0012237001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,250,000 gallons per day. The facility is located at 1100 Dunson Glen, approximately 1,300 feet north of the point where Kuykendahl Road crosses Harris County Flood Control District Ditch P-145-03-00 and approximately 2,400 feet north-northwest of the intersection of Kuykendahl Road and Ella Boulevard in Harris County, Texas 77090.

HABC LTD has applied to for a renewal of TCEQ Permit No. WQ0014587001 which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 325,000 gallons per day via subsurface and surface drip irrigation on 76 acres of public access land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site will be located approximately 3 miles northeast of the intersection of Rural Route 12 and U.S. Highway 290 in Dripping Springs and approximately 1.8 miles due north of U.S. Highway 290 in Hays County, Texas 78620.

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 10 has applied for a renewal of TPDES Permit No. WQ0014643001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 94,500 gallons per day. The facility is located at 15839 1/2 Whisper Woods Drive, on the east side of Barker Cypress Road, 4,600 feet north of Huffmeister Road in Harris County, Texas in Harris County, Texas 77249.

WESTSIDE COMMUNITY DEVELOPMENT CORPORATION has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014940001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 7,500 gallons per day. The facility will be located at 2123 Farm-to-Market Road 2238, approximately one mile north of Interstate Highway 10 on the east side of Farm-to-Marked Road 2238 in Fayette County, Texas 78956.

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-201003600
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 23, 2010

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on June 22, 2010, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. 4200 Rosedale LLC and the Goodyear Tire & Rubber Company; SOAH Docket No. 582-09-5891; TCEQ Docket No. 2007-1259-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against 4200 Rosedale LLC and the Goodyear Tire & Rubber Company on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you

have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201003603
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 23, 2010

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General Land Office

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by William E. Merten, Licensed State Land Surveyor, conducted January 27, 2009, locating the following shoreline boundary:

Survey in Harris County, a portion of the Texas Gulf Coast shoreline along the line of Mean Higher High Water, on the east shore of Mudd Lake, at the Clear Lake Forest Community Park, 1001 Baronridge, Seabrook, Texas, the same line being a portion of the boundary of the David Harris Survey, Abstract No. 25.

This survey is intended to provide pre-project baseline information related to an erosion response activity on coastal public lands. An owner of uplands adjoining the project area is entitled to continue to exercise littoral rights possessed prior to the commencement of the erosion response activity, but may not claim any additional land as a result of accretion, reliction, or avulsion resulting from the erosion response activity.

For a copy of this survey or more information on this matter, contact Bill O'Hara, Director of the Survey Division, Texas General Land Office by phone at (512) 463-5212, email bill.ohara@glo.state.tx.us, or fax (512) 463-5223.

TRD-201003411
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: June 17, 2010

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Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by William E. Merten, Licensed State Land Surveyor, conducted in September 2009, locating the following shoreline boundary:

Survey in Galveston County, a portion of the Texas Gulf Coast shoreline along the line of Mean High Water, in the southwest portion of Pierce Marsh 1.9 miles southwest of the intersection of Interstate Highway 45 and State Highways No. 6 and No. 197 near Hitchcock, Texas, the same line being a portion of the boundary of the James Spillman Survey, Abstract No. 175.

This survey is intended to provide pre-project baseline information related to an erosion response activity on coastal public lands. An owner of uplands adjoining the project area is entitled to continue to exercise littoral rights possessed prior to the commencement of the erosion response activity, but may not claim any additional land as a result of accretion, reliction, or avulsion resulting from the erosion response activity.

For a copy of this survey or more information on this matter, contact Bill O'Hara, Director of the Survey Division, Texas General Land Office by phone at (512) 463-5212, email bill.ohara@glo.state.tx.us, or fax (512) 463-5223.

TRD-201003412
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: June 17, 2010

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Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by Nedra Foster, Licensed State Land Surveyor, conducted December 23, 2009, locating the following shoreline boundary:

Survey in Jefferson County, a portion of the Texas Gulf Coast shoreline along the line of Mean High Water, on the Neches River, on the east end of the site known as "CB & I Island Park," the same line being a portion of the boundary of W. Hodges Survey, Abstract No. 131, on the east side of Beaumont.

This survey is intended to provide pre-project baseline information related to an erosion response activity on coastal public lands. An owner of uplands adjoining the project area is entitled to continue to exercise littoral rights possessed prior to the commencement of the erosion response activity, but may not claim any additional land as a result of accretion, reliction, or avulsion resulting from the erosion response activity.

For a copy of this survey or more information on this matter, contact Bill O'Hara, Director of the Survey Division, Texas General Land Office by phone at (512) 463-5212, email bill.ohara@glo.state.tx.us, or fax (512) 463-5223.

TRD-201003413
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: June 17, 2010

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Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by William E. Merten, Licensed State Land Surveyor, conducted April 12, 2007, locating the following shoreline boundary:

Survey in Harris County, a portion of the Texas Gulf Coast shoreline along the line of Mean Higher High Water, on the east shore of Seabrook Slough, at 1505 and 1509, Toddville Road, Seabrook, Texas, the same line being a portion of the boundary of Ritson Morris Survey, Abstract No. 52, Harris County.

This survey is intended to provide pre-project baseline information related to an erosion response activity on coastal public lands. An owner of uplands adjoining the project area is entitled to continue to exercise littoral rights possessed prior to the commencement of the erosion response activity, but may not claim any additional land as a result of accretion, reliction, or avulsion resulting from the erosion response activity.

For a copy of this survey or more information on this matter, contact Bill O'Hara, Director of the Survey Division, Texas General Land Office by phone at (512) 463-5212, email bill.ohara@glo.state.tx.us, or fax (512) 463-5223.

TRD-201003414
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: June 17, 2010

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 10-047, Amendment Number 940, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to modify the asset limits to the Medicare Savings Program as mandated under the Medicare Improvements for Patients and Providers Act. The proposed amendment will have no significant fiscal impact to the state or federal budgets.

To obtain copies of the proposed amendment, interested parties may contact Emily Zalkovsky by mail at Health and Human Services Commission, P.O. Box 13247, Mail Code H600, Austin, Texas 78711; by telephone at (512) 491-2078; by facsimile at (512) 491-1953; or by e-mail at emily.zalkovsky@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-201003556
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: June 21, 2010

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective September 1, 2010.

The Legislative Budget Board and the Governor's Office informed HHSC in a letter dated May 17, 2010, of their revision to the Spending Reduction Plan for the 2010-11 Biennium submitted by HHSC. The spending reduction plan was submitted in response to a letter dated January 15, 2010 from the Governor, Lieutenant Governor, and Speaker requesting a spending reduction proposal. As a result of this revision to the spending reduction plan the proposed reimbursement for all procedure codes submitted on and after September 1, 2010, will be equal to the reimbursement indicated on the agency's current fee schedule in effect at the time, less one percent. The amendments will modify the reimbursement methodologies in the Texas Medicaid State Plan as a result of Medicaid fee changes for the following services:

Clinical Laboratory Services (non-state entities)

Freestanding Psychiatric Facilities (non-state entities)

Ambulatory Surgical Centers

Hospital Outpatient Medicaid Services

Renal Dialysis Facilities

The proposed amendments are estimated to result in an additional annual aggregate expenditure of $(2,134,193) for the remainder of federal fiscal year (FFY) 2010, with approximately $(1,513,998) in federal funds and $(620,195) in State General Revenue (GR). For FFY 2011, the estimated additional aggregate expenditure is $(25,610,308), with approximately $(16,174,191) in federal funds and $(9,436,117) in GR.

Interested parties may obtain copies of the proposed amendment by contacting Kevin Nolting, Director of Rate Analysis for Hospital Services, 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) 491-1348; by facsimile at (512) 491-1998; or by e-mail at Kevin.Nolting@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201003606
Steve Aragon
Chief Clerk
Texas Health and Human Services Commission
Filed: June 23, 2010

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Texas Department of Insurance

Company Licensing

Application to change the name of AIOI INSURANCE COMPANY OF AMERICA to AIOI NISSAY DOWA INSURANCE COMPANY OF AMERICA, A NEW YORK CORPORATION, a foreign fire and casualty company. The home office is in New York, New York.

Application for admission to the State of Texas by HOLYOKE MUTUAL INSURANCE COMPANY IN SALEM, a foreign fire and casualty company. The home office is in Salem, Massachusetts.

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-201003591
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 23, 2010

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Correction of Error

The Texas Department of Insurance proposed amendments to 28 TAC Chapter 12, concerning Independent Review Organizations, published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4859).

The Cross Reference to Statute citation for each subchapter was incomplete as published on pages 35 TexReg 4883, 4887, 4890, 4894, 4895, 4896. For each subchapter there are two paragraphs under the Cross Reference to Statute which should be corrected.

1. The reference as published reads, "§§12.101 - 12.106, Insurance Code §§4201.002, 4202.002, 4202.004, and 12.108, and 12.110, 4202.005".

It should read, "§§12.101 - 12.106, 12.108, and 12.110 Insurance Code §§4201.002, 4202.002, 4202.004, and 4202.005".

2. The reference as published reads, "§§12.201, 12.202, Insurance Code §1305.355 and §4202.002; and 12.204 - 12.207 Labor Code §§408.0043 - 408.0045 and 413.031".

It should read, "§§12.201, 12.202, and 12.204 - 12.207, Insurance Code §1305.355 and §4202.002; Labor Code §§408.0043 - 408.0045 and 413.031".

TRD-201003594

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Third Party Administrator Application

The following third party administrator (TPA) application have been filed with the Texas Department of Insurance and are under consideration.

Application of CHUBB SERVICES CORPORATION, a foreign third party administrator. The home office is CHICAGO, ILLINOIS.

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.

TRD-201003588
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 23, 2010

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Texas Board of Pardons and Paroles

Request for Proposal

The Texas Board of Pardons and Paroles announces the issuance of Request for Proposal (RFP) #696-BP-10-P003.

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Texas Department of Criminal Justice (TDCJ) is accepting proposals for a Consulting Services Contract for the Texas Board of Pardons and Paroles for an analysis of its current Parole Guidelines Risk Item Factors Scale Instrument. TDCJ anticipates awarding a contract to the Offeror most advantageous to TDCJ based on the factors specified within the solicitation.

The RFP may obtain information through the Electronic State Business Daily, *http://esbd.cpa.state.tx.us/,* or by contacting TDCJ Contracts and Procurement, Mary Drewry, Contract Administrator, *mary.drewry@tdcj.state.tx.us,* (936) 437-7130.

Sealed offers will be accepted until 3:00 p.m., August 3, 2010, Texas Department of Criminal Justice, Contracts and Procurement Department, 2 Financial Plaza, Suite 525, Huntsville, Texas 77340, Attn: 696-BP-10-P003.

TRD-201003599
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Filed: June 23, 2010

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Texas Department of Public Safety

Pre-Disaster Mitigation and Repetitive Flood Claims Grant Program for FY 2011 Announced

The Pre-Disaster Mitigation (PDM) and Repetitive Flood Claims (RFC) FY 2011 grant application window is open, offering an opportunity to obtain grant funding for projects that mitigate risks from natural hazards.

The state encourages PDM projects that address acquisition and demolition of residences on flood prone properties or the elevation of residences or non-residential properties to reduce flood damage; individual or community safe rooms for tornado and high wind hazards; and localized drainage and flood management projects. A PDM grant may also be used to create or update a local mitigation plan. The RFC program addresses the acquisition or elevation of current National Flood Insurance Program (NFIP) insured properties with repetitive losses.

Eligible applicants are state agencies, local jurisdictions, recognized Indian Tribal governments, state supported colleges/universities and councils of government. Private non-profit agencies are not themselves eligible but may be able to find a local government entity to apply on their behalf. All eligible applicants applying for projects other than mitigation planning grants must have a FEMA-approved local mitigation plan in accordance with the 44 CFR 201.6.

To submit an application, a web-based account managed by FEMA is set up through the Texas Division of Emergency Management (TDEM). The chief elected officer must mail a letter to TDEM requesting access for identified individuals to create and submit an application. Information for requesting e-Grant access and submitting applications can be found at http://www.txdps.state.tx.us/dem/pages/PDMFY2011announcementandguidance.pdf.

The deadline for requesting e-Grant access through TDEM is August 6, 2010. The deadline for submitting an RFC application is October 16, 2010. The deadline for submitting a PDM application is October 29, 2010.

TRD-201003565
Stuart Platt
General Counsel
Texas Department of Public Safety
Filed: June 22, 2010

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Public Utility Commission of Texas

Notice of Application for a Certificate of Convenience and Necessity for a Proposed CREZ Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on June 16, 2010, for a certificate of convenience and necessity (CCN) for a proposed Competitive Renewable Energy Zone (CREZ) transmission line in Dickens, Kent, and Scurry Counties, Texas.

Docket Style and Number: Application of Wind Energy Transmission Texas, LLC for a Certificate of Convenience and Necessity for the Panhandle AD to Central B (Cottonwood to Dermott) 345-kV CREZ Transmission Line in Dickens, Kent and Scurry Counties. SOAH Docket Number 473-10-4788; PUC Docket Number 38295.

The Application: Wind Energy Transmission Texas, LLC (WETT) requests a CCN for a proposed CREZ transmission line designated the Panhandle AD to Central B 345-kV Transmission Line (project). The proposed project consists of constructing a new double-circuit, 345-kV transmission line. This line will extend from WETT's new Panhandle AD Switching Station (Cottonwood Station), located in northwestern Dickens County, to Oncor Electric Delivery Company LLC's new Central B Switching Station (Dermott Station), which is located in northwestern Scurry County. The proposed project is described in the ERCOT CREZ Transmission Optimization Study as the Panhandle AD to Central B double-circuit 345-kV line. WETT subsequently changed the name of the substation from Panhandle AD to the Cottonwood Sta-

tion and Oncor has changed the name of the Central B Switching Station to the Dermott Station.

The application includes 13 alternative routes and WETT identified the Central Transmission Alternative Route as the preferred route. However, any route presented could be approved by the commission. The preferred route for the new 345-kV double-circuit line is approximately 7l.6 miles in length and is proposed to be constructed on double-circuit lattice steel towers. The estimated date to energize facilities is December 2012. The estimated cost of the project is $141,837,664. Pursuant to the Public Utility Regulatory Act §39.203(e), the commission must issue a final order in this docket before the 181st day after the date the application is filed with the commission.

In Docket No. 33672, *Commission Staff's Petition for Designation of Competitive Renewable Energy Zones*, Order on Rehearing (October 7, 2008), the commission determined that the transmission facilities identified in the final order were necessary to deliver to customers renewable energy generated in the CREZ. The Panhandle AD - Central B 345-kV transmission line project, the subject of this application, was specifically identified in that order as a necessary facility. In Docket Number 36802 WETT was ordered to complete the project identified as the Panhandle AD - Central B double-circuit CREZ Project. *Proceeding to Sequence Certificate of Convenience and Necessity Applications for the Subsequent Projects for the Competitive Renewable Energy Zones*, Docket Number 36802, (April 5, 2010).

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is July 16, 2010. 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 SOAH Docket Number 473-10-4788 and PUC Docket Number 38295.

TRD-201003472
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 18, 2010

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Notice of Application for a Certificate of Convenience and Necessity for a Proposed CREZ Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on May 24, 2010, for a certificate of convenience and necessity (CCN) for a proposed Competitive Renewable Energy Zone (CREZ) transmission line in Scurry, Mitchell, Fisher, Jones, Shackelford, Stephens, Palo Pinto, Erath, Somervell, Bosque, Johnson, Taylor, Eastland, Callahan, Comanche, Hill and Navarro Counties, Texas.

Docket Style and Number: Application of Lone Star Transmission, LLC for a Certificate of Convenience and Necessity for the Central A to Central C to Sam Switch/ Navarro 345-kV CREZ Transmission Line. SOAH Docket Number 473-10-4398; PUC Docket Number 38230.

The Application: Lone Star Transmission, LLC (Lone Star) requests a CCN for a proposed CREZ transmission line designated the Central A to Sam Switch/ Navarro 345-kV Transmission Line (Project). The proposed Project consists of constructing an approximately 311 mile double/single circuit transmission line. In addition, Lone Star proposes to construct three new 345-kV substations. This line will extend from: (1) the new Oncor Electric Delivery Company's Central A substation located south of Snyder, Texas in Scurry County, to (2) Lone Star's new Central C substation located southwest of Albany in Shackelford County, to (3) the new Sam Switch substation located southeast of Hillsboro in Hill County, and to (4) the new Navarro substation located southwest of Corsicana in Navarro County.

The Project is described in the ERCOT CREZ Transmission Optimization Study as the Central A to Sam Switch (Combined Application): (1) Central A to Central C double-circuit 345- kV, (2) Central C to Navarro/ Sam Switch double-circuit 345-kV (Central C to Navarro portion), and (3) Central C to Navarro/ Sam Switch double-circuit 345-kV (Navarro to Sam Switch portion).

The application includes a total of nine alternative routes for the Central A to Central C segment, 14 alternative routes for the Central C to Sam Switch segment, and seven alternative routes for the Sam Switch to Navarro segment. Lone Star identified Route AC6 as the preferred route for the Central A to Central C segment; Route CSS14 as the preferred route for the Central C to Sam Switch segment, and Route SSN4 as the preferred route for the Sam Switch to Navarro segment. However, any route presented could be approved by the commission. The preferred route begins in west Texas and passes through as many as 17 counties ending in north central Texas. The preferred route for the new 345-kV double-circuit line is approximately 311 miles in length and is proposed to be constructed on double-circuit spun concrete monopole, tubular steel or hybrid structures. The estimated date to energize facilities is March 2013. The estimated cost of the Project is $767,800,000. Pursuant to the Public Utility Regulatory Act §39.203(e), the commission must issue a final order in this docket before the 181st day after the date the application is filed with the commission.

In Docket No. 33672, *Commission Staff's Petition for Designation of Competitive Renewable Energy Zones*, Order on Rehearing (October 7, 2008), the commission determined that the transmission facilities identified in the final order were necessary to deliver to customers renewable energy generated in the CREZ. The Central A to Sam Switch/ Navarro 345-kV transmission line project, the subject of this application, was specifically identified in that order as a necessary facility. In Docket Number 36802, Lone Star was ordered to complete the project identified as the Central A to Sam Switch/ Navarro CREZ Project. *Proceeding to Sequence Certificate of Convenience and Necessity Applications for the Subsequent Projects for the Competitive Renewable Energy Zones*, Docket Number 36802, (April 5, 2010).

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is June 23, 2010. 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 SOAH Docket Number 473-10-4398 and PUC Docket Number 38230.

TRD-201003563
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 21, 2010

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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 June 15, 2010, for designation as an

eligible telecommunications carrier (ETC) pursuant to Public Utility Commission Substantive Rule §26.418.

Docket Title and Number: Application of Budget Prepay, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to Public Utility Commission Substantive Rule §26.418 for Link-Up and Lifeline Support. Docket Number 38352.

The Application: The company is requesting ETC designation only for the limited purpose of receiving Federal Universal Service Fund (FUSF) low income support for qualifying low-income customers. Budget Prepay is not seeking authority to be eligible to receive FUSF high cost support or support from the Texas Universal Service Fund (TUSF). Pursuant to 47 United States Code §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. Budget Prepay is requesting ETC designation in the entirety of the service territories of AT&T Texas and Verizon Southwest in Texas as shown on Exhibit B of the application. Budget Prepay does not seek ETC designation in the service territory of any rural ILEC. The company holds Service Provider Certificate of Operating Authority Number 60231.

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 July 16, 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 38352.

TRD-201003473
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 18, 2010

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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 June 21, 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 Teleconnect LLC for a Service Provider Certificate of Operating Authority, Docket Number 38369.

Applicant intends to provide facilities-based 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 July 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 38369.

TRD-201003593
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 23, 2010

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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 June 18, 2010, for waiver of denial by the Pooling Administrator (PA) of Charter Fiberlink TX-CCO, LLC (Charter) request for assignment of one (1) thousand block of numbers in the Cleburne rate center.

Docket Title and Number: Petition of Charter Fiberlink TX-CCO, LLC for Waiver of Denial of Numbering Resources for Cleburne Rate Center, Docket Number 38364.

The Application: Charter submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because Charter 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 July 9, 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 38364.

TRD-201003564
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 21, 2010

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed CREZ Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on June 16, 2010, to amend a certificate of convenience and necessity (CCN) for a proposed Competitive Renewable Energy Zone (CREZ) transmission line in Wise, Denton, Parker, and Tarrant Counties, Texas.

Docket Style and Number: Application of Oncor Electric Delivery Company LLC to amend a Certificate of Convenience and Necessity for the Willow Creek - Hicks 345-kV CREZ Transmission Line in Wise, Denton, Parker, and Tarrant Counties. SOAH Docket Number 473-10-4789; PUC Docket Number 38324.

The Application: Oncor Electric Delivery Company LLC (Oncor) requests to amend its CCN for a proposed CREZ transmission line designated the Willow Creek to Hicks 345-kV Transmission Line (project). The proposed project consists of constructing an approximately 43.3 mile double-circuit transmission line. This line will extend from the existing Oncor Willow Creek Switching Station, located in southwestern Wise County, to the new Oncor Hicks Switching Station, to be located in north central Tarrant County. The proposed project is described in the ERCOT CREZ Transmission Optimization Study as the Willow Creek to Hicks 345-kV line.

The application includes a preferred route and 94 alternative routes. Oncor identified Route 222 as the preferred route for the Willow Creek to Hicks line. However, any route presented could be approved by the commission. The preferred route for the new 345-kV double-circuit line is approximately 43.3 miles in length and is proposed to be constructed on double-circuit lattice steel towers. The estimated date to energize facilities is June 2013. The estimated cost of the project is $97,590,000. Pursuant to the Public Utility Regulatory Act §39.203(e), the commission must issue a final order in this docket before the 181st day after the date the application is filed with the commission.

In Docket No. 33672, *Commission Staff's Petition for Designation of Competitive Renewable Energy Zones*, Order on Rehearing (October 7, 2008), the commission determined that the transmission facilities identified in the final order were necessary to deliver to customers renewable energy generated in the CREZ. The Willow Creek to Hicks 345-kV transmission line project, the subject of this application, was specifically identified in that order as a necessary facility. In Docket Number 36802 Oncor was ordered to complete the project identified as the Willow Creek to Hicks double-circuit CREZ Project. *Proceeding to Sequence Certificate of Convenience and Necessity Applications for the Subsequent Projects for the Competitive Renewable Energy Zones*, Docket Number 36802, (April 5, 2010).

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is July 16, 2010. 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 SOAH Docket Number 473-10-4789 and PUC Docket Number 38324.

TRD-201003470
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 18, 2010

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Notice of Application to Amend a Certificate of Convenience and Necessity for Proposed CREZ Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on June 16, 2010, to amend a certificate of convenience and necessity (CCN) for a proposed Competitive Renewable Energy Zone (CREZ) transmission line in Armstrong, Carson, Deaf Smith, Oldham, Potter, and Randall Counties, Texas.

Docket Style and Number: Application of Sharyland Utilities, LP to Amend its Certificate of Convenience and Necessity for the Hereford to White Deer (Formerly Panhandle AB to Panhandle BA) 345-kV CREZ Transmission Line in Armstrong, Carson, Deaf Smith, Oldham, Potter, and Randall Counties. SOAH Docket Number 473-10-4790; PUC Docket Number 38290.

The Application: Sharyland Utilities, LP (Sharyland) requests approval to amend its CCN for a proposed CREZ transmission line designated the Hereford to White Deer 345-kV Transmission Line (project). The project is described in the ERCOT CREZ Transmission Optimization Study (CTO) as the Panhandle AB to Panhandle BA (Hereford to White Deer) project. The proposed project consists of a new 345-kV single-circuit transmission line, constructed on double-circuit capable lattice towers, from the proposed Hereford Collection Station (formerly Panhandle AB) located in southeast Deaf Smith County, to the proposed White Deer Collection Station (formerly Panhandle BA) located in southern Carson County.

The application includes 12 alternative routes and Sharyland identified Alternative Route 1 as the preferred route. However, any route presented could be approved by the commission. The preferred route is approximately 91.16 miles in length and is proposed to be constructed on double-circuit lattice steel towers. The estimated date to energize facilities is July 2013. The estimated cost of the project is $190,503,197. Pursuant to the Public Utility Regulatory Act §39.203(e), the commission must issue a final order in this docket before the 181st day after the date the application is filed with the commission.

In Docket No. 33672, *Commission Staff's Petition for Designation of Competitive Renewable Energy Zones*, Order on Rehearing (October 7, 2008), the commission determined that the transmission facilities identified in the final order were necessary to deliver to customers renewable energy generated in the CREZ. The Hereford to White Deer 345-kV (formerly Panhandle AB to Panhandle BA) transmission line project, the subject of this application, was specifically identified in that order as a necessary facility. In Docket Number 36802 Sharyland was ordered to complete the project identified as the Panhandle AB to Panhandle BA single-circuit, double-circuit capable 345-kV CREZ Project. *Proceeding to Sequence Certificate of Convenience and Necessity Applications for the Subsequent Projects for the Competitive Renewable Energy Zones*, Docket Number 36802, (April 5, 2010).

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is July 16, 2010. 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 SOAH Docket Number 473-10-4790 and PUC Docket Number 38290.

TRD-201003471
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 18, 2010

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on June 16, 2010, to amend a certificate of convenience and necessity for a proposed transmission line in Harris County, Texas.

Docket Style and Number: Application of CenterPoint Energy Houston Electric, LLC to Amend a Certificate of Convenience and Necessity for a Proposed 138-kv Transmission Line within Harris County, Docket Number 38307.

The Application: The application of CenterPoint Energy Houston Electric, LLC (CenterPoint Energy) for a proposed transmission line is designated the 138-kV Zenith Transmission Line Project. The preferred route for the new 138-kV line is approximately five miles in length and is proposed to be constructed on lattice towers. The estimated cost of the proposed route is $21,107,000. The estimated date to energize facilities is February 14, 2012.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or

toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is August 2, 2010. 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 38307.

TRD-201003469
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 18, 2010

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Notice of ERCOT's Filing for Approval of Unaffiliated Director

Notice is hereby given to the public of the June 22, 2010, filing with the Public Utility Commission of Texas (commission) of the Petition of the Electric Reliability Council of Texas, Inc. (ERCOT) for Approval of an Unaffiliated Director.

Docket Style and Number: Petition of the Electric Reliability Council of Texas for Approval of Unaffiliated Director, Docket Number 38373.

The Application: ERCOT seeks approval of an Unaffiliated Director of the ERCOT Board. The commission has jurisdiction over this matter pursuant to Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §39.151 (Vernon 2007 and Supplement 2009). On May 19, 2010, pursuant to the direction of the ERCOT Board, ERCOT issued its notice of Special Meeting of ERCOT's Corporate Membership for July 18, 2010, for the election of Mr. Bermudez as an Unaffiliated Director. Pursuant to the ERCOT Amended and Restated Bylaws, Mr. Bermudez received the requisite amount of segment votes by ballot on June 16, 2010, in lieu of the Special Meeting, to be elected as an Unaffiliated Director for a term beginning on July 1, 2010. Mr. Bermudez will serve on the ERCOT Board, beginning July 1, 2010, pending the commission's approval.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or 1-800-735-2989. All correspondence should refer to Docket Number 38373.

TRD-201003605
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 23, 2010

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Public Notice of Public Hearing on the Rulemaking Relating to 911

The staff of the Public Utility Commission of Texas (commission) will hold a public hearing regarding the Rulemaking Relating to 911 on Tuesday, July 27, 2010, at 9:00 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78711. Project Number 38047 has been established for this proceeding.

Questions concerning the public hearing or this notice should be referred to Susan Goodson, Attorney, Legal Division at (512) 936-7292, or James Kelsaw, Senior Utility Analyst, Infrastructure and Reliability Division at (512) 936-7338. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201003590
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 23, 2010

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Texas Council on Purchasing from People with Disabilities

Request for Comment Regarding the Management Fee Rate Charged by TIBH Industries, Inc. (Central Nonprofit Agency)

Notice is hereby given that the Texas Council on Purchasing from People with Disabilities (Council) will review and make a decision on the management fee rate charged by the central nonprofit agency, TIBH Industries Inc., for its services to the community rehabilitation programs (CRPs) for Fiscal Year 2010 as required by §122.019(e) of the Texas Human Resources Code. This review will be conducted at the Council's meeting on Friday, September 17, 2010. The Council's meeting will be held at the Capitol Extension, 1400 North Congress Avenue, Hearing Room E2.026, Austin, Texas. TIBH Industries Inc. has requested that the Council set the management fee rate at 6% of the sales price for products, 6% of the contract price for services and 5% for Temporary Services. The Council seeks public comment on TIBH Industries Inc. management fee rate request as required by §122.030(a) - (b) of the Texas Human Resources Code.

Comments should be submitted in writing on or before Friday, September 3, 2010 to Kelvin Moore of the Texas Council on Purchasing from People with Disabilities, 111 E. 17th Street, Austin, Texas 78711.

For all other questions or comments, contact the Texas Council on Purchasing from People with Disabilities at (512) 463-3244. In addition, hearing and speech impaired individuals with text telephones (TTY) may also contact the Council on Purchasing from People with Disabilities at (800) 531-5441.

TRD-201003444
David Duncan
Deputy General Counsel
Texas Council on Purchasing from People with Disabilities
Filed: June 18, 2010

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Request for Comment Regarding the Services Performed by TIBH Industries, Inc.

Notice is hereby given that the Texas Council on Purchasing from People with Disabilities (Council) intends to review the services provided by the central nonprofit agency, TIBH Industries Inc., for Fiscal Year 2010 as required by §122.019(c) of the Texas Human Resources Code. As required by that section, the Council will review the performance of TIBH to determine whether that agency's performance complies with the Council's contractual specifications. This review will be considered at the next Council meeting on Friday, September 17, 2010. The Council's meeting will be held at the Capitol Extension, 1400 North Congress Avenue, Hearing Room E2.026, Austin, Texas. The Council requests that interested parties submit comments regarding the services of TIBH Industries Inc. in its operation of the State Use Program, under §122.019(a) - (b) of the Texas Human Resources Code.

Comments should be submitted in writing on or before Friday, September 3, 2010 to Kelvin Moore of the Texas Council on Purchasing from People with Disabilities, 111 E. 17th Street, Austin, Texas 78711.

For all other questions or comments, contact the Texas Council on Purchasing from People with Disabilities at (512) 436-3244. In addition, hearing and speech-impaired individuals with text telephones (TTY) may also contact the Council on Purchasing from People with Disabilities at (800) 531-5441.

TRD-201003443
David Duncan
Deputy General Counsel
Texas Council on Purchasing from People with Disabilities
Filed: June 18, 2010

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Texas Department of Savings and Mortgage Lending

Notice of Application for Change of Control of a State Savings Bank

Notice is hereby given that on May 11, 2010, application was filed with the Savings and Mortgage Lending Commissioner of Texas for change of control of Pioneer Bank, SSB, Dripping Springs, Texas, by Patrick W. Hopper, as Trustee of PWH Trust UTD 3/2/94.

This application is filed pursuant to 7 TAC §§75.121 - 72.127 of the rules and regulations applicable to Texas Savings Banks. These rules are on file with the Office of the Secretary of State, Texas Register Division, or may be seen at the Department's offices in the Finance Commission Building, 2601 North Lamar, Suite 201, Austin, Texas 78705.

TRD-201003410
Douglas B. Foster
Commissioner
Texas Department of Savings and Mortgage Lending
Filed: June 17, 2010

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

http://www.txdot.gov/public_involvement/hearings_meetings.

Or visit www.txdot.gov, click on Public Involvement and click on Hearings and Meetings.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-201003595
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: June 23, 2010

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Public Notice - Photographic Traffic Signal Enforcement Systems: Municipal Reporting of Traffic Crashes

The Texas Department of Transportation (department) is requesting that each municipality subject to the requirements contained in Transportation Code, §707.004 provide the required data to the department **no later than October 29, 2010** in order for the department to meet the mandated deadline for an annual report to the Texas Legislature.

Pursuant to Transportation Code, §707.004, each municipality operating a photographic traffic signal enforcement system or planning to install such a system must compile and submit to the department certain statistical information. Before installing such a system, the municipality is required to submit a written report on the number and type of traffic crashes that have occurred at the intersection over the last 18 months prior to installation. The municipality is also required to provide annual reports to the department after installation showing the number and type of crashes that have occurred at the intersection.

The department is required by Transportation Code, §707.004 to produce an annual report of the information submitted to the department by December 1 of each year.

The department has created a web page detailing municipal reporting requirements and to allow the required data to be submitted electronically:

http://www.txdot.gov/safety/red_light_cameras.htm.

For additional information contact the Texas Department of Transportation, Traffic Operations Division, 125 East 11th Street, Austin, Texas 78701-2483 or call (512) 416-3118.

TRD-201003596
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: June 23, 2010

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University of North Texas Health Science Center at Fort Worth

Notice of Award of Major Consulting Contract

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the University of North Texas Health Science Center at Fort Worth (UNTHSC) announces this notice of consultant contract award.

The invitation for consultants to provide proposals of consulting services (RFP) was published in the June 4, 2010, issue of the *Texas Register* (35 TexReg 4764).

The consultant will assist UNTHSC with Phase II of development of a detailed academic and business plan for a potential new academic degree program accredited by the Liaison Committee on Medical Education (LCME).

The contract for Phase II is awarded to PricewaterhouseCoopers, LLP, 10 Tenth Street NW, Suite 1400, Atlanta, Georgia 30309. UNTHSC will pay an amount not to exceed $53,000. The term of the contract is June 21, 2010 through August 30, 2010, with an option to renew for up to twelve additional months. The consultant must submit documents, films, recordings, or reports that consultant is required to provide under the contract to UNTHSC no later than August 30, 2010.

TRD-201003576

Carolyn Cross
Associate Director of Purchasing
University of North Texas Health Science Center at Fort Worth
Filed: June 22, 2010

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Stephen F. Austin State University

Notice of Consultant Contract Award

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of contract award of university's contract with The Northeast Foundation for Children, Inc., 85 Avenue A, Suite 204, Turner Falls, MA 01376. The contract is in the sum of $14,500. The original contract availability notice was published in the April 23, 2010, issue of the *Texas Register* (35 TexReg 3341).

No documents, films, recording, or reports of intangible results will be required to be presented by the outside consultant. Services are provided on a per program basis.

For further information, please call Ms. Lysa Hagan, Leader - SFA Charter School at (936) 468-5899.

TRD-201003389
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: June 16, 2010

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Texas State University System

Request for Proposals for Outside Counsel

RFP ISSUE DATE: July 2, 2010

PROPOSALS DUE: July 22, 2010

PURPOSE

The Texas State University System ("System") solicits responses to this Request for Proposal ("RFP") from law firms interested in providing outside counsel services in the area(s) of intellectual property, real estate, tax, immigration, federal communications commission (FCC laws and regulations), and/or financial law to the System and its component institutions for a one year renewable contract. The System may extend the agreement(s) for these services for an additional period of up to 12 months. Based upon consideration of the responses to this RFP, the System may select one or more firms with which to contract for these legal services. The time and number of contracts resulting from this RFP and all procedures relating to such contracts are within the discretion of the System, contingent upon approval of the Office of the Attorney General.

It is the policy of the System to make a good faith effort to include participation of Historically Underutilized Businesses (HUB) certified firms in its contracts. A "HUB" is a for profit business that meets the requirements of Texas Government Code, Chapter 2161 and administrative rules of the Texas Comptroller of Public Accounts in 34 TAC Chapter 20, Subchapter B. In order to comply with the System's HUB policy, the System may select, from firms responding to this RFP, one or more firms to serve as outside counsel in each area of law listed above.

THE SYSTEM

The System was created by the Texas Legislature in 1911; its institutional components include Lamar University, Sam Houston State University, Sul Ross State University (including Sul Ross Rio Grande College), Texas State University - San Marcos, Lamar Institute of Technology, Lamar State College - Orange, and Lamar State College - Port Arthur.

The System is governed by a nine-member Board plus one non-voting student regent. Regents are appointed by the Governor with consent of the Senate for six-year, staggered terms. The student regent is appointed by the Governor for a one-year term. The current members of the Board are: Ron Blatchley, Chairman; Charlie Amato, Vice Chairman; Trisha Pollard; Michael J. Truncale; Kevin Lilly; David Montagne; Ron Mitchell; and Donna Williams. The current student regent is Christopher Covo. Dr. Brian McCall is Chancellor of the Texas State University System.

Responses to this RFP should be based upon performance, under the direction of the Vice Chancellor and General Counsel, of the following tasks:

Intellectual Property

(1) Assisting in making presentations and required submissions and obtaining approval of patents and other intellectual property.

(2) Preparing resolutions, agreements, contracts, and other documents to which the System is a party and which will be necessary in connection with the issuance of patents.

(3) Attending meetings as requested.

(4) Preparing patents, licensing agreements, and other such documents.

(5) Representing the System and its component institutions in presentations and proceedings involving patent applications.

(6) Rendering advice to the System and its component institutions on intellectual property matters.

(7) Assisting on other matters necessary or incidental to the intellectual property operations of the System and its component institutions.

Real Estate

(1) Preparing and reviewing contracts and other documents intended for the purchase or sale of real estate.

(2) Advising the System and its component institutions on real estate matters.

Tax

(1) Advising the System and its component institutions on taxation matters that apply to state agencies and their affiliated private support organizations, including matters related to unrelated business income taxation.

(2) Preparing and reviewing tax returns and information submitted to the Internal Revenue Service and to state taxing authorities.

Immigration

(1) Representing the System's component institutions in matters relating to immigration and employment;

(2) Representing the component institutions when they recruit and hire international applicants in order to fill vacant faculty positions. This involves sponsoring candidates to obtain appropriate work authorization and the institutions' paying fees and costs associated with filing the labor certification application.

Federal Communications Commission (FCC) Law

(1) Advising and representing the System and its component institutions in matters related to radio, television and other mass communica-

tion outlets before the Federal Communications Commission and other state and federal agencies.

(2) Preparing and reviewing documents related to licenses, permits, and fees associated with the System's component institutions mass communications outlets.

Financial

(1) Advising and representing the System and its component institutions in complex financial matters that involve a high level of expertise;

(2) Preparing and reviewing documents related to corporate and financial matters involving the System, its component institutions, and their affiliated private support organizations.

Contract(s) resulting from this RFP shall be in the form provided by the Office of the Attorney General. (A copy of the Office of the Attorney General Outside Counsel Contract Template may be found on the TSUS web site at www.tsus.edu.) With the approval of the Attorney General's office, a contract may include the following sentence: "This contract does not include litigation or contested case services." No other provision relating to the exclusion of services will be accepted.

SCHEDULE OF EVENTS

The System anticipates that the outside counsel RFP process will proceed in accordance with the following schedule:

July 2, 2010 - RFP Issued

July 22, 2010 - DEADLINE FOR SUBMISSION OF PROPOSALS (2:00 p.m.)

Evaluation Completed by August 2, 2010

Selection of firm(s) - August 9, 2010

The System reserves the right to change this schedule. Notice of any changes will be posted on the System's website.

FORM OF RESPONSE

1. Overview of the Firm

Provide a brief description of your firm, including the total number of attorneys and employees, the number of attorneys practicing in the area(s) of law for which you are responding, and the number of years the firm has been engaged in such practice in Texas. Explain how your firm is organized and how its resources will be applied to the System's work.

2. Qualifications

Provide a brief narrative updating your firm's work since JANUARY 2007 assisting higher education clients in the area(s) of law for which you are responding.

3. Resumes

Provide resumes of those persons who would be assigned to serve the System, and indicate specifically the proposed role of each individual. The resumes must clearly specify the number of years the attorney has been licensed to practice law in Texas, and/or other jurisdiction, and the number of years experience in the area(s) of law in which he/she is expected to work for the System. Further, identify who would be assigned as the primary, day-to-day contact for the System.

4. Business Practices

A. Participation of minorities and women.

(1) Describe your previous experience and involvement working with HUB certified firms (if your firm is not HUB certified) or as a HUB certified firm in a co-counsel relationship. Please describe your firm's approach to working with co-counsel, including level of effort, division of duties and providing opinions.

(2) Describe efforts made by the firm to encourage and develop the participation of minorities and women in the provision of the firm's legal services. Specify whether the firm has adopted formal Equal Employment Opportunity and Affirmative Action policies, and provide a summary of the firm's hiring and promotion statistics for women and minority attorneys from January 2007 to date. Complete EXHIBIT A (RFP), the grid describing workforce composition of your firm, which may be found at http://www.tsus.edu/about-system/division/general_counsel.html, and return it as part of your proposal.

5. Conflicts of Interest

Please disclose any actual or potential conflicts of interest. In addition, identify each matter in which the firm has, within the past calendar year, represented any entity or individual with an interest adverse to the System or to State of Texas, or any of its boards, agencies, commissions, universities, or elected or appointed officials.

6. References

Please provide names, addresses, and phone numbers of three references.

PROPOSAL MODIFICATION

Any response to this RFP may be modified or withdrawn at any time prior to the proposal due date. No changes will be allowed after the expiration of the proposal due date. The System reserves the right to make amendments to the RFP by giving written notice to all firms who receive the RFP or posting notice thereof as indicated in the RFP Notice published at www.tsus.edu.

TIME SCHEDULE AND SUBMISSION DIRECTIONS

Be certain to attach a completed EXHIBIT A (RFP) (found on the TSUS web site at http://www.tsus.edu/about-system/division/general_counsel.html) to your proposal.

Proposals are due no later than 2:00 p.m., July 22, 2010.

Proposals may be submitted electronically or by mail. If you submit your proposal electronically, email it to: therese.sternenberg@tsus.edu and enter the phrase PROPOSAL - OUTSIDE COUNSEL in the subject line of the email message.

If you submit your proposal by mail, please mail four (4) copies to: Fernando Gomez, Vice Chancellor and General Counsel, Texas State University System, 200 E. 10th Street, Suite 600, Austin, Texas 78701.

If you submit your proposal by mail, mark the outside of the envelope or shipping container as "PROPOSAL - OUTSIDE COUNSEL."

All proposals become the property of the System. Proposals must set forth accurate and complete information as required by this RFP. Oral instructions or offers will not be considered. Contact with Board Members, System or component institution officials regarding this RFP is expressly prohibited and will result in disqualification of your firm from consideration.

The System's staff will review the proposals.

CONTRACT FORMATION AND CONTRACT ADMINISTRATION INFORMATION

The System has the sole discretion and reserves the right to reject any and all responses to this RFP and to cancel the RFP if it is deemed in the best interest of the System to do so. Issuance of this RFP in no way constitutes a commitment by the System to award a contract or to pay for any expenses incurred either in the preparation of a response

to this RFP or in the production of a contract for legal services. Firms responding must maintain a Texas office staffed with personnel who are responsible for providing legal services to the System.

In accordance with Texas Government Code, §1201.027 and §2254.004, the System will evaluate responses to this RFP to identify the firm(s) it judges to be the most highly qualified. Fees may not be considered and may not be indicated in responses to this RFP. The System will then attempt to negotiate a contract at a fair and reasonable price with such firm(s) deemed to be most highly qualified. If a satisfactory contract cannot be negotiated, the System will proceed with another firm.

The System reserves the right to negotiate all elements of the contract for legal services and to approve all personnel assigned to the System's work. If personnel assignments are to be changed, the firm will have to submit resumes of the to-be assigned attorneys and their addition to the contract will be subject to the System's approval.

Further, the System reserves the right to terminate a resulting contract for legal services, for any reason, subject to thirty (30) days prior written notice, and upon payment of earned fees and expenses accrued as of the date of termination.

Any contract resulting from this RFP must be approved by the General Counsel Division of the Office of the Attorney General.

COST INCURRED IN RESPONDING

All costs directly or indirectly related to preparation of a response to this RFP or any supplemental information required to clarify your original response shall be the sole responsibility of, and shall be borne by, your firm.

RELEASE OF INFORMATION AND OPEN RECORDS

Information submitted in response to this RFP shall not be released by the System during the proposal evaluation process, unless required by an Attorney General ruling or court order. After the evaluation process is completed as determined by the Board, all proposals and the information contained therein may be subject to public disclosure under the public information act, Texas Government Code, Chapter 552.

TRD-201003480
Fernando Gomez
Vice Chancellor and General Counsel
Texas State University System
Filed: June 21, 2010

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Workforce Solutions Brazos Valley Board

Request for Proposal for Outreach Skills Training

On June 18, 2010 Workforce Solutions Brazos Valley Board (WSBVB) will release a Request for Proposal (RFP) for Outreach Skills Training. Workforce Solutions Brazos Valley Board is interested in developing long-term relationships with local businesses, and developing program and system strategies to build relationships with new business customers while developing stronger relationships with existing customers.

WSBVB is soliciting proposals for workforce business services outreach skills training for workforce professionals to include Board staff, outreach staff, case managers, business services representatives, and job developers, approximately 75 - 90 people. The complete scope of required services and the proposal requirements are contained in the Request for Proposal which may be viewed and downloaded at www.bvjobs.org.

A bidder's conference will be held at the office of Workforce Solutions Brazos Valley Board, 3991 East 29th Street, Bryan, Texas 77802 on June 29, 2010 at 10:00 a.m. CSDT. Bidders may submit questions by email to jbienski@bvcog.org up until the Bidders conference. All questions and answers will be posted on www.bvjobs.org by July 6, 2010.

Due Date: An original and four (4) copies of a written proposal are due to the Board's offices no later than Tuesday, July 20, 2010 at 4:00 p.m. CST. Faxed or email proposals are not acceptable. Proposals received after the indicated due date and time regardless of delivery method will not be accepted or considered for award.

Proposals may be hand delivered to:

ATTENTION: OUTREACH SKILLS TRAINING

Joseph Bienski, Program Specialist

Workforce Solutions Brazos Valley Board

3991 East 29th St.

Bryan, Texas 77802

Proposals may be mailed to:

ATTENTION: OUTREACH SKILLS TRAINING

Joseph Bienski, Program Specialist

Workforce Solutions Brazos Valley Board

P.O. Drawer 4128

Bryan, Texas 77805

Email address for questions only: jbienski@bvcog.org

Proposals received after the deadline will not be considered. WSBV accepts no responsibility for late proposals.

Workforce Solutions Brazos Valley is an equal opportunity employer and provides equal opportunity employment programs. Auxiliary aids are available upon request to disabled individuals.

Texas Relay: (800) 735-2989

Voice: (800) 735-2988

TRD-201003441
Tom Wilkinson
Executive Director
Workforce Solutions Brazos Valley Board
Filed: June 18, 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.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 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)*