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ADVANCED PRACTICE NURSES AND LIMITED PRESCRIPTIVE AUTHORITY

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IN ADDITION

OFFICE OF THE ATTORNEY GENERAL

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

Opinions

Opinion Number JC-0307. Requested by The Honorable J. Collier Adams, Jr., Cochran County Attorney, 109 West Washington, Morton, Texas 79346-2536, concerning whether a criminal violation of the Open Meetings Act, chapter 551 of the Government Code, occurs when a person urges individual members of a commissioners court to place an item on the commissioners court's agenda or to vote a certain way on an item on the agenda (RQ-0242-JC).

Summary. A person who acts independently to urge individual members of a commissioners court to place an item on the commissioners court's agenda or vote a certain way on an item on the agenda does not commit an offense under the Open Meetings Act, even if he or she informs members of other members' views on the matter. A person who is not a member of the commissioners court may be charged with a violation of §551.143 or §551.144 of the Open Meetings Act, but only if the person, acting with intent, aids or assists a member or members who knowingly act to violate the Act. Circulation of a claim, invoice, or bill among members of a commissioners court for approval of payment in writing in lieu of consideration of the item at a meeting held pursuant to the Act would violate the Act.

Opinion Number JC-0308. Requested by Mr. Thomas A. Davis, Jr., Director, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0001, concerning whether attendance at a legislative hearing by a quorum of members of a state governmental body is subject to the Open Meetings Act (RQ-0243-JC).

Summary. Attendance by a quorum of the members of the board of a state governmental body at a legislative hearing is subject to the Open Meetings Act if one or more members participates in a discussion of matters within the board's jurisdiction. If the board is summoned with less than seven days notice by the legislative committee, it may invoke the emergency notice provisions of the Act.

Opinion Number JC-0309. Requested by The Honorable Gary L. Walker, Chair, Land and Resource Management Committee, Texas House of Representatives, P.O. Box 2910m, Austin, Texas 78768-2910, concerning whether a child under the age of 14 may solicit newspaper subscriptions, and related question (RQ-0253-JC).

Summary. A child under the age of 14 years may not be employed to "solicit" newspaper subscriptions except where two conditions are met: (1) the child concurrently attempts to sell a newspaper while "soliciting" the subscription; and (2) the same child will be the person delivering the newspaper based on the new subscription. The Texas Workforce Commission may not require parental consent forms of persons engaged in an activity that meets these criteria.

For further information, please call (512) 463-2110

TRD-200008170
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: November 22, 2000

♦ ♦ ♦

Request for Opinions

RQ-0303-JC

The Honorable Carole Keeton Rylander, Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528

Re: Whether the value of property subject to a tax increment financing agreement may be deducted from a school district's total taxable value, and related questions (Request No. 0303-JC)

Briefs requested by December 14, 2000

RQ-0304-JC

The Honorable Chris Harris, Chair, Administration Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068

Re: Application of chapter 711 of the Health & Safety Code to cemeteries not dedicated under that chapter, and related questions (Request No. 0304-JC)

Briefs requested by December 14, 2000

RQ-0305-JC

The Honorable Ben W. "Bud" Childers, Fort Bend County Attorney, 301 Jackson, Suite 621, Richmond, Texas 77469-3108

Re: Whether a public funds investment pool may use the "reset date" to calculate its portfolio's "weighted average maturity," and related questions (Request No. 0305-JC)

Briefs requested by December 15, 2000

RQ-0306-JC

The Honorable C. E. "Mike" Thomas, III, Howard County Attorney, P.O. Box 2096, Big Spring, Texas 78721

Re: Authority of a county to charge a fee for preparing documents on behalf of other counties in mental health proceedings, and related question (Request No. 0306-JC)

Briefs requested by December 15, 2000

RQ-0307-JC

The Honorable Tom Ramsay, Chair, County Affairs Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Whether an individual may simultaneously hold the offices of mayor and director of a hospital district board that has condemned property in the mayor's city (Request No. 0307-JC)

Briefs requested by December 15, 2000

RQ-0308-JC

Ms. Cynthia S. Vaughn, D.C., President, Texas State Board of Chiropractic Examiners, 333 Guadalupe, Suite 3 825, Austin, Texas 78701-3945

Re: Whether a licensed acupuncturist may perform spinal manipulation (Request No. 0308-JC)

Briefs requested by December 17, 2000

RQ-0309-JC

The Honorable Jose R. Rodriguez, El Paso County Attorney, 500 East San Antonio, Room 203, El Paso, Texas 79901

Re: Authority of a county to charge an applicant for costs incurred in the replatting of a subdivision (Request No. 0309-JC)

Briefs requested by December 15, 2000

RQ-0310-JC

The Honorable Phil Garrett, Palo Pinto County Attorney, P.O. Box 190, Palo Pinto, Texas 76484

Re: Disposition of funds received by a county from a county attorney's partial waiver of annual compensation (Request No. 0310-JC)

Briefs requested by December 17, 2000

For further information, please call 512 463-2110.

TRD-200008153
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: November 22, 2000

EMERGENCY RULES

An agency may adopt a new or amended section or repeal an existing section on an emergency basis if it determines that such action is necessary for the public health, safety, or welfare of this state. The section may become effective immediately upon filing with the ***Texas Register***, or on a stated date less than 20 days after filing and remaining in effect no more than 120 days. The emergency action is renewable once for no more than 60 additional days.

Symbology in amended emergency sections. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 25. HEALTH SERVICES

PART 8. INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

CHAPTER 621. EARLY CHILDHOOD INTERVENTION

SUBCHAPTER B. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

25 TAC §621.22

The Interagency Council on Early Childhood Intervention is renewing the effectiveness of the emergency adoption of amended §621.22, for a 20-day period. The text of amended §621.22 was originally published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7443).

Filed with the Office of the Secretary of State, on November 20, 2000.

TRD-200008090
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Effective date: November 20, 2000
Expiration date: December 10, 2000
For further information, please call: (512) 424-6750

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SUBCHAPTER C. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

25 TAC §621.42

The Interagency Council on Early Childhood Intervention is renewing the effectiveness of the emergency adoption of amended §621.42, for a 20-day period. The text of amended §621.42 was originally published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7445).

Filed with the Office of the Secretary of State, on November 20, 2000.

TRD-200008091
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Effective date: November 20, 2000
Expiration date: December 10, 2000
For further information, please call: (512) 424-6750

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PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 1. ADMINISTRATION

PART 18. TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

CHAPTER 471. OPERATING RULES OF THE TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

The Telecommunications Infrastructure Fund Board (TIFB) proposes the repeal of §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30-471.33, 471.50, 471.60, 471.70, 471.80, 471.90-471.92, 471.100 and new §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30-471.33, 471.50 and 471.60, concerning Operating Rules of the Telecommunications Infrastructure Fund Board.

The purpose of the repeal and replacement is to update the TIFB Board rules and regulations and make them consistent with TIFB policies.

Elsewhere in this issue of the *Texas Register*, the Telecommunication Infrastructure Fund Board contemporaneously proposes the review of Chapter 471, concerning Operating Rules of the Telecommunications Infrastructure Fund Board. The rule review is pursuant to the requirements of the Appropriations Act of 1997, House Bill 1, Article IX, §167.

Frank Pennington, Director of Finance and Administration, Telecommunications Infrastructure Fund Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing the sections.

Mr. Pennington also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be updated regulations as a result of the rule review process. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Michelle Pundt, Telecommunications Infrastructure Fund Board, P.O. Box 12876, Austin, Texas 78711 or email at: mpundt@tifb.state.tx.us.

1 TAC §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30-471.33, 471.50, 471.60, 471.70, 471.80, 471.90-471.92, 471.100

(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 Telecommunications Infrastructure Fund Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to Texas Civil Statutes, Article 1446c-0(f) and the Government Code, Chapter 2001, which provides the Telecommunications Infrastructure Fund Board with the authority to promulgate rules and regulations. The repeals are also proposed pursuant to Article 9, Appropriations Act, §9-10.13, Review of Agency Rules.

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

§471.3. Number, Terms of Office and Qualifications.
§471.5. Chairman.
§471.7. Vice-Chairman.
§471.9. Compensation of Board Members.
§471.11. Place of TIF Board Meetings.
§471.13. Regular Meetings.
§471.15. Emergency Meetings.
§471.17. Executive Sessions.
§471.19. Quorum, Manner of Acting and Adjournment.
§471.30. Finance and Audit Committee.
§471.31. Other Committees.
§471.32. Advisory Committees.
§471.33. Committee Procedure.
§471.50. Contracts and Appointments of Agents.
§471.60. Rules Governing Acceptance of Gifts, Grants and Donations.
§471.70. Standard of Conduct and Conflict of Interest Provisions.
§471.80. Private Interest in Measure or Decision.
§471.90. Fiscal Year.
§471.91. Books and Records.

§471.92. Effective Date of Rules.

§471.100. Amendments to the 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 November 20, 2000.

TRD-200008092
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 344-4306

♦ ♦ ♦

1 TAC §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30-471.33, 471.50, 471.60

The new sections are proposed pursuant to Texas Civil Statutes, Article 1446c-0(f) and the Government Code, Chapter 2001, which provides the Telecommunications Infrastructure Fund Board with the authority to promulgate rules and regulations. The new sections are also proposed pursuant to Article 9, Appropriations Act, §9-10.13, Review of Agency Rules.

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

§471.3. Structure.

(a) The Board consists of nine members: appointed by the Governor, Lieutenant Governor, and Speaker of the House of Representatives, respectively.

(b) The Board elects from its members a Vice Chair. The Vice Chair acts in the absence of the Chair.

(c) The Board may delegate any power, duty or function to the Executive Director or any employee designated by the Board or Executive Director.

(d) The Board may appoint any committees it determines may assist it in performing its duties.

(e) The Executive Director is the agency's chief executive officer. The Executive Director is hired by and serves at the pleasure of the Board and is accountable to the Board. The Executive Director is responsible for the agency's staffing, fiscal management, and the execution of the Board's policies, procedures and programs.

(f) Any responsibilities or authority of the Board described in rules of the Board may be exercised by the Executive Director unless the Board assigns specific duties or prerogatives exclusively to the Board of Directors.

(g) To assist with meetings and functions of the Board, the Board may direct the Executive Director to retain a general counsel function via the Office of Attorney General. He or she is a member of the State Bar of Texas, but may not be a lobbyist registered with the Office of the Secretary of the State of Texas.

§471.5. Compensation of Board Members.

Members of the Board serve without pay but are entitled to reimbursement for their travel-related expenses incurred in attending meetings of the Board or in attending to other work of the Board.

§471.7. Place of TIF Board Meetings.

The Chair may call meetings in locations as s/he feels necessary to carry out the goals of the TIF.

§471.9. Meetings.

(a) Meetings occur six times per calendar year within the guidelines of the Texas Open Meetings Act.

(b) A quorum of members is required to conduct official business.

(c) Each member has one vote that may not be exercised by proxy, telephone or fax.

(d) Board and committee meetings are conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless the Board adopts a different procedure.

(e) Members of the general public are welcomed to appear before the Board to speak on any issue under the jurisdiction of the Telecommunications Infrastructure Fund Board for the time permitted by the Board Chair. Speakers are expected to register on the agency's form and state the topic to be addressed.

(f) Members of the general public will not address or question Board members during meetings unless recognized by the Board's presiding officer pursuant to a published agenda item.

(g) Official Board minutes will be presented on the Telecommunications Infrastructure Fund Board web site at http://www.tifb.state.tx.us/board/index.html, and delivered to the State Library and Archives Commission.

(h) Observers of any Board meeting may make audio or visual recordings of such proceedings conducted in open session subject to any limitations set by the Chair of the meeting.

§471.11. Responsibility.

(a) The Chair or the Vice Chair (in the Chair's absence) may enter into necessary contracts in the absence of an Executive Director.

(b) The Board members adhere to a standard of conduct so as no conflicts of interest are perceived or proven. Board members must acknowledge such conflict by open testimony and refrain from voting on the issue or participating in the decision making process.

(c) The Board acts in a responsible manner to meet the needs of its constituents and the public. As a guardian of the public's interest, the Board uses a common sense approach to governance, adheres to legal and ethical standards and considers human and financial costs in its decision-making processes. In an ongoing effort to maximize operational functions, the Board periodically assesses its function to provide the maximum benefit of all.

(d) The Board communicates its roles and functions to its constituents and the public through publications and open forums. The Board welcomes and values open and collaborative relationships with agency staff, its constituents and the public. Through the use of working groups or ad-hoc groups, the Board creates a broad-based input for the development of clear, concise and timely decision-making.

(e) The Board speaks with one voice, not individually. The Board will not focus on personal agendas, but respects the diversity of opinion. The Board collectively establishes policies to be implemented by the Executive Director and through unified instruction to the Executive Director, promotes the hiring of a diversified staff, supports staff development and encourages a work-friendly environment.

(f) The Board will:

(1) Plan for the welfare of the Agency and its constituents to meet the intent of the Agency's enabling legislation.

(2) Develop policy to guide the overall operation of the Agency and to ensure the fulfillment of the Agency's mission.

(3) Accept responsibility for decisions and actions.

(4) Establish an effective relationship with the Executive Director.

(5) Review the Executive Director's performance annually.

(6) Express opinions and questions freely with each other and communicate with the Executive Director in one voice.

(7) Maintain objectivity in reviewing facts in the process of making decisions.

(8) Respond clearly in the best interest of the public, not to pressure.

(9) Strive to educate its members regarding the requirements of governance for state agencies.

(10) Support the Executive Director's implementation of operational policies to fulfill the Agency's mission.

(11) Take responsibility for the contents of its meeting agendas and Board minutes, proactively identify action items and key information issues.

§471.13. Accountability.

To assure the fulfillment of the Telecommunications Infrastructure Fund Board's mission and purpose, as well as to facilitate the achievement of its goals the Board is accountable for the following:

(1) Maintaining a thorough background of House Bill 2128, Section 2.606 and related telecommunications industry issues to effectively represent the Board to its various constituents

(2) Maintaining a demeanor which projects a positive and professional image of the Board and its members

(3) Responding to the requests and initiating opportunities to inform all constituents and the public regarding the Board's professional issues, activities, and mission

(4) Reviewing, evaluating, and acting upon financial and operational information to ensure the financial integrity and operational success of the Agency

(5) Researching, reviewing, and evaluating issues confronting the Board and the Agency to provide meaningful and timely contributions to decisions and the direction of the Agency

(6) Regularly attending and participating in Board meetings, its committee meetings, and other Board related functions to assure all designated constituencies are represented and the Board continues along a meaningful and constructive path for the protection and welfare of the public. If a member fails to attend an adequate number of meetings, they may be reported to the office from which they were appointed.

§471.15. Committees.

(a) The Chair will appoint Board members to service on the Finance and Audit Committee, including a presiding officer. The Committee will be responsible for receiving reports from internal and external auditors, reviewing and approving financial reports, reflecting the Agency's fiscal status, developing a monitoring system of the grants and loans awarded by TIFB and additional duties assigned by the Board.

(b) The Board may establish other regular, standing or temporary committees as appropriate. The committee(s) will include a presiding officer. If the committee is an advisory committee, the Board will develop and implement rules regarding the composition, duration and procedures of the committee.

§471.17. Committee Procedure.

Each member of a committee shall serve as a member of that committee at the pleasure of the Chair. The Chair of the TIF Board shall serve as an ex officio member of all committees, with the same rights and obligations as all duly appointed members, except that he shall not be counted to establish a quorum. A majority of the committee members shall constitute a quorum and an act of a majority of those present as which a quorum is present shall constitute an act of the committee. Meetings of each Committee shall be called by the presiding officer of the committee. Notice of committee meetings shall be given pursuant to Government Code, Chapter 551.

§471.19. Board Actions Requiring Approval.

(a) Purpose. HB 2128 establishes the Board to oversee the Telecommunications Infrastructure Fund Board's mission achievement through the management of two funding accounts. The Board reviews and approves major policy decisions having significant impact on the Agency. Board approval is specifically required for entering into interagency and interlocal contracts, as well as oversight of the daily operations functions assigned to the Executive Director.

(b) Personnel. The Executive Director is the Agency's chief executive officer. The Executive Director serves at the pleasure of the Board and is accountable to the Board. The Executive Director is responsible for the Agency's staffing, fiscal management, and the execution of the Board's policies, procedures and programs.

(c) Fiscal. The staff will develop and the Board will review and approve the following fiscal documents:

(1) Telecommunications Infrastructure Fund Board's biennial legislative appropriation request,

(2) Telecommunications Infrastructure Fund Board's operating budgets,

(3) Transfers of funds authorized by Appropriation Bill rider,

(4) Expenditures of $25,000 or more for the procurement of capital assets, and

(5) Consultant and professional services contracts in the amount of $15,000 or more.

(d) Administrative. The Board with the staff's cooperation is responsible for:

(1) Ensuring the accomplishment of the Agency's Strategic Plan through leadership and oversight of the process,

(2) Ensuring the accomplishment of the Agency's Work Plan through leadership and oversight of the process,

(3) Responding to external and contracted internal audits,

(4) Accepting gifts,

(5) Approving minutes of Board meetings,

(6) Complying with the Open Meetings Law and the State's ethics legislation for public officials, and

(A) The Chair and the Executive Director will determine agenda items for Board meetings,

(B) Two or more Board members may request the Board Chair to place an item on a Board meeting agenda, and

(C) Staff will prepare the agendas and file timely with the Texas Register,

(7) Evaluating annually the Executive Director's job performance.

§471.30. Agency Acceptance of Gifts, Grants and Donations.

(a) The Board must publicly accept and acknowledge gifts, grants, and donations during Open Board Meetings. The Board must use the gifts, grants and donations for the purposes in which they are intended or for any purpose within the Board's authority.

(b) Any funds received by TIFB shall be deposited in the State Treasury. All donations, in whatever form, will be used for the purpose specified by the donor, or for the general TIFB programs if no purpose is specified.

§471.31. Standard of Conduct and Conflict of Interest Provisions.

In no case may a TIFB staff member accept any gift, item, service, or benefit of any dollar value that is of any personal benefit to the staff member from any grantee, contractor, subcontractor or potential contractor.

(1) a TIF officer or employee will not accept other employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;

(2) a TIF officer or employee will not accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties;

(3) a TIF officer or employee will not make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the public interest; and

(4) a TIF officer or employee will not intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.

§471.32. Fiscal Year.

The fiscal year of the TIF shall be the official fiscal year of the State of Texas. It shall begin on September 1 and end on August 31 of each year.

§471.33. Books and Records.

The TIF office shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its Board and committees having any of the authority of the TIF Board. Minutes of the Board meetings, as required in the Texas Open Meeting Act, shall be approved by the Board. Before the Board approves the minutes of the last meeting, the minutes shall be sent to each Board member for review, comment and correction prior to approval. Board minutes are available for public review as authorized by the Texas Open Meetings Act. All books and records of the TIF and its Board shall be stored according to the records retention schedules as set forth by the State Library and Archives Commission.

§471.50. Effective Date of Rules.

These rules shall become effective only upon approval of the TIF Board and in accordance of Government Code, Chapter 2001.

§471.60. Amendments to the Rules.

Any of these rules may be altered, amended or repealed and new rules may be adopted, by an affirmative vote of a majority of the TIF Board. Any changes in these rules must be posted as an action item of the Board and follow all guidelines as set forth in Government Code, Chapters 551 and 2001.

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

Filed with the Office of the Secretary of State, on November 20, 2000.

TRD-200008093
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 344-4306

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 50. LOW INCOME HOUSING TAX CREDIT RULES--1999

10 TAC §§50.1-50.16

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

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§50.1-50.16, concerning the Low Income Tax Credit Rules. The Sections are proposed to be repealed in order to enact new sections conforming to the requirements of new regulations enacted under the Internal Revenue Code of 1986, §42 as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing.

Daisy A. Stiner, Executive Director, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Stiner also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules for the allocation of low income housing tax credit authority within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the tax credit program administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments may be submitted to Cherno M. Njie, Manager, Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: bboston@tdhca.state.tx.us.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306; and the Internal Revenue Code of 1986, §42 as amended, which provides the Department with the authority to adopt rules governing the administration

of the Department and its programs and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

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

§50.1. Scope.
§50.2. Definitions.
§50.3. State Housing Credit Ceiling.
§50.4. Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments.
§50.5. Set-Asides, Commitments and Preferences.
§50.6. Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects.
§50.7. Compliance Monitoring.
§50.8. Housing Credit Allocations.
§50.9. Department Records; Certain Required Filings.
§50.10. Department Responsibilities.
§50.11. Program Fees.
§50.12. Manner and Place of Filing Applications.
§50.13. Withdrawals, Cancellations, Amendments.
§50.14. Waiver and Amendment of Rules.
§50.15. Forward Reservations; Binding Commitments.
§50.16. Deadlines for Allocation of Low Income Housing Tax Credits.

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

Filed with the Office of the Secretary of State, on November 20, 2000.

TRD-200008081
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 475-3726

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CHAPTER 50. 2001 LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.16

The Texas Department of Housing and Community Affairs proposes new §§ 50.1 - 50.16, concerning the 2001 Low Income Housing Tax Credit Qualified Allocation Plan and Rules. The new sections are necessary to provide procedures for the allocation by the Department of certain low income housing tax credits available under federal income tax laws to owners of qualified low income rental housing developments.

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

Ms. Stiner also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the enhancement of the state's ability to provide safe and sanitary housing for Texans through the efficient and coordinated allocation of federal income tax credit authority available to the state for administration of state housing agencies. There will be no effect on small businesses or persons. There is no anticipated economic costs to persons who are required to comply with the sections as proposed.

Comments may be submitted to Cherno M. Njie, Manager, Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: bboston@tdhca.state.tx.us.

The proposed new sections are proposed under the Texas Government Code, Chapter 2306; the Internal Revenue Code of 1986, § 42, as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing tax credit allocations in the State of Texas.

No other code, article or statute is affected by these new sections.

§50.1. Scope.

(a) Purpose. The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of certain low income housing tax credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, as amended, provides for credits against federal income taxes for owners of qualified low income rental housing Projects. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Executive Order AWR-91-4 (June 17, 1991), the Department was authorized to make housing credit allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed a Qualified Allocation Plan (QAP) which is set forth in §50.3 through §50.9 of this title. Sections in this chapter establish procedures for applying for and obtaining an allocation of the low income housing tax credit, along with ensuring that the proper threshold criteria, selection criteria, priorities and preferences are followed in making such allocations.

(b) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state and to promote maximum utilization of the available tax credit amount. The criteria utilized to realize this goal is described in §50.7(b) of this title. Such criteria shall be implemented to ensure that the tax credits are allocated to owners of Projects that will serve the Department's public policy objectives and federal requirements to provide housing to persons and families of very low and low income.

(c) Utilization of Historically Underutilized Businesses. It is the policy of the Department to encourage the use of Historically Underutilized Businesses (HUBs) in the tax credit program as developers, general partners and members of a development team. In response to this policy, all Applicants are required to make a good faith effort to ensure maximum HUB participation in the program. The Department will require the Applicant to identify the HUBs that will be used in the development and/or continuous operation of the Project. The Department will also request information pertaining to the use of HUBs in the actual development of the Project at the time of final allocation of tax credits, pursuant to §50.9(f) of this title.

(d) The Rural Development services of the United States Department of Agriculture serving the state of Texas (TxRD-USDA)

Memorandum of Understanding (MOU). Although not mandated to do so, the Department developed a MOU with the TxRD-USDA to assure maximum utilization and optimum geographic distribution of tax credits in rural areas. This MOU seeks to achieve increased sharing of information, reduction of processing procedures, and fulfillment of project compliance requirements involving existing, rehabilitated, and new construction housing projects financed by TxRD-USDA.

(e) Memorandum of Understanding (MOU) with the United States Department of Housing and Urban Development (HUD) regarding the 911 Subsidiary Layering Review. The Department and HUD shall enter into a MOU regarding the Subsidy Layering Review of the sources and uses of funds in projects receiving tax credits and HUD Housing Assistance.

§50.2. Definitions.

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

(1) Ad Hoc Tax Credit Committee - That Committee comprised of members of the Board of the Department charged with the direct oversight of the Low Income Housing Tax Credit Program, also referred to as the "Committee."

(2) Affiliate - An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with any other Person, and specifically shall include parents or subsidiaries.

(3) Agreement and Election Statement - A document in which the Project Owner elects, irrevocably, to fix the applicable credit percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Project Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(4) Applicable Percentage - The percentage used to determine the amount of the low income housing tax credit, as defined more fully in the Code, §42(b). The Applicable Percentage in the Application will be calculated using the formula provided in the Application Submission Procedures Manual.

(5) Applicant - Any Person and any Affiliate of such Person, corporation, a partnership, joint venture, association, or other that submits an Application to the Department requesting a tax credit allocation pursuant to the Rules and the QAP. The Applicant is also the Project Owner unless the Applicant transfers or assigns its interest in the Project (which assignment can only occur with the consent of the Department). Each Project Owner, and each of the Project Owner's successors in interest, shall be obligated to carry out the commitments made to the Department by the Applicant.

(6) Application - An Application in the form prescribed by the Department, including any required exhibits or other supporting materials, filed with the Department by a Project Owner requesting a Housing Tax Credit Allocation from the State Housing Credit Ceiling or a Determination Notice.

(7) Application Acceptance Period - That period of time during which Applications for either a Housing Credit Allocation from the State Housing Credit Ceiling or a Determination Notice for Tax Exempt Bond Projects may be submitted to the Department as more fully described in §50.12 of this title.

(8) Application Round - The period beginning with the start of the Application Acceptance Period and lasting until such time as all available credits from the State Housing Credit Ceiling (as stipulated by the Department) are allocated, provided that the Application Round not extend beyond the last day of the calendar year.

(9) Application Submission Procedures Manual - The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Applications for low income housing tax credits.

(10) Area Median Gross Income (AMGI) - The tenant income requirements pursuant to the qualified low income housing project requirements of the Code, §42(g).

(11) Applicable Fraction - The fraction used to determine the Qualified Basis of the qualified low income building, which is the smaller of the Unit fraction or the floor space fraction, as defined more fully in the Code, §42(c)(1).

(12) Beneficial Owner - A "Beneficial Owner" means:

(A) Any Person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares;

(i) voting power which includes the power to vote, or to direct the voting as any other Person or the securities thereof; and/or

(ii) investment power which includes the power to dispose, or direct the disposition of, any Person or the securities thereof.

(B) Any Person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such Person of Beneficial Ownership (as defined herein) of a security or preventing the vesting of such Beneficial Ownership as part of a plan or scheme to evade inclusion within the definitional terms contained herein; and

(C) Any Person who has the right to acquire Beneficial Ownership during the Compliance Period, including but not limited to any right to acquire any such Beneficial Ownership;

(i) through the exercise of any option warrant or right,

(ii) through the conversion of a security,

(iii) pursuant to the power to revoke a trust, discretionary account or similar arrangement, or

(iv) pursuant to the automatic termination of a trust, discretionary account, or similar arrangement.

(D) Provided, however, that any Person who acquires a security or power specified in clauses (i), (ii) or (iii) of subparagraph (C) of this paragraph, with the purpose or effect or changing or influencing the control of any other Person, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition is deemed to be the Beneficial Owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to options, warrants, rights or conversion privileges as deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such Person but are not deemed to be outstanding for the purpose of computing the percentage of the class by any other Person.

(13) Board - The governing Board of Directors of the Department.

(14) Carryover Allocation - An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(E) and Treasury Regulations, §1.42-6.

(15) Carryover Allocation Document - A document issued by the Department to a Project Owner pursuant to §50.4(k) of this title.

(16) Carryover Allocation Procedures Manual - The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(17) Code - The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(18) Commitment Notice - A notice issued by the Department to a Project Owner pursuant to §50.4(f) of this title and also referred to as the "commitment".

(19) Compliance Period - With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(20) Control - (including the terms "controlling," "controlled by", and/or "under common control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the general partner interest in a limited partnership, or designation as a managing general partner or the managing member of a limited liability company.

(21) Cost Certification Procedures Manual - The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Projects placed in service under the Low Income Housing Tax Credit Program.

(22) Credit Period - With respect to a building within a Project, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Project Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(23) Department - The Texas Department of Housing and Community Affairs, a public and official governmental Department of the State of Texas created and organized under the Texas Department of Housing and Community Affairs Act, Texas Government Code, Chapter 2306 and Texas Civil Statutes, Article 4413(501) as amended by the 73rd Legislature, Chapter 725 and 141.

(24) Determination Notice - A notice issued by the Department to the Owner of a Tax Exempt Bond Project which states that the Project may be eligible to claim low income housing tax credits without receiving an allocation of credits from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Project before the Department will issue the IRS Form(s) 8609 to the Project Owner; and specifies the amount of tax credits necessary for the financial feasibility of the Project and its viability as a qualified low income housing project throughout the Credit Period.

(25) Development Team - All Persons or Affiliates thereof which play(s) a material role in the development, construction, rehabilitation, management and/or continuing operation of the subject Property, which will include any consultant(s) hired by the Applicant for the purpose of the filing of an Application for low income housing tax credits with the Department.

(26) Eligible Basis - With respect to a building within a Project, the building's Eligible Basis as defined in the Code, §42(d).

(27) Extended Low Income Housing Commitment - An agreement between the Department, the Project Owner and all successors in interest to the Project Owner concerning the extended low income housing use of buildings within the Project throughout the extended use period as provided in the Code, §42(h)(6). The Extended Low Income Housing Commitment with respect to a Project is expressed in the LURA applicable to the Project.

(28) General Contractor - One who contracts for the construction, or rehabilitation of an entire building or Project, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the said subcontractors. This party may also be referred to as the "contractor."

(29) General Projects - Any project which is not a Qualified Nonprofit Project or is not under consideration in the Rural/Prison set-aside as such terms are defined by the Department.

(30) General Pool - The pool of credits that have been returned or recovered from prior years' allocations or the current year's Commitment Notices after the Board has made its initial allocation of the current year's available credit ceiling. General pool credits will be used to fund Applications on the waiting list without regard to set-aside except for the 10% Nonprofit Set-Aside allocation required under §42(h)(5) of the Code.

(31) Governmental Entity - Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(32) Highrise Project - a project comprised of three or more stories and includes the construction of elevators.

(33) Historically Underutilized Businesses - Pursuant to Texas Civil Statutes, Article 601b, §§1.02, 1.03, and 1.04, entitled State Purchasing and General Services Act which is codified at Chapter 2161, Texas Government Code, entitled Historically Underutilized Businesses, a business created for the purpose of making a profit in the form of a corporation, partnership or joint venture which is at least 51% owned, or a sole proprietorship which is 100% owned by a person or persons who have been historically underutilized due to their identification as a member of a certain group. The following are the groups which will be considered pursuant to this definition:

(A) African Americans - persons having origins in any of the Black racial groups of Africa;

(B) Hispanic Americans - persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(C) Asian-Pacific Americans - persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, Philippines, Samoa, Guam, U.S. Trust Territories of the Pacific and the Northern Marianas;

(D) Native Americans - persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or

(E) Women - includes all women of any ethnicity.

(34) Housing Credit Agency - A Governmental Entity charged with the responsibility of allocating low income housing tax credits pursuant to the Code, §42. For the purposes of these Rules, the Department is the sole "Housing Credit Agency" of the State of Texas.

(35) Housing Credit Allocation - An allocation by the Department to a Project Owner of low income housing tax credit in accordance with §50.9 of this title.

(36) Housing Credit Allocation Amount - With respect to a Project or a building within a Project, that amount the Department determines to be necessary for the financial feasibility of the Project and its viability as a qualified low income housing Project throughout the Compliance Period and allocates to the Project.

(37) HUD - The United States Department of Housing and Urban Development, or its successor.

(38) Ineligible Building Types - Those buildings or facilities which are ineligible, pursuant to this QAP, for funding under the tax credit program as follows:

(A) Hospitals, nursing homes, trailer parks and dormitories (or other buildings that will be predominantly occupied by Students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and single room occupancy units, as provided in the Code, §§42(i)(3)(B)(iii) and (iv)) are not eligible.

(B) Single family detached housing, duplexes, and triplexes shall not be included in tax credit developments. The only exceptions to this definition are:

(i) Any project comprised of single family detached homes, duplexes or triplexes, located on contiguous property under common ownership, management and Control or dispersed within an existing residential subdivision and satisfying either of the requirements listed in subclauses (I) and (II) of this clause shall not be considered to include an Ineligible Building Type:

(I) Projects with 36 units or less that are located within a city or county with a population of not more than 20,000 or 50,000, respectively; or

(II) Projects receiving a financial contribution from the local governing entity in an amount equal to or exceeding ten percent of the construction hard costs. The financial contribution can be either a capital contribution, in-kind services to the Project, or a combination of capital contribution and in-kind services. The in-kind services must be above and beyond services typically provided to similar developments.

(ii) An existing Rural Project that is federally assisted within the meaning of §42(d)(6)(B) of the Code and is under common ownership, management and Control shall not be considered to include an Ineligible Building Type. For qualifying federally assisted Rural Projects, construction cannot include the construction of new residential units. Rural Projects purchased from HUD will qualify as federally assisted.

(39) IRS - The Internal Revenue Service, or its successor.

(40) Land Use Restriction Agreement (LURA) - An agreement between the Department, the Project Owner and all successors in interest in the Project Owner which encumbers the Project with respect to provisions stipulated in the Code, §42, and this chapter (relating to Low Income Housing Tax Credit Qualified Allocation Plan and Rules), and the Texas Government Code, Chapter 2306 as may be amended from time to time. The LURA includes an Extended Low Income Housing Commitment.

(41) Material Deficiencies - The absence of information or documents from the Application which are essential for the complete review and scoring of the project and which remain uncorrected after notification of the Applicant as further described in subparagraphs (A) and (B) of this paragraph.

(A) If an Application contains deficiencies which, in the determination of the Department staff, are either administrative in nature or are caused by the need for clarification of information submitted at the time of the Application, the Department staff shall request correction of such deficiencies. The Department staff shall provide this request in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. Potential Material Deficiencies which may be corrected include, but are not limited to, incorrect calculation of the project's unit mix, gross and net rentable areas or the submission of exhibits that contain incomplete or conflicting information. If such deficiencies are not corrected to the satisfaction of the Department within three business days of the deficiency notice date, then five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains uncorrected. If such deficiencies are not corrected within five business days from the deficiency notice date, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The correction of Material Deficiencies may not include changes in the Development Team, the Project Configuration, or any other matters affecting the evaluation of the Application under §50.7 of this title.

(B) Deficiencies caused by the omission of Threshold Criteria documentation specifically required by §50.7(d) of this title shall automatically be considered Material Deficiencies and shall be cause for termination (if not remedied pursuant to subparagraph (A) of this paragraph).

(42) Material Non-Compliance - A property will be classified by the Department as being in material non-compliance status so long as the non-compliance score for such property is equal to or exceeds 30 points in accordance with the methodology and point system set forth in the Application Submission Procedures Manual.

(43) Person - Means, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal.

(44) Persons with Disabilities - A person who:

(A) has a physical, mental or emotional impairment that;

(i) is expected to be of a long, continued and indefinite duration,

(ii) substantially impedes his or her ability to live independently, and

(iii) is of such a nature that the ability could be improved by more suitable housing conditions, or

(B) has a developmental disability, as defined in Section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001-6007).

(45) Preservation Project - A Project involving the preservation of low-income units within buildings currently receiving funds from a federal or state program that currently has rent or income restrictions.

(46) Prison Community - A city or town which is located outside of a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) and was awarded a state prison as set forth in the Reference Manual.

(47) Project - A low income rental housing Property the owner of which represents that it is or will be a qualified low income housing Project within the meaning of the Code, §42(g). With regards to this definition, the "Project" is that Property which is the basis for the Application for low income housing tax credits

(48) Project Consultant - Any Person (without ownership interest in the Project) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(49) Project Owner - Any Person or Affiliate thereof that owns or proposes to develop the Project or expects to acquire Control of the Project pursuant to a purchase contract satisfactory to the Department.

(50) Property - The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(51) Qualified Allocation Plan (QAP) - An allocation plan executed by the Governor of the State of Texas which sets forth the threshold criteria, selection criteria, priorities, preferences, and compliance and monitoring as provided in the Code, §42(m)(1) and as further provided in §50.3 through §50.9 of this title.

(52) Qualified Basis - With respect to a building within a Project, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(53) Qualified Census Tract - Any census tract which is so designated by the Secretary of HUD and, for the most recent year for which census data are available on household income in such tract, in which 50% or more of the households have an income which is less than 60% of the area median family income for such year.

(54) Qualified Market Analyst - A real estate appraiser certified or licensed by the Texas Appraiser or Licensing and Certification Board or a real estate consultant or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's experience and educational background will provide the general basis for determining competency as a Market Analyst. Such determination will be at the sole discretion of the Department. The Qualified Market Analyst must not be related to or an Affiliate of the Project Owner, Project Consultant, or the CPA which provides documentation required for the Carryover Allocation Procedures Manual or Cost Certification Procedures Manual.

(55) Qualified Nonprofit Organization - An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not Affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low income housing within the meaning of the Code, §42(h)(5)(C).

(56) Qualified Nonprofit Project - A Project in which a Qualified Nonprofit Organization (directly or through a partnership or wholly-owned subsidiary) holds an ownership interest and materially participates (within the meaning of the Code, §469(h), as may be amended from time to time) in its development and operation throughout the Compliance Period.

(57) Real Estate Owned (REO) Projects - Any existing Residential Development that is owned or that is being sold by an insured depository institution in default, or by a receiver or conservator of such an institution, or is a property owned by HUD, Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), federally chartered bank, savings bank, savings and loan association, Federal Home Loan Bank or a federally approved mortgage company or any other federal agency.

(58) Reference Manual - That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Low Income Housing Tax Credit Program.

(59) Residential Development - Any Project that is comprised of at least one "Unit" as such term is defined in paragraph (72) of this subsection.

(60) Rules - The Department's low income housing tax credit Rules as presented in this title excluding §§50.3 through 50.9 of this title.

(61) Rural Project - A Project located within an area which:

(A) is situated outside the boundaries of a PMSA or MSA; or

(B) is situated within the boundaries of a PMSA or MSA if the area has a population of not more than 20,000. If the area shares legal boundaries with another urbanized area, then the combined population of the areas cannot exceed 20,000; or

(C) is located in an area that is eligible for funding by TxRD-USDA.

(62) Selection Criteria - Criteria used to determine housing priorities of the State under the Low Income Housing Tax Credit Program as specifically defined in §50.7(e) of this title.

(63) Special Housing Project - Any Project developed specifically for Special Housing Need Groups, including mental health/mental retardation Projects, group homes, housing for the homeless, transitional housing, elderly Projects, congregate care facilities, projects for persons with HIV/AIDS, or as otherwise defined in the State Consolidated Plan.

(64) State Housing Credit Ceiling - The limitation imposed by the Code, §42(h), on the aggregate amount of housing credit allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3).

(65) Student - Per the Code §42(I)(3)(D), "A unit shall not fail to be treated as a low-income unit merely because it is occupied:

(A) by an individual who is:

(i) a student and receiving assistance under title IV of the Social Security Act (42 U.S.C. §§ 601 et seq.), or

(ii) enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 USCS §§ 1501 et seq., generally; for full classification, consult USCS Tables volumes) or under other similar Federal, State, or local laws, or

(B) entirely by full-time students if such students are:

(i) single parents and their children and such parents and children are not dependents (as defined in section 152) of another individual, or

(ii) married and file a joint return."

(66) Sustaining Occupancy - The figure at which occupancy income is equal to all operating expenses and mandatory debt service requirements for a Project.

(67) Tax Exempt Bond Project - A Project which receives a portion of its financing from the proceeds of Tax Exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4)(B).

(68) Threshold Criteria - Criteria used to determine the Project's qualifications which are the minimum level of acceptability for consideration under the Low Income Housing Tax Credit Program as defined in §50.7(d) of this title.

(69) Total Housing Development Cost - The total of all costs incurred or to be incurred by the Project Owner in acquiring, constructing, rehabilitating and financing a Project, as determined by the Department based on the information contained in the Applicant's Application. Such costs include reserves and any expenses attributable to commercial areas. Costs associated with the sale or use of tax credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment. Projects which include commercial space must allocate the relative portion of all applicable expenses to the commercial space and exclude the same from Total Housing Development Costs. To determine the difference between the Project's total sources of financing and the total Project costs to be filled with the proceeds of the credit, the Department will not deduct the amount of financing associated with the commercial use from the Project's sources of funds, unless such financing specifically identifies in its terms that it is being provided for the commercial use.

(70) Town Home - Each Town Home living unit is one of a group of no less than four units that are adjoined by common walls. Town Homes shall not have more than two walls in common with adjacent units. Town Homes shall not have other units above or below another unit. Town Homes shall not share a common back wall. Town Homes shall have individual exterior entries.

(71) TxRD-USDA -The Rural Development (RD) services of the United States Department of Agriculture (USDA) serving the State of Texas (formerly known as TxFmHA) or its successor.

(72) Unit - Any residential rental unit in a Project consisting of an accommodation containing separate and complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation. The term "Unit" may also include a single room occupancy housing unit used on a non-transient basis so long as separate facilities exist as above described.

(73) Urban Infill Project - A project located within a Central Business District or its immediate environs or in inner-city neighborhoods characterized by documented higher than average land costs and higher density.

§50.3. State Housing Credit Ceiling.

(a) The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C).

(b) The Department shall publish each such determination in the Texas Register within 30 days after notification by the Internal Revenue Service.

(c) The aggregate amount of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. Housing Credit Allocations made to Tax Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§50.4. Application Submission; Unacceptable Applications; Required Application Notifications and Receipt of Public Comment; Board Recommendations; Board Decisions; Commitment Notices and Determination Notices; Waiting List; Agreements and Election Statement; Cost Certification and Carryover Filings; LURA.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application to the Department during the Application Acceptance Period. Only one Application may be submitted for each site. While the Application Acceptance Period is open, Applicants may withdraw their Application and subsequently file a new Application along with the required Application fee. The Department is authorized to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be a deficiency.

(b) Unacceptable Applications. Applications involving Ineligible Building Types will not be considered for allocation of tax credits under this QAP and the Rules. Applications that show Material Deficiencies (which are not corrected within the applicable correction period) will be terminated, and the Applicant may only re-apply if the Application Acceptance Period is still open. An Application that does not fulfill the requirements of this Qualified Allocation Plan and Rules and the current Application Submission Procedures Manual will be deemed not to have been timely filed and the Department shall not be deemed to have accepted the Application.

(c) Required Application Notifications and Receipt of Public Comment.

(1) Approximately 15 business days prior to the opening of the Application Acceptance Period, the Department shall publish a Pre-Application Notification Submission Log on its web site. Such log shall contain the: Project name, address, city, zip code, household type and the estimated number of total units, program units, and credit request amount for those Applicants that provide this information per §50.7(e)(8)(A) of this title.

(2) Within approximately 15 business days of the close of the Application Acceptance Period, the Department shall:

(A) publish an Application submission log on its web site. Such log shall contain the Project's name, address, set-aside, number of units, requested credits, requested selection criteria score and the owner contact name and phone number.

(B) give notice of a proposed Project in writing to the:

(i) mayor or other equivalent chief executive officer of the municipality, if the Project or a part thereof is located in a municipality; otherwise the Department shall notify the chief executive officer of the county in which the Project or a part thereof is located, to advise such individual that the Project or a part thereof will be located in his/her jurisdiction and request any comments which such individual may have concerning such Project. If the local municipal authority expresses opposition to the Project, the Department will give consideration to the objections raised and will visit the proposed site or Project within 30 days of notification.

(ii) state representative and state senator representing the area where a project would be located. The state representative or senator may hold a community meeting at which the Department shall provide appropriate representation.

(3) The Department shall hold at least three public hearings in metropolitan areas across the state to gather comment on the submitted Applications.

(4) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if it is received 15 business

days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. If comments are received by the Department after this deadline, then they may be reviewed at the discretion of the Board.

(5) Notice of Selection Criteria Scoring. When all Applications have been scored, the Department shall publish the results of the scoring on its web site.

(d) Board Recommendations. After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Committee and the Board. Such recommendation and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The recommendations to the Board will include a list of all submitted Applications which enumerates the reason(s) for the Project's proposed selection or denial, including all evaluation factors provided in §50.7(b) of this title that were used in making this determination.

(1) Unless the Department staff makes a recommendation to the Board based on the need to fulfill the goals of the Program as expressed in this QAP and Rules and the Board grants a waiver, a Commitment Notice shall not be issued with respect to any Project where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established from time to time by the Department and the Board as more specifically provided in the Application Submission Procedures Manual. The Department's recommendation to the Board shall be clearly documented.

(2) The Department will reduce the Applicant's estimate of developer's and/or Contractor fees in instances where these fees are considered excessive, as more specifically provided for within the Application Submission Procedures Manual. In the instance where the Contractor is an Affiliate of the Project Owner and both parties are claiming fees, Contractor's overhead, profit, and general requirements, the Department will reduce the total fees estimated to a level that it deems appropriate. Further, the Department shall deny or reduce the amount of low income housing tax credits on any portion of costs which it deems excessive or unreasonable. The Department also may require bids in support of the costs proposed by any Applicant.

(e) Board's Decisions. The Board's decisions shall be based upon its evaluation of the Project's consistency with the criteria and requirements set forth in the QAP and the Rules. In making a determination to allocate tax credits, the Department staff and Board shall be authorized not to rely solely on the number of points scored by an Applicant. They shall in addition, be entitled to take into account, as appropriate, the evaluation factors described in §50.7(b) of this title. If the Board disapproves or fails to act upon the Application, the Department shall issue to the Project Owner a written notice stating the reason(s) for the Board's disapproval or failure to act.

(f) Commitment Notices and Determination Notices. If the Board approves the Application, the Department will:

(1) if the Application is for a Housing Credit Allocation, issue a Commitment Notice to the Project Owner which shall:

(A) confirm that the Board has approved the Application; and

(B) state the Department's commitment to make a Housing Credit Allocation to the Applicant in a specified amount, subject to the feasibility determination described at §50.9(b) of this title, compliance by the Project Owner with the remaining requirements of this chapter, and any other conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Project Owner indicates acceptance of the commitment by executing the Commitment Notice or Determination Notice, pays the required fee specified in §50.11 of this title, and satisfies any other conditions set forth therein by the Department. A Project Owner may request an extension of the Commitment Notice expiration date by submitting extension request and associated extension fee as described in §50.11(h) of this title. In no event shall the expiration date of a Commitment Notice be extended beyond the last business day of the applicable calendar year.

(2) if the Application is with respect to a Tax Exempt Bond Project, issue a Determination Notice to the Project Owner which shall:

(A) confirm the Board's determination that the Project satisfies the requirements of this QAP; and

(B) state the Department's commitment to issue IRS Form(s) 8609 to the Applicant in a specified amount, subject to the requirements set forth at §50.7(h) of this title, compliance by the Project Owner with all applicable requirements of this chapter, and any other conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Project Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §50.11 of this title. The Determination Notice shall also expire unless the Project Owner satisfies any conditions set forth therein by the Department within the applicable time period.

(3) notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable.

(g) Waiting List. If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Department shall place all remaining Applications which have satisfied all Threshold Criteria on a waiting list. All such waiting list Applications will be weighed one against the other and a priority list shall be developed by the Department staff and approved by the Ad Hoc Tax Credit Committee. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Department shall issue a Commitment Notice to Applications on the waiting list in order of priority subject to the amount of returned credits and the 10% Nonprofit Set-Aside allocation required under §42(h)(5) of the Code. In the event that the Department makes a Commitment Notice or offers a commitment within the last month of the calendar year, it will require immediate action by the Applicant to assure that an allocation or Carryover Allocation can be issued before the end of that same calendar year. At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated, unless the Department shall determine to retain or act upon such Applications as provided in §50.15 of this title. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(h) Agreement and Election Statement. Together with or following the Project Owner's acceptance of the commitment or determination, the Project Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the applicable credit percentage for the Project as that for the month in which the commitment was accepted (or the month the bonds were issued for Tax Exempt Bond Projects), as provided in the Code, §42(b)(2). For non Tax Exempt Bond Projects, the Agreement and Election Statement shall be executed by the Project Owner no later than five days after the end of the month in which the offer of commitment was accepted. Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Project Owner to make an effective

election to fix the applicable credit percentage for a Project, the Commitment Notice must be executed by the Department and the Project Owner in the same month. The Department staff will cooperate with a Project Owner, as needed, to assure that the Commitment Notice can be so executed.

(i) Cost Certification or Carryover Filings. Projects that will be placed in service and request IRS Forms 8609 in the year the Commitment Notice was issued must submit the required Cost Certification documentation and compliance and monitoring fee to the Department by the second Friday in November of that same year. All other Projects which received a Commitment Notice, must submit the Carryover documentation to the Department no later than the second Friday in October of the year in which the Commitment Notice is issued. The Carryover Allocation must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual.

(j) Land Use Restriction Agreement (LURA). Prior to the Department's issuance of the IRS Form 8609 declaring that the Project has been placed in service for purposes of the Code, §42, Project Owners must date, sign and acknowledge before a notary public a LURA and send the original to the Department for execution. The Project Owner shall then record said LURA, along with any and all exhibits attached thereto, in the real Property records of the county where the Project is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Project and/or the Property prior to the recording of the LURA, the Project Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department shall physically inspect the Project for compliance with the Application and the representatives, warranties, covenants, agreements and undertakings contained therein before the IRS Form 8609 is issued, but in no event later than the end of the second calendar year following the year the last building in the project is placed in service. The Project Owner for Tax Exempt Bond Projects shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA

§50.5. Ineligible and Disqualified Applications.

(a) An Application will be ineligible if a member of the Development Team has been or is:

(1) Barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or,

(2) convicted of, under indictment for, or on probation for a state or federal crime involving fraud, bribery, theft, misrepresentations of material facts, misappropriation of funds, or other similar criminal offenses; or,

(3) subject to enforcement action under state or federal securities law, or is the subject of an enforcement proceeding with any Governmental Entity unless such action has been concluded and no adverse action or finding (or entry into a consent order) has been taken with respect to such member.

(b) Additionally, the Department will disqualify an Application if it is determined by the Department that:

(1) fraudulent information, knowingly false documentation or other material misrepresentation has been provided in the Application or other information submitted to the Department. The aforementioned policy will apply at any stage of the evaluation or approval process; or,

(2) the Applicant or any Person, general partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income housing tax credit property in the state of Texas who received an allocation of tax credits in the 2000 Application Round but did not close the construction loan as required under the Carryover Allocation (including any extension period granted by the Committee) except for reasons beyond the control of the Applicant as determined by the Department; or,

(3) the Applicant or any Person, general partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income housing tax credit property has failed to place in service buildings or removed from service buildings for which credits were allocated (either Carryover Allocation or issuance of 8609s). The Department may consider the facts and circumstances on a case-by-case basis, including whether the credits were returned prior to the expiration date for re-issuance of the credits, in its sole determination of Applicant eligibility; or,

(4) the Applicant or any Person, general partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income rental housing property in the state of Texas funded by the Department that is in Material Non-Compliance with the LURA (or any other document containing an Extended Low Income Housing Commitment) or the program rules in effect for such property on the closing date of the Application Acceptance Period or upon the date of filing Volume I of the Application for a Tax Exempt Bond Project. The Department may take into consideration the representations of the Applicant regarding compliance violations described in §50.7(d)(5)(C) and (D) of this title; however, the records of the Department are controlling; or,

(5) the Applicant or any Person, general partner, general contractor and their respective principals or Affiliates active in the ownership or control of other low income rental housing tax credit property outside of the state of Texas has incidence of non-compliance with the LURA or the program rules in effect for such tax credit property as reported on Exhibits 105C and 105D and/or as determined by the state regulatory authority for such state and such non-compliance is determined to be Material Non-Compliance by the Department; or,

(6) the Project is located on a site that has been determined to be "unacceptable" by the Department staff.

§50.6. Regional Allocation Formula and Set-Asides.

(a) Regional Allocation Formula. As required by Section 2306.111 of the Texas Government Code, the Department will use a regional distribution formula to distribute credits from the State Housing Credit Ceiling. This formula will establish targeted tax credit amounts for each of the state service regions. Each region's targeted tax credit amount will be published in the Texas Register and on the Department's web site concurrently with the publication of the QAP. The formula will be published in the Application Submission Procedures Manual and may be amended from time to time by the Department.

(b) Set-Asides. The regional credit distribution amounts are additionally subject to the factors presented in paragraphs (1) through (4) of this subsection:

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Projects which meet the requirements of the Code, §42(h)(5).

(2) At least 15% of the State Housing Credit Ceiling for each calendar year shall be allocated to projects which meet the Rural Project definition. Of this 15% allocation, 25% will be set-aside for projects financed through Rural Development (TxRD-USDA). Projects financed through TxRD-USDA's 538 Guaranteed Rural Rental Housing Program will not be considered under the 25% portion. Should there not be sufficient qualified applications submitted for the TxRD-USDA set-aside, then the credits would revert to projects that meet the Rural Project definition.

(3) At least 75% of the State Housing Credit Ceiling will be allocated to General Set-Aside. In addition at least 10% of the State Housing Credit Ceiling will be allocated to Preservation Projects regardless of set-aside.

(4) The Department may redistribute the credits amongst the different regions and set asides depending on the quality of applications submitted as evaluated under the factors described in §50.7(b) of this title and the level of demand exhibited in the regions during the Allocation Round. However as described in paragraph (2) of this subsection, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Projects which are not Qualified Nonprofit Projects. If credits will be transferred from a region which does not have enough qualified applications to meet its regional credit distribution amount, then those credits will be apportioned to the other regions based on their relative percentage of the total amount available for allocation. If forward commitments are approved by the Board, they shall be distributed with regard to the relative regional percentages established by the regional distribution formula.

§50.7. Evaluation Process; Evaluation Factors; Tie Breaker Criteria; Threshold Criteria; Selection Criteria; Credit Amount; Tax Exempt Bond Financed Projects.

(a) Evaluation Process. After eligible Applications have been evaluated, ranked and underwritten in accordance with this section of the QAP and the Rules, an application may be eligible for a recommendation to the Board as described in §50.4(d) of this title.

(1) Threshold Criteria Review. Applications will be initially evaluated against the Threshold Criteria. Applications not meeting Threshold Criteria will be terminated, unless the Department determines that the failure to meet the Threshold Criteria is the result of correctable Material Deficiencies, in which event the Applicant may be given an opportunity to correct such Material Deficiencies. Applications not meeting Threshold Criteria will be returned to the Applicant without further review with a written notice to the effect that the Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(2) Selection Criteria Review. For an Application to be considered under the Selection Criteria, the Applicant must demonstrate that the Project meets all of the Threshold Criteria requirements set forth in §50.7(d) of this title. Applications that satisfy the Threshold Criteria will then be ranked according to the points scored under the Selection Criteria in accordance with the Selection Criteria listed in §50.7(e) of this title. Applications not scored by the Department's staff shall be deemed to have the points allocated through self-scoring by the Applicants until actually scored. This shall apply only for ranking purposes.

(3) Underwriting Evaluation. After the Application is scored under the Selection Criteria, the Department will determine to assign the Project for evaluation of financial feasibility by the Department's credit underwriting division based on the evaluation factors outlined in §§50.7(b)(2) through 50.7(b)(8) of this title. The reasons for recommending or not recommending a project for underwriting shall be documented by the Department. The Department may have an outside third party perform the underwriting evaluation to the extent it determines appropriate. The expense of any third party underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(b) Evaluation Factors. The Department staff, Committee, and Board shall evaluate an Application for recommendation of a Commitment Notice or Determination Notice on the basis of additional factors beyond scoring criteria. These additional factors include the items described in paragraphs (1) through (8) of this subsection; provided, however, that Tax Exempt Bond Project Applications will be evaluated only under paragraphs (1), (3), (4), and (7) of this subsection.

(1) Project Feasibility. A determination by the Department, pursuant to §42 of the Code, that the amount of credits recommended for allocation to a project is necessary for the financial feasibility of the project and its long-term viability as a qualified low income housing property. In making this determination, the Department will take into account:

(A) the project's total development costs;

(B) actual or projected operating expenses and reserves for replacement;

(C) project's sources of financing;

(D) proceeds from the syndication of the tax credits;

(E) the project's debt coverage ratio and break-even occupancy; and

(F) the project's overall conformance with the Department's underwriting guidelines as stated in the Application Submission Procedures Manual.

(2) Geographic Dispersion. The dispersion of credits within each region shall be evaluated under one or more of subparagraphs (A) through (D) of this paragraph:

(A) number of tax credit and other affordable housing projects within a city and county and the number of units attributable to such projects;

(B) population of a city and county in relation to the number of existing tax credit and affordable units created;

(C) city and county population and employment growth trends; and

(D) rental housing affordability trends.

(3) Concentration of Affordable Housing Developments. The concentration of tax credit developments and other affordable housing developments within specific markets and submarkets shall be evaluated under one or more of subparagraphs (A) through (D) of this paragraph.

(A) occupancy levels projected for the proposed project and the occupancy level of existing projects;

(B) market and submarket absorption levels;

(C) the percentage of comparable affordable housing projects and units in the submarket; and

(D) any other information (such as employer relocation) that could have an impact on the submarket.

(4) Site Conditions. Site conditions shall be evaluated through a physical site inspection by Department staff. Such inspection will evaluate the site based on the Site Evaluation form provided in the Application Submission Procedures Manual and provide a site evaluation of "Excellent," "Acceptable," "Poor" or "Unacceptable". The evaluations shall be based on condition of the surrounding neighborhood and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's visibility to prospective tenants and accessibility of the site via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites would include a non-mitigable environmental factor that would impact the health and safety of the residents.

(5) Experience of the Development Team. The Development Team's experience as it relates to the ability to successfully complete the Project will be considered, based on the prior development experience of members of the team.

(6) Housing Type. The type of housing provided may be considered in order to serve a broad segment of the population.

(7) Program's Goals and Consistency with Local Need. The Project's impact on the Low Income Housing Tax Credit Program's goals and objectives including, but not limited to, the project's inconsistency with local needs or its impact as part of a revitalization or preservation plan.

(8) Allocation to Multiple Entities. The goal of allocating credits among as many different entities as practicable without diminishing the quality of the housing that is built as required under the Texas General Appropriations Act applicable to the Department.

(c) Tie Breaker Criteria. In the event that two or more Applications receive the same number of points in any given set-aside category and compare equally under the factors described in §50.7(b) of this title, the Department will utilize the factors in paragraphs (1) through (6) of this subsection, in the order they are presented, to determine which Project will receive a preference in consideration for a tax credit commitment. As described by these paragraphs, preference will be given to projects which:

(1) serve the lowest income tenants;

(2) serve low income tenants for the longest period of time, in the form of a longer Compliance Period and/or extended low income use period (as set forth in the LURA);

(3) is a Special Housing Project as defined in §50.2 of this title (relating to Definitions);

(4) have substantial community support as evidenced by the commitment of local public funds toward the construction, rehabilitation and acquisition and subsequent rehabilitation of the Project;

(5) provide for the most efficient usage of the low income housing tax credit on a per Unit basis; and

(6) have a Unit composition provides the highest percentage of three bedrooms or greater sized Units.

(d) Threshold Criteria. The following Threshold Criteria listed in paragraphs (1) through (12) of this subsection are mandatory requirements at the time of Application submission:

(1) Exhibit 101. The "Design Certification Form" provided in the Application Submission Procedures Manual and supporting documents. This exhibit will provide:

(A) A description of the type of amenities proposed for the development. If fees in addition to rent are charged for amenities reserved for an individual tenant's use (i.e. covered parking, storage, etc.), then the amenity may not be included among those provided to complete this exhibit. Projects with more than 36 units must provide at least four of the amenities provided in clauses (i) through (x) of this subparagraph. Projects with 36 Units or less, Special Housing Projects and Preservation Projects must provide at least two of the amenities provided in clauses (i) through (x) of this subparagraph.

(i) full perimeter fencing with controlled gate access;

(ii) designated playground and equipment;

(iii) community laundry room/laundry hook-up in Units;

(iv) furnished community room;

(v) recreation facilities;

(vi) public telephone(s) available to tenants 24 hours a day;

(vii) on-site day care, senior center, or community meals room;

(viii) storage areas;

(ix) computer facilities; or

(x) covered parking.

(B) A certification that the Project will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies.

(C) For a new construction project, a certification from the Project Owner stating that all multifamily dwellings covered under the Fair Housing Act will be designed and built in compliance with the Fair Housing Accessibility Guidelines (ANSI A117.1 - 1986); or for a rehabilitation project designed and built for first occupancy after March 13, 1991 and covered under the Fair Housing Act, a certification from the Project Owner stating that the Project is in compliance with (ANSI A117.1 - 1986). Applicant's proposing two-story townhomes must ensure that 7% of the dwelling units include single story units designed and built in compliance with the above standards. At the construction loan closing a certification from an accredited architect will be required stating that the Project was designed in conformance with these standards. Prior to issuance of IRS Form 8609 each housing unit will be inspected for compliance with accessibility requirements. A specifically qualified third party, at the Project Owner's expense, shall perform the inspections. All rehabilitation projects should submit a self-evaluation accessibility report complete with a needs assessment and transition plan.

(D) A certification that the Project will be built by a General Contractor that satisfies the requirements of the Seventy-fifth Legislature in House Bill 1 of the General Appropriation Act, Article VII, Rider 11(c). This bill requires that the General Contractor hired by the Project Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(E) All of the architectural drawings identified in clauses (i) through (v) of this subparagraph. While full size design or construction documents are not required, the drawings must have a scale and/or show the dimensions.

(i) a site plan which:

(I) is consistent with the number of units specified in the "Rent Schedule" provided in the Application;

(II) identifies all residential, common buildings and proposed amenities; and

(III) clearly delineates the flood plain boundary lines and other easements shown in the site survey;

(ii) floor plans and elevations for each type of residential building;

(iii) floor plans and elevations for each type of common area building;

(iv) unit floor plans for each type of unit. The net rentable areas these unit floor plans represent should tie with those shown in the "Rent Schedule" provided in the application; and

(v) elevations of residential and common area buildings which include a percentage estimate of the exterior composition, i.e. 50% brick, 50% siding.

(F) Rehabilitation Projects must submit photographs of the existing signage, typical building elevations and interiors, existing project amenities, and site work. These photos should clearly document the typical areas and building components which exemplify the need for rehabilitation.

(2) Exhibit 102. Evidence of the Project's development costs and corresponding credit request as described in subparagraphs (A) through (C) of this paragraph.

(A) All projects must submit the "Project Cost Schedule" provided in the Application Submission Procedures Manual. Rehabilitation developments must establish that the rehabilitation will be substantial and will involve at least $6,000 per unit in direct hard costs.

(B) For projects located in a Qualified Census Tract (QCT) as defined by the Secretary of HUD and qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C), Applicants must submit a copy of the census map clearly showing that the proposed development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(C) Rehabilitation Projects must also submit the "Proposed Work Write Up for Rehabilitation Projects" provided in the Application Submission Procedures Manual. This form must be prepared and certified by a third party registered architect, professional engineer or general Contractor.

(3) Exhibit 103. Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) through (E) of this paragraph:

(A) Exhibit 103A. Evidence of site control in the name of the ownership entity, or entities which comprise the Applicant. If the evidence is not in the name of the Project Owner, then the documentation should reflect an expressed ability to transfer the rights to the Project Owner. One of the following items described in clauses (i) through (iii) of this subparagraph must be provided:

(i) a recorded warranty deed; or

(ii) a contract for sale or lease (the minimum term of the lease must be at least 45 years) which is valid for the entire period the development is under consideration for tax credits or at least 90 days, whichever is greater; or

(iii) an exclusive option to purchase which is valid for the entire period the development is under consideration for tax credits or at least 90 days, whichever is greater.

(B) Exhibit 103B. Evidence from the appropriate local municipal authority that satisfies one of clauses (i) through (iii) of this subparagraph:

(i) a letter stating that the property is appropriately zoned for the Project or that zoning is not required in that municipality;

(ii) if the property is not appropriately zoned, a letter confirming that a rezoning request has been filed. This letter should also provide a timeline for completion of the rezoning process. Any commitment of tax credits to the Applicant will be contingent upon proper rezoning prior to the Carryover Allocation.

(iii) In the case of a rehabilitation project, if the property is currently a non-conforming use as presently zoned, a letter which discuss the items in subclauses (I) through (IV) of this clause:

(I) a detailed narrative of the nature of non-conformance;

(II) the applicable destruction threshold;

(III) owner's rights to reconstruct in the event of damage; and

(IV) penalties for noncompliance.

(C) Exhibit 103C. Evidence of the availability of all necessary utilities/services to the development site. Necessary utilities include natural gas (if it will be utilized by the project), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost, and an estimate of any portion of that cost that will be borne by the developer. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the address of the proposed site. If utilities are already accessible, then the documentation must not be older than 12 months from the first day of the Application Acceptance Period. If utilities are not already accessible (undeveloped areas), then the letter should not be older than three months from the first day of the Application Acceptance Period.

(D) Exhibit 103D. Evidence of permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) through (iv) of this subparagraph:

(i) bona fide permanent financing in place as evidenced by a valid and binding loan agreement and a deed(s) of trust in the name of the ownership entity which identifies the mortgagor as the Applicant or entities which comprise the general partner and/or expressly allows the transfer to the Proposed Project Owner; or,

(ii) bona fide commitment or term sheet issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the ownership entity, or entities which comprise the Applicant and which has been executed and accepted by both parties (the term of the loan must be for a minimum of 15 years with at least a 30 year amortization). Such a commitment may be conditional upon the completion of due diligence by the lender; or,

(iii) any Federal, State or locally subsidized gap financing of soft debt must be identified at the time of application. At a minimum, evidence from the lending agency that an application for funding has been made and a term sheet which clearly describes the amount and terms of the funding must submitted. While evidence of application for funding from another TDHCA program is not required (as these funds will be presented to the Board concurrently with the recommendation for tax credits), the Applicant must clearly indicate that such an application has been filed as required by the Application Submission Procedures Manual. If the necessary financing has not been committed by the applicable lending agency, the Commitment Notice, Housing Credit Allocation or Determination Notice, as the case may be, will be conditioned upon Applicant obtaining a commitment for the required financing by a date certain; or

(iv) if the development will be financed through Project Owner contributions, provide a letter from an independent CPA verifying the capacity of the Applicant to provide the proposed financing with funds that are not otherwise committed together with a letter from the Applicant's bank or banks confirming that sufficient fundsare available to the Applicant.

(E) Exhibit 103E. A copy of the full legal description and either of the documents described in clauses (i) and (ii) of this subparagraph:

(i) a copy of the current title policy which shows that the ownership (or leasehold) of the land/Project is vested in the exact name of the Applicant, or entities which comprise the Applicant; or

(ii) a copy of a current title commitment with the proposed insured matching exactly the name of the Applicant or entities which comprise the Applicant and the title of the land/Project vested in the name of the exact name of the seller or lessor as indicated on the sales contract or lease, as applicable.

(4) Exhibit 104. Evidence of all of the notifications described in subparagraphs (A) through (D) of this paragraph. Such notices must be prepared in accordance with "Exhibit 104, Pre-Application Public Notifications" provided in the Application Submission Procedures Manual.

(A) Exhibit 104A. A copy of the public notice published in a widely circulated newspaper in the area in which the proposed development will be located. Such notice must run at least twice within a thirty day period or three times within a five day period. The notice should not run on holidays or weekends. Such notice must be published prior to the submission of the Application to the Department and can not be older than three months from the first day of the Application Acceptance Period.

(B) Exhibit 104B. Evidence of notification of the local chief executive officer(s) (i.e., mayor and county judge), state senator, and state representative of the locality of the development. Evidence of such notification shall include a letter which at a minimum contains a copy of the public notice sent to the official and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said official. Proof of notification should not be older than three months from the first day of the Application Acceptance Period.

(C) Exhibit 104C. If any of the units in the Project are occupied at the time of application, then the Applicant must post a copy of the public notice in a prominent location at the Project throughout the period of time the Application is under review by the Department. When the Department's public hearing schedule for comment on submitted applications becomes available, a copy of the schedule must also be posted until such hearings are completed. Compliance with these requirements shall be confirmed during the Department's site inspection.

(D) Exhibit 104D. Public Housing Waiting List. Evidence that the Project Owner has committed in writing to the local public housing authority (PHA) the availability of Units and that the Project Owner agrees to consider households on the PHA's waiting list as potential tenants and that the Property is available to Section 8 certificate or voucher holders. Evidence of this commitment must include a copy of the Project Owner's letter to the PHA and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said PHA. Proof of notification should not be older than three months from the first day of the Application Acceptance Period. If no PHA is within the locality of the development, the Project Owner must utilize the nearest authority or office responsible for administering Section 8 programs.

(5) Exhibit 105. Evidence of the Project's ownership structure and the Applicant's previous experience as described in subparagraphs (A) through (F) of this paragraph.

(A) a chart which clearly illustrates the complete organizational structure of the Project Owner. This chart should provide the names and ownership percentages of Persons with an ownership interest in the development. The percentage ownership of all Persons in Control of these entities and sub-entities must also be clearly defined.

(B) The Applicant, General Partner and all Persons in Control of these entities and sub-entities must also provide documentation of standing to include items found in clauses (i) and (ii) of this subparagraph.

(i) the following documentation as applicable under either subclause (I) or (II) of this clause:

(I) For entities to be formed:

(-a-) a copy of the Certificate of Reservation of Name from the Secretary of State; and

(-b-) a letter from the Applicant or entities Attorney certifying that the entity will be formed in accordance with all state and federal laws.

(II) For existing entities:

(-a-) a copy of the Certificate of Good Standing from the State Comptroller and a copy of the Certificate of Charter or Limited Partnership and Articles of Incorporation filed of record; or

(-b-) a recorded copy of the local DBA Certificate for non-incorporated or non-State Certified sub-entities.

(ii) the Applicant must provide evidence that the signor(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control of the Applicant.

(C) A copy of the completed and executed "Exhibit 105C, Previous Participation and Background Certification Form," which is provided in the Application Submission Procedures Manual. This form must be completed with respect to each Person owning an interest in the general partner (or if Applicant is to be a Limited Liability Company, the managing member) of the Applicant.

(D) Evidence that each Person owning an interest in the general partner (or if Applicant is to be a Limited Liability Company, the managing member) of the Applicant has sent "Exhibit 105D, National Previous Participation and Background Certification Form," to the appropriate Housing Credit Agency for each state in which they have developed or operated affordable housing. Evidence of such notification shall be a copy of the form sent to the agency and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said agency.

(E) Submission of IRS Form 8821, Tax Information Authorization signed and executed on behalf of the Applicant for the release of tax information relating to non-disclosure or recapture issues.

(F) Evidence that the Project Owner's general partner, partner (or if Applicant is to be a Limited Liability Company, the managing member) General Contractor or their principals have a record of successfully constructing or developing residential units or comparable commercial property (i.e. dormitory and hotel/motel) in the capacity of owner, general partner, managing member or General Contractor. If the General Contractor's experience is being claimed for this exhibit, then the Project Owner must request the Department's approval prior to replacing the General Contractor. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $6,000 of direct hard cost per unit.

(i) The term "successfully" is defined as acting in a capacity as the general contractor or developer of:

(I) at least 100 residential units or comparable commercial property; or

(II) at least 36 residential units or comparable commercial property if the project applying for credits is a Rural Project.

(ii) Evidence must be one of the following documents:

(I) A certification from the Department that the Person with the experience satisfies this exhibit. Applicants who have previously applied for a Tax Credit Allocation must request this certification at least sixty days prior to the beginning of the Application Acceptance Period. Applicants should ensure that the individual whose name is on the certification appears in the organizational chart provided in Exhibit 105A. If the certification is for the General Contractor, then this should be clearly indicated on the document.

(II) If the Department has not previously certified that the experience of the Project Owner, general partner, managing member or General Contractor qualifies for this exhibit, then one of the following documents must be submitted: American Institute of Architects (AIA) Document A111 - Standard Form of Agreement Between Owner & Contractor, AIA Document G704 - Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other appropriate documentation verifying that the general partner, General Contractor or their principals have the required experience. If submitting the IRS Form 8609, only one form per project is required. The evidence must clearly indicate:

(-a-) that the project has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion.);

(-b-) that the names on the forms and agreements tie back to the ownership entity, general partner, general contractor and their respective principals as listed in the Application; and

(-c-) the number of units completed or substantially completed.

(6) Exhibit 106. Evidence of the Project's projected income and operating expenses as described in subparagraphs (A) through (C) of this paragraph:

(A) All developments must provide a 15-year proforma estimate of operating expenses and supporting documentation used to generate projections (excerpts from the market study, operating statements from comparable properties, etc).

(B) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate. If there is more than one entity (Section 8 administrator, utility company) responsible for setting the utility allowance(s) in the area of the Project location, then the selected Utility Allowance must reflect the actual utility costs in that project area. Documentation from the local utility provider supporting the selection must be provided.

(C) Occupied projects undergoing rehabilitation must also submit both items described in clauses (i) and (ii) of the subparagraph. If the current property owner is unwilling to provide the required documentation, then a signed statement as to their unwillingness to do so is required.

(i) historical monthly operating statements of the subject development for 12 consecutive months ending not more than 45 days prior to the first day of the Application Acceptance Period. In lieu of the monthly operating statements, two annual operating statement summaries may be provided. If 12 months of operating statements or two annual operating summaries can not be obtained, then the monthly operating statements since the date of acquisition of the development and any other supporting documentation used to generate projections may be provided; and

(ii) a current rent roll that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease.

(7) Exhibit 107. All Applicants involving a nonprofit general partner regardless of the set-aside applied under must submit all of the documents described in subparagraph (A) through (E) of this paragraph which confirm that the Applicant is a Qualified Nonprofit Organization pursuant to Code, §42(h)(5)(C):

(A) an IRS determination letter which states that the Qualified Nonprofit Organization is a 501(c)(3) or (4) entity;

(B) if the Project involves a joint-venture between a Qualified Nonprofit Organization and a for-profit entity, an agreement which shows that the nonprofit organization will hold an ownership interest in and materially participate (within the meaning of the Code §469(h)) in the development and operation of the Project throughout the Compliance Period;

(C) a copy of the articles of incorporation of the nonprofit organization which specifically states that the fostering of affordable housing is one of the entity's exempt purposes;

(D) "Exhibit 107A, Nonprofit Participation Exhibit"; and

(E) Exhibit 107B, Attorney Opinion Letter for Nonprofit Organizations.

(8) Exhibit 108. Applicants applying for acquisition credits or affiliated with the seller must provide all of the documentation described in subparagraphs (A) through (C) of this paragraph. Applicants applying for acquisition credits must also provide the items described in subparagraphs (D) and (E) of this paragraph and as provided in the Application Submission Procedures Manual.

(A) an appraisal which complies with the Uniform Standards of Professional Appraisal Practice and the Department's Market Analysis and Appraisal Policy. This appraisal of the Property must separately state the as-is, pre-acquisition or transfer value of the land and the improvements where applicable;

(B) a valuation report from the county tax appraisal district;

(C) clear identification of the selling Persons or entities, and details of any relationship between the seller and the Applicant or any Affiliation with the Development Team, Qualified Market Analyst or any other professional or other consultant performing services with respect to the Project. If any such relationship exists, complete disclosure and documentation of the related party's original acquisition and holding costs since acquisition to justify the proposed sales price must also be provided. Holding costs may include a rate of return consistent with the historical return of similar risk on any equity position in the property. The Department will also consider exit taxes that may be required as a result of the transfer of ownership if they are detailed and well documented and certified to by the owners CPA;

(D) "Exhibit 108, Acquisition of Existing Buildings Form"; and

(E) "Exhibit 108, Attorney Opinion Letter for Projects Requesting Acquisition and Rehabilitation Credits."

(9) Exhibit 109. Evidence of the Applicant's financial status as provided by both documents described in subparagraphs (A) and (B) of this paragraph and as provided in the Application Submission Procedures Manual. Such evidence must be filed separately from the volume containing the Threshold Criteria and placed in a large envelope labeled as Exhibit 109, as instructed in the Application Submission Procedures Manual.

(A) Exhibit 109A. A Personal Financial and Credit Statement completed and signed by each Person with a general partner (or if Applicant is to be a Limited Liability Company, managing member) interest in the Applicant. Applicant's statement must not be older than 90 days from the first day of the Application Acceptance Period. If submitting partnership and corporate financials in addition to the individual statements, the certified financial statements should not be older than 12 months.

(B) Exhibit 109B. Authorization to Release Credit Information must be completed by all Persons with an ownership interest in the Applicant.

(10) Exhibit 110. A Phase I Environmental Site Assessment (ESA) on the subject Property, dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Project is older than 12 months, the Project Owner must supply the Department with an update letter from the Person or organization which prepared the initial assessment; provided however, that the Department will not accept any Phase I Environmental Site Assessment which is more than 24 months old. The ESA must be prepared in accordance with the policies provided in the Application Submission Procedures Manual.

(11) Exhibit 111. A Market Study prepared by a Qualified Market Analyst in accordance with the Market Analysis and Appraisal Policy provided in the Application Submission Procedures Manual unless the Project has an obligation of TxRD-USDA funds. The Market Study should be prepared for and addressed to the Department. While a Market Study is not required of Projects which have an obligation of TxRD-USDA funds, the Department may request information with respect to the operating expenses, proposed new construction or rehabilitation cost or other information.

(A) The Department may determine from time to time that information not requested in the Third Party Market Study Standards will be relevant to the Department's evaluation of the need for the Project and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the Qualified Market Analyst to meet this need.

(B) All Applicants shall acknowledge by virtue of filing an Application that the Department shall not be bound by any such opinion or the Market Study itself, and may substitute its own analysis and underwriting conclusions for those submitted by the Qualified Market Analyst.

(12) Exhibit 112. A current original plat of survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time to time by the Texas Surveyors Association. This survey, among other things, shall set forth the number of total square feet comprising the proposed site, together with a metes and bounds description thereof. The metes and bounds description of the site shall be identical to the description reflected in the site control document provided in Exhibit 103A, or provisions in the site control document shall allow the metes and bounds description in the Survey to be substituted for the description in the site control document, or the site acquisition cost shall be reduced on a prorata or otherwise acceptable manner by the difference in land size reflected in the Site Control document and the Survey. The Surveyor shall certify to the Department, among others as needed, the following items listed in subparagraphs (A) through (E) of this paragraph:

(A) the Survey was made and staked on the ground and corners are marked with permanent monuments;

(B) the plat shows the location of all utilities, improvements, highways, streets, roads, railroads, rivers, creeks or other waterways, fences, easements, encroachments and rights-of-way on or contiguous to the property with all easements and rights-of-way and/or exceptions shown in the title commitment and shown on the Survey, referenced to their recording information by volume and page number, if available;

(C) the survey is a true, correct and accurate representation of the site;

(D) that there are no visible discrepancies, conflicts, encroachments, overlapping of improvements, fences, roads or rights-of-way except as shown on the plat; and

(E) no part of the land is located within the 100-year flood plain or flood prone area, as identified by the most current Federal Emergency Management Agency (FEMA) insurance map or otherwise, except as shown on the plat.

(e) Selection Criteria. All Applications will be ranked according to the Selection Criteria listed in paragraphs (1) through (8) of this subsection.

(1) Exhibit 201, Development Location. Evidence that the subject Property is located within one of the geographical areas described in subparagraphs (A) through (E) of this paragraph. (Areas qualifying under subparagraph (A) of this paragraph will receive the number of points set forth in the applicable clause; areas qualifying under any one of the subparagraphs (B) through (E) of this paragraph will receive 5 points. A project may receive points under both subparagraph (A) of this paragraph and any one of subparagraphs (B) through (E) of this paragraph:

(A) A geographical area (city or county) with a relatively low ratio of awarded tax credits (in dollars) to its population. Such ratios shall be calculated by the Department based on its inventory of tax credit developments and the Texas State Data Center's place population estimates as of the beginning of the Application Round. In the

event that the Texas State Data Center does not publish an estimate for a specific place, then the Department will rely on the local municipality's most recent population estimate to calculate the ratio. The ratios shall be published in the Application Submission Procedures Manual. Geographical areas will be eligible for points as described in clauses (i) through (iv) of this subparagraph.

(i) A city or county with no LIHTC developments will receive six points.

(ii) A city or county with a ratio greater than zero and less than one will receive three points.

(iii) A city or county which has a ratio equal to or greater than one but less than two will receive two points.

(iv) A city or county which has a ratio greater than four shall have four points deducted from the score.

(B) A geographical area which is:

(i) a "Difficult Development Area" as specifically designated by the Secretary of HUD. These are areas which have high construction, land, and utility costs relative to area median family income; or

(ii) a Targeted Texas County (TTC) as designated by the Department in the Application Submission Procedures Manual;

(C) a designated state or federal empowerment/enterprise zone. Such developments must submit a letter and a map from a city/county official verifying that the proposed development is located within such a designated zone. Letter should be no older than 90 days from the first day of Application Acceptance Period; or

(D) a city-sponsored Tax Increment Financing Zone (TIF), Public Improvement District (PIDs), or other area or zone where a city or county has, through a local government initiative, specifically encouraged or channeled growth, neighborhood preservation or redevelopment. Significant incentives or benefits must be received from the local government which amount to at least 5% of the Total Development Costs. Such developments must submit all of the following documentation: a letter from a city/county official verifying that the proposed development is located within the city sponsored zone or district; a map from the city/county official which clearly delineates the boundaries of the district; and a certified copy of the appropriate resolution or documentation from the mayor, local city council, county judge, or county commissioners court which documents that the designated area was:

(i) created by the local city council/county commission,

(ii) targets a specific geographic area which was not created solely for the benefit of the Applicant, and

(iii) offers tangible and significant area-specific incentives or benefit over and above those normally provided by the city or county.

(E) a non-impacted Census Tract pursuant to the Young vs. Cuomo judgment. Such developments must submit evidence in the form of a certification from HUD that the Project is located in such an area.

(2) Housing Needs Characteristics.

(A) The proposed development is located in a county in which 10% or more of the households are below the poverty level as set forth in the Department's "County Data Elements Guide" incorporated into the Reference Manual. Utilize the percentages in clauses (i) through (iv) of this subparagraph to assess the appropriate score:

(i) 10% to 20% of households are below the poverty level (3 points);

(ii) 21% to 31% of households are below the poverty level (5 points);

(iii) 32% to 42% of households are below the poverty level (7 points); or

(iv) 43% or more of households are below the poverty level (9 points).

(B) The proposed development is located in a county in which 20% or more of the rental units have a cost burden as set forth in the County Data Elements guide. Utilize the following percentages to assess the appropriate score:

(i) 20% to 30% of rental units have a cost burden (4 points);

(ii) 31% to 41% of rental units have a cost burden (6 points); or

(iii) 42% or more of rental units have a cost burden (8 points).

(3) Project Characteristics. Projects may receive points under as many of the following subparagraphs as are applicable.

(A) Exhibit 202. Evidence that the Project to be purchased qualifies as a federally assisted building within the meaning of the Code, §42(d)(6)(B), and is in danger of having the mortgage assigned to HUD, TxRD-USDA, or creating a claim on a federal mortgage insurance fund (such evidence must be a letter from the institution to which the development is in danger of being assigned); OR evidence that the Applicant is purchasing(ed) a Property owned by HUD, an insured depository institution in default, or a receiver or conservator of such an institution, or is an REO Property. Such evidence must be in the form of a binding contract to purchase from such federal or other entity as described in this paragraph, closing statements, or recorded warranty deed (5 points).

(B) Exhibit 203. Evidence that the Project is a low income building with mortgage prepayment eligibility as provided for in the Code, §42(d)(6)(C), or that the Project has an expiring Section 8 contract, which the owner is under no obligation to renew. Such evidence must be a copy of the HUD regulatory agreement and/or mortgage which evidences the prepayment clause; a copy of the expiring Section 8 contract(s); and in either event, a copy of the opt-out notice or non-renewal notice per HUD regulations. Applicant shall also provide a statement as to its willingness to maintain low-income use restrictions for the period applicable to the type of HUD assistance involved, and the actions taken or required by it in order to assure that the HUD assistance will continue to be provided to the Project (8 points).

(C) The Project composition offers a Unit mix which is conducive to housing large families. To qualify for these points, these Units must have at least 1000 square feet of net rentable area for three bedrooms or 1200 square feet of net rentable area for four bedrooms. Unless the building is served by an elevator, 3 or 4 bedroom Units located above the building's second floor will not qualify for these points. If the Project is a mixed-income development, only tax credit Units will be used in computing the percentage of qualified Units for this selection item.

(i) 15% of the Units in the development are three or four bedrooms (5 points); and

(ii) an additional point will be awarded for each additional 5% increment of Units that are three or four bedrooms up to 30% of the Units (a maximum of three points) (3 points).

(D) The Project will utilize at least four of the following energy saving devices in the construction of each tax credit Unit. The devices selected must be certified by the project architect as being included in the design of each tax credit Unit prior to the closing of the construction loan and in actual construction upon Cost Certification. (4 Points):

(i) ceiling fans in living room and each bedroom;

(ii) insulation of at least R-15 for walls and R-30 for ceilings;

(iii) roof radiant barrier;

(iv) gas heating system with an energy factor of 0.59;

(v) energy efficient air conditioning system with a 12 SEER or above rating;

(vi) a shading coefficient for windows of 0.4 provided in the form of solar screens; or dual pane insulating, low-e windows;

(vii) evaporative cooling system; or

(viii) utilization of appliances and residential light fixtures that qualify for the United States Environmental Protection Agency (EPA) and the United States Department of Energy's Energy Star Label. At a minimum, this shall include the installation of programmable thermostats, water heaters, refrigerators and dishwashers in each unit.

(E) The proposed development provides low density housing of no more than 20 Units per acre or as follows:

(i) 16 Units or less per acre (6 points); or

(ii) 17 to 20 Units per acre (4 points).

(F) The proposed development is designed as a multi-story elderly development or a Highrise Urban Infill Project. Points are awarded as follows:

(i) 20 to 24 Units per acre (5 points); or

(ii) 24 to 28 Units per acre (3 points).

(G) The Project is an existing Residential Development without maximum rent limitations or set-asides for affordable housing. If maximum rent limitations had existed previously, then the restrictions must have expired at least one year prior to the date of Application to the Department (8 points).

(H) The Project is a mixed-income development comprised of both market rate Units and qualified tax credit Units. To qualify for these points, the project must be located in a submarket where the average rents based on the number of bedrooms for comparable market rate units are at least 10% higher on a per net rentable square foot basis than the maximum allowable rents under the Program. Additionally, the proposed rents for the market rate units in the project must be at least 5% higher on a per net rentable square foot basis than the maximum allowable rents under the Program. The Market Study required by §50.7(d)(11) of this title must provide an analysis of these requirements for each bedroom type shown in proposed unit mix. Points will be awarded to Project's with a Unit based Applicable Fraction which is no greater than:

(i) 60% (10 points); or,

(ii) 75% (6 points); or,

(iii) 85% (3 points).

(I) Exhibit 204. Evidence that the proposed historic Residential Development has received an historic property designation by a federal, state or local Governmental Entity. Such evidence must be in the form of a letter from the designating entity identifying the development by name and address and stating that the project is:

(i) listed in the National Register of Historic Places under the United States Department of the Interior in accordance with the National Historic Preservation Act of 1966;

(ii) located in a registered historic district and certified by the United States Department of the Interior as being of historic significance to that district;

(iii) identified in a city, county, or state historic preservation list; or

(iv) designated as a state landmark (6 points).

(J) Project Owner will set-aside Units for households with incomes at 50% or less of Area Median Gross Income (AMGI). The rents for these Units must not be higher than the allowable tax credit rents at the 50% AMGI level. The Project Owner will set aside Units at 50% AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. For the purposes of this subparagraph (maintaining the promised percentage of set aside 50% AMGI Units), if at re-certification the tenant's household income exceeds 140% of the 50% AMGI level, then the Unit remains a 50% AMGI Unit until the next available Unit of comparable or smaller size is designated to replace this Unit. Once the over 50% AMGI Unit is replaced, then the rent for the previously qualified 50% AMGI Unit may be increased over the LIHTC requirements. Rent increases, if any, should comply with lease provisions and local tenant-landlord laws. If the Project is a mixed-income development, only tax credit Units should be used in computing the percentage of qualified Units for this selection item. Utilize the percentages in clause (i) through (ii) of this subparagraph to assess the appropriate score.

(i) four points will be awarded for the first 10% of the Units in the development that are set-aside for tenants with incomes at 50% or less of AMGI (4 points);and

(ii) an additional point will be awarded for every 5% of additional Units set-aside for tenants with incomes at 50% or less of AMGI up to a maximum of eight points (8 points).

(K) The Project is comprised entirely of fourplexes and Town Homes. To qualify for these points the development must be on contiguous property under common ownership, management, and Control and must have a density of no more than 16 Units per acre. None of the residential buildings may share common roofs with other buildings. None of the residential buildings may have an exterior door that opens onto a breezeway or hallway that serves other units or buildings (5 points).

(L) Exhibit 205. For developments which involve rehabilitation of existing units, evidence that a majority of the development's residential Units are vacant and uninhabitable at the time the Application is submitted. Such evidence must be in the form of a letter and report from the local municipal authority citing substantial code violations. To qualify for these points, the Applicant or its Affiliates must not have owned a significant interest in, or have had Control of the Project during the period in which such Units were rendered uninhabitable (4 points).

(M) Exhibit 206. Evidence from the local municipal authority stating that the Project fulfills a need for additional affordable

rental housing as evidenced in a local Consolidated Plan, Comprehensive Plan, other or local planning document. If the municipality does not have such a planning document, then a letter from the local municipal authority stating that there is no local plan and that the city supports the Project must be submitted (5 points).

(N) The Project consists of not more than 36 Units and is not a part of, or contiguous to, a larger Project. A Project may not receive points for this characteristic if it would otherwise qualify as a Rural Project (5 points).

(O) Exhibit 207. Evidence that the proposed Project is partially funded by a HOPE VI grant from HUD. The Project must have already received the commitment from HUD. Submission of a HOPE VI application to HUD does not qualify a Project for these points. Evidence shall include a copy of the commitment letter from HUD indicating the HOPE VI grant terms and grant award amount (5 points).

(4) Sponsor Characteristics. Projects may only receive points for one of the two criteria listed in subparagraphs (A) and (B) of this paragraph:

(A) EXHIBIT 208. Evidence that a HUB, as certified by the General Services Commission, is the Project Owner or Controls the Project Owner. With respect to the filing of an Application and the development, operation and ownership of a Project, the historically underutilized person or persons whose ownership interests comprise a majority of a corporation, partnership, joint venture or other business entity, must maintain this majority and must demonstrate regular, continuous, and substantial participation in the operation and management activities of the entity. Likewise, with regard to a sole proprietorship, the individual who comprises the sole proprietorship must demonstrate regular, continuous, and substantial participation in the development, operation and ownership of the Project. The Department shall, during and after the Application Round, monitor those individuals whose purported ownership interest(s) and participation form the basis upon which the designation of HUB is being claimed and may require the submission of additional documentation as required to verify said evidence. The Department's goal is to have substantive participation by those individuals whose purported ownership interest(s) and participation form the basis which the designation as a HUB is claimed. A determination by the Department that there has been a material misrepresentation as to such participation or that insufficient evidence has been provided to substantiate such participation will be final and points awarded for HUB participation will be withdrawn accordingly. The following documentation must be provided to qualify for these points:

(i) certification from the General Services Commission that the Person is a HUB; and

(ii) evidence of regular, continuous and substantial participation. This evidence shall include, but not be limited to, the agreement to personally guarantee the interim construction loan secured relative to the development of a Project (and to personally provide all other guarantees to the equity investor) by the person or persons whose purported ownership interest(s) and participation form the basis upon which the designation of a HUB is being claimed. Any such guarantee wherein an Affiliate, partner and or Beneficial Owner of the guarantor agrees to indemnify, in whole or in part, the guarantor from the liability arising from the guarantee, shall not constitute said evidence (3 points).

(B) Exhibit 209. Joint Ventures with Qualified Nonprofit Organizations. Evidence that the Project involves a joint venture between a forprofit organization and a Qualified Nonprofit Organization. The Qualified Nonprofit Organization must be materially participating in the Project as one of the General Partners. Such evidence must be in the form of an executed partnership agreement between the organizations participating in the joint venture. The partnership agreement must clearly identify the percentage interest of each organization.(3 points)

(5) Exhibit 210. Participation of Local Tax Exempt Organizations. Evidence that the Project Owner has an executed agreement with a local tax exempt organization or public entity such as an educational institution or city/county agency for the provision of special supportive services for the tenants. Local tax exempt organizations are entities described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time. They must also be registered or qualified to conduct business in the State of Texas and/or the governmental unit wherein the Project will be situated. The provision of supportive services will be included in the LURA (up to 5 points, depending upon the services committed in accordance with subparagraph (B)).

(A) Both documents described in clauses (i) and (ii) of this subparagraph must be submitted for the service provider to be considered under this exhibit.

(i) A fully executed contract between the service provider and the Applicant that establishes that the services offered provide a benefit that would not be readily available to the tenants if they were not residing in the development.

(ii) A document that clearly establishes the organization's tax exempt status.

(B) The supportive services contract will be evaluated using the criteria described in clauses (i) through (v) of this subparagraph. The contract must clearly state the:

(i) Cost of Services to the Project Owner. The cost shown in the contract must also be included in the Project's operating budget and proforma. The costs must be reasonable for the benefit derived by the tenants. Services for which the Project Owner does not pay, will not receive a point for this item (1 point).

(ii) Availability of Services - The services must be provided on site or with transportation provided to offsite locations. (1 point).

(iii) Duration of Contract - A commitment to provide the services for not less than five years or an option to renew the contract annually for not less than five years must be provided (1 point).

(iv) Experience of Service Provider - The Department will evaluate the experience of the organization as well as the professional and educational qualifications of the individuals delivering the services (1 point).

(v) Appropriateness - Services must be appropriate and provide a tangible benefit in enhancing the standard of living of a majority of low-income tenants (1 point).

(6) Tenant Populations With Special Housing Needs. Projects may receive points under as many of the subparagraphs as apply, in accordance with the terms of those subparagraphs.

(A) This criterion applies to elderly Projects which provide significant facilities and services specifically designed to meet the physical and social needs of the residents. Significant services may include congregate dining facilities, social and recreation programs, continuing education, welfare information and counseling, referral services, transportation and recreation. Other attributes of such Projects include providing hand rails along steps and interior hallways, grab bars in bathrooms, routes that allow for barrier-free travel, lever type doorknobs and single lever faucets. All multistory buildings (two or more floors) must be served by an elevator. Individual Units shall not

be multistory. Elderly Projects must not contain any Units with three or more bedrooms. Such a Project must conform to the Federal Fair Housing Act and must be a Project which:

(i) is intended for, and solely occupied by Persons and elderly families 62 years of age or older. For the purposes of qualifying for these points elderly family is defined as a family of two or more persons, all of whom are 62 years of age or older; or

(ii) is intended and operated for occupancy by at least one person 55 years of age or older per unit, where at least 80% of the total housing units are occupied by at least one person who is 55 years of age or older; and

(iii) adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for persons 55 years of age or older (10 points).

(B) Exhibit 211. Evidence that the Project is designed solely for transitional housing for homeless persons on a non-transient basis, with supportive services designed to assist tenants in locating and retaining permanent housing. For the purpose of this exhibit, homeless persons are individuals or families that lack a fixed, regular, and adequate nighttime residence as more fully defined in 24 Code of Federal Regulations, §91.5, and as may be amended from time to time. All of the items described in clauses (i) through (v) of this subparagraph must be submitted:

(i) a detailed narrative describing the type of proposed housing;

(ii) a referral agreement with an established organization which provides services to the homeless;

(iii) a marketing plan designed to attract qualified tenants and housing providers;

(iv) a list of supportive services; and

(v) adequate additional income source and executed guarantee to supplement any anticipated operating and funding gaps (15 points).

(7) Exhibit 212. Evidence that Project Owner agrees to provide a right of first refusal to purchase the Project upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department; and either an individual tenant with respect to a single family building; or a tenant cooperative, a resident management corporation in the Project or other association of tenants in the Project with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Project Owner may qualify for these points by providing the right of first refusal in the following terms (5 points).

(A) Upon the earlier to occur of:

(i) the Project Owner's determination to sell the Project, or

(ii) the Project Owner's request to the Department, pursuant to §42(h)(6)(I) of the Code, to find a buyer who will purchase the Project pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Project Owner shall provide a notice of intent to sell the Project ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Project Owner determines that it will sell the Project at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period. If the Project Owner determines that it will sell the Project at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to date upon which the Project Owner intends to sell the Project.

(B) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Project only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) during the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. § 92.1 (a "CHDO") and is approved by the Department,

(ii) during the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) during the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iv) If, during such two-year period, the Project Owner shall receive an offer to purchase the Project at the Minimum Purchase Price from one of the organizations designated in clauses (i), (ii), and (iii) of this subparagraph (within the period(s) appropriate to such organization), the Project Owner shall sell the Project at the Minimum Purchase Price to such organization. If, during such period, the Project Owner shall receive more than one offer to purchase the Project at the Minimum Purchase Price from one or more of the organizations designated in clauses (i), (ii), and (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Project Owner shall sell the Project at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After the later to occur of:

(i) the end of the Compliance Period; or

(ii) two years from delivery of a Notice of Intent, the Project Owner may sell the Project without regard to any right of first refusal established by the LURA if no offer to purchase the Project at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Project Owner or matters related to the title for the Project.

(D) At any time prior to the giving of the Notice of Intent, the Project Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Project for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Project by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Project Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Project at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Project Owner's obligation to sell the Project as herein contemplated by obtaining a power-of-attorney from the Project Owner to execute

such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(8) Bonus Points.

(A) Projects included on a list of proposed Applications submitted to the Department by the Applicant at least 20 business days prior to the beginning of the Application Acceptance Period shall receive two points. This list must include the following information about the proposed development(s): Project name, address, city, zip code, household type ("family", "elderly", or "transitional") and the estimated number of total units, program units, and credit request amount. (2 points).

(B) Applications received within the first ten working days of the Application Acceptance Period shall receive two points (2 points).

(C) Projects will receive points for the site determination made by the Department as follows:

(i) Projects that are evaluted by the Department as an "Excellent" site will receive 2 points.

(ii) Projects that are evaluated by the Department as a "Poor" site will have 4 points deducted from their score.

(f) Credit Amount.

(1) The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Project throughout the Compliance Period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Project by the Department. The Department will limit the allocation of tax credits to no more than $1.2 million per Project. The allocation of tax credits shall also be limited to not more than $1.8 million per Applicant. These limitations will apply to all Affiliates of any Applicant, developer, Project Owner, general partner, sponsor or their Affiliates or related entities unless otherwise provided for by the Department. Tax Exempt Bond Project Applications are not subject to the per Project and per Applicant credit limitations, and Tax Exempt Bond Projects will not count towards the total limit on tax credits per Applicant.

(2) In making determinations with respect to the limitation the Department may take into account such factors as the percentage of interest held by a particular individual or any Affiliate thereof in a Project, the amount of fees or other compensations paid to a particular individual or any Affiliate thereof with respect to a Project, any other financial benefits, either directly or indirectly, through Beneficial Ownership received by a particular individual or any Affiliate thereof with respect to a Project. The limitation does not apply:

(A) to an entity which raises or provides equity for one or more Projects, solely with respect to its actions in raising or providing equity for such Projects (including syndication related activities as agent on behalf of investors);

(B) to the provision by an entity of "qualified commercial financing" within the meaning of the Code, §49(a)(1)(D)(ii) (without regard to the 80% limitation thereof);

(C) to a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Project by such organization consists only of the provision of loan funds or grants; and

(D) to a Project Consultant with respect to the provision of consulting services.

(g) Limitations on the Size of Projects.

(1) The minimum Project size will be limited to 16 units unless otherwise provided for under the Ineligible Building Types definition.

(2) Rural Projects involving new construction will be limited to 76 Units unless the Market Study clearly documents that larger developments are consistent with the comparables in the community and that there is a significant demand for additional units. All other Projects involving new construction will be limited to 250 units. These maximum unit limitations also apply to those Projects which involve a combination of rehabilitation and new construction. Projects that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum unit restrictions. For those developments which are a second phase or are otherwise adjacent to an existing tax credit developments, the combined Unit total for the developments may not exceed the maximum allowable project size, unless the first phase has been completed and stabilized for at least six months.

(3) Tax Exempt Bond Projects will be limited to 280 Units.

(h) Tax Exempt Bond Financed Projects.

(1) Tax Exempt Bond Project Applications are also subject to evaluation under the QAP and Rules and the requirements and underwriting review criteria described in the Application Submission Procedures Manual. Such projects requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in §50.7(d) of this title. Such projects which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such projects shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department determines applicable. Tax Exempt Bond Financed Projects are not subject to the Selection Criteria set forth in §50.7(e) of this title and are not required to submit documentation relating thereto.

(2) Tax Exempt Bond Project Applications will be evaluated under the factors set forth at paragraphs (1), (3), (4) and (7) of §50.7(b) of this title. With respect to paragraph (1) of §50.7(b) of this title, Projects determined to be infeasible by the Department will not receive a Determination Notice. With respect to paragraph (3) of §50.7(b) of this title, Projects determined by the Department to result in an excessive concentration of affordable housing developments within a particular market area will not receive a Determination Notice. With respect to paragraph (4) of §50.7(b) of this title, Projects determined by the Department to be located on an "Unacceptable" site will not receive a Determination Notice. For purposes of paragraph (7) of §50.7(b) of this title, Projects must demonstrate the Project's consistency with the bond issuer's consolidated plan or other similar planning document. Consistency with the local municipality's consolidated plan or similar planning document must also be demonstrated in those instances where the city or county has a consolidated plan.

(3) Tax Exempt Bond Projects may not include Ineligible Building Types unless the Department determines that it is in the best interests of the particular Project, its market area and the tax credit program to permit a particular building type to be included in the Project.

(4) Tax Exempt Bond Projects are subject to the requirements and restrictions set forth in §50.5 of this title.

(5) Tax Exempt Bond Project Applications are not subject to the limitations on amount of tax credits per Applicant or per Project set forth in §50.7(f)(1) of this title.

(6) Tax Exempt Bond Project Applications must provide an executed agreement with a qualified service provider for the provision

of special supportive services that would otherwise not be available for the tenants. The provision of these services will be included in the LURA. Acceptable services as described in subparagraphs (A) through (C) of this paragraph include:

(A) the services must be in one of the following categories: child care, transportation, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities; or

(B) any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§ 601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families, or

(C) any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(7) Code §42(m)(2)(D) required the bond issuer (if other than the Department) to make sure that a Tax Exempt Bond Project does not receive more tax credits than the amount needed for the financial feasibility and viability of a Project throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Project for this purpose in accordance with the QAP and the Department's underwriting guidelines; or delegate, by agreement, that function to the Department. If the issuer underwrites the Project, the Department will, nonetheless, review the underwriting report and may make such changes in the amount of credits which the Project may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Project is determined to be eligible in accordance with this paragraph, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service.

(8) If the Department staff determines that all requirements of this §50.7(h) of this title have been met, the Ad Hoc Tax Credit Committee, without further action, shall authorize the Department to issue a Determination Notice to the Applicant that the Project satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

(i) Adherence to Obligations. All representations, undertakings and commitments made by an Applicant in the applications process for a Project, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such Project, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Project, shall be reflected in the LURA. All such representations are enforceable by the Department, including enforcement by administrative penalties for failure to perform as stated in the representation and enforcement by inclusion in deed restrictions to which the Department is a party.

§50.8. Compliance Monitoring.

(a) The Code, §42(m)(1)(B)(iii), requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Projects for noncompliance with the provisions of the Code, §42 and in notifying the IRS of such noncompliance of which the Department becomes aware. Such procedure is set out in this QAP and in the Owner's Compliance Manual prepared by the Department's Compliance Division, as amended from time to time. Such procedure only addresses forms and records that may be required by the Department to enable the Department to monitor a Project for violations of the Code and the LURA and to notify the IRS of any such non-compliance. This procedure does not address forms and other records that may be required of Project Owners by the IRS more generally, whether for purposes of filing annual returns or supporting Project Owner tax positions during an IRS audit.

(b) The Department will monitor compliance with all covenants made by the Project Owner in the Application and in the LURA, whether required by the Code, Treasury Regulations or other rulings of the IRS, or undertaken by the Project Owner in response to Department requirements or criteria.

(c) The Project Owner must keep records for each qualified low income building in the Project, showing on a monthly basis (with respect to the first year of a building's Credit Period and on an annual basis, thereafter):

(1) the total number of residential rental Units in the building (including the number of bedrooms and the size in square feet of each residential rental Unit);

(2) the percentage of residential rental Units in the building that are low income Units;

(3) the rent charged for each residential rental Unit in the building including, with respect to low income Units, documentation to support the utility allowance applicable to such Unit;

(4) the number of occupants in each low income Unit;

(5) the low income Unit vacancies in the building and information that shows when, and to whom, all available Units were rented;

(6) the annual income certification of each tenant of a low income Unit, in the form designated by the Department in the Compliance Manual, as may be modified from time to time;

(7) documentation to support each low income tenant's income certification, consistent with the verification procedures required by HUD under Section 8 of the United States Housing Act of 1937 ("Section 8"). In the case of a tenant receiving housing assistance payments under Section 8, the documentation requirement is satisfied if the public housing authority provides a statement to the Project Owner declaring that the tenant's income does not exceed the applicable income limit under the Code, §42(g) as described in the Compliance Manual;

(8) the Eligible Basis and Qualified Basis of the building at the end of the first year of the Credit Period;

(9) the character and use of the nonresidential portion of the building included in the building's Eligible Basis under the Code, §42(d), (e.g. whether tenant facilities are available on a comparable basis to all tenants; whether any fee is charged for use of the facilities; whether facilities are reasonably required by the Project); and

(10) any additional information as required by the Department.

(d) The Project Owner will deliver to the Department within 90 days after the end of each calendar year, the current financial statements, in form and content satisfactory to the Department, itemizing the income and expenses of the Project.

(e) Specifically, to evidence compliance with the requirements of the Code, Section 42(h)(6)(B)(iv) which requires that the LURA prohibit Project Owners of all tax credit projects placed in service after August 10, 1993 from refusing to lease to persons holding Section 8 vouchers or certificates because of their status as holders of such Section 8 voucher or certificate, Project Owners must:

(1) maintain a written management plan that is available for review upon request. Such management plan must state an intention of the Project Owner to comply with state and federal fair housing and anti-discrimination laws. Such management plan must also clearly state the following objectives:

(A) prospective applicants who hold Section 8 vouchers or certificates are welcome to apply and will be provided the same consideration for occupancy as any other applicant;

(B) any minimum income requirements for Section 8 voucher and certificate holders will only be applied to the portion of the rent the prospective tenant would pay. Minimum income requirements for Section 8 voucher and certificate holders will not exceed 2.5 times the portion of rent the tenant pays; and

(C) all employment policies or procedures and other leasing criteria (such as rental history, credit history, criminal history, etc.) will be applied to applicants uniformly regardless of whether or not an applicant holds a section 8 voucher or certificate and in a manner consistent with the Fair Housing Act and with Department and Code requirements;

(2) post Fair Housing logos and the Fair Housing poster in the leasing office;

(3) approve and distribute a written Affirmative Marketing Plan to the property management and on-site staff.

(4) communicate annually during the first quarter of each year in writing with one or more public housing authorities or Section 8 administrators for the area in which the Project is located. Such communication will include information on the unit characteristics and rents and will advise the administrating agency that the property accepts Section 8 vouchers and certificates and will treat referrals in a fair and equal manner. Copies of such correspondence must be available during on-site reviews conducted by the Department.

(f) Record retention provision. The Project Owner is required to retain the records described in subsection (c) of this section for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building.

(g) Certification and Review.

(1) On or before February 1st of each year, the Department will send each Project Owner of a completed Project an Owner's Certification of Program Compliance (form provided by the Department) to be completed by the Owner and returned to the Department on or before the first day of March of each year in the Compliance Period. Any Project for which the certification is not received by the Department, is received past due, or is incomplete, improperly completed or not signed by the Project Owner, will be considered not in compliance with the provisions of §42 of the Code and reported to the IRS on Form 8823, Low Income Housing Credit Agencies Report of Non Compliance. The Owner Certification of Program Compliance shall cover the proceeding calendar year and shall include at a minimum the following statements of the Project Owner:

(A) the Project met the minimum set-aside test which was applicable to the Project;

(B) there was no change in the Applicable Fraction of any building in the Project, or that there was a change, and a description of the change;

(C) the owner has received an annual income certification from each low income tenant and documentation to support that certification;

(D) each low income Unit in the Project was rent-restricted under the Code, §42(g)(2) and Treasury Regulation §1.42-10 regarding utility allowances;

(E) all Units in the Project were for use by the general public including the requirement that no finding of discrimination under the Fair Housing Act occurred for the Project;

(F) each building in the Project was suitable for occupancy, taking into account local health, safety, and building codes, and the state or local government unit responsible for making building code inspections did not issue a report of a violation for any building or low income Unit in the Project. If a violation report or notice was issued by the governmental unit, the Project Owner must attach either a statement summarizing the violation report or notice or a copy of the violation report or notice, and in addition, the Project Owner must state whether the violation has been corrected;

(G) either there was no change in the Eligible Basis (as defined in the Code, §42(d)) of any building in the Project, or that there has been a change, and the nature of the change;

(H) all tenant facilities included in the Eligible Basis under the Code, §42(d), of any building in the Project, such as swimming pools, other recreational facilities, and parking areas, were provided on a comparable basis without charge to all tenants in the building;

(I) if a low income Unit in the Project became vacant during the year, reasonable attempts were, or are being, made to rent that Unit or the next available Unit of comparable or smaller size to tenants having a qualifying income before any other Units in the Project were, or will be, rented to tenants not having a qualifying income;

(J) if the income of tenants of a low income Unit in the Project increased above the limit allowed in the Code, §42(g)(2)(D)(ii), the next available Unit of comparable or smaller size in the Project was, or will be, rented to tenants having a qualifying income;

(K) a LURA including an Extended Low Income Housing Commitment as described in the Code, §42(h)(6)(B), was in effect for buildings subject to the Revenue Reconciliation Act of 1989, §7106(c)(1) (generally any building receiving an allocation after 1989), including the requirement under Code, §42(h)(6)(B)(iv) that a Project Owner cannot refuse to lease a Unit in the Project to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8, and the Project Owner has not refused to lease a Unit to an applicant because of his or her status as a holder of a Section 8 voucher nor is the Project out of compliance with the provisions, including any special provisions, outlined in the Extended Low Income Housing Commitment;

(L) no change in the ownership of a Project has occurred during the reporting period;

(M) the Project Owner has not been notified by IRS that the Project is no longer "a qualified low income housing project" within the meaning of the Code, §42;

(N) the Project met all terms and conditions which were recorded in the LURA, or if no LURA was required to be recorded, the Project met all representations of the Project Owner in the Application for credits;

(O) if the Project Owner received its Housing Credit Allocation from the portion of the state ceiling set-aside for Projects involving Qualified Nonprofit Organizations under Code, 42(h)(5), a Qualified Nonprofit Organization owned an interest in and materially participated in the operation of the Project within the meaning of the Code 469(h);

(P) all low income Units in the Project were used on a nontransient basis (except for transitional housing for the homeless provided under §42(i)(3)(B)(iii) of the Code or single-room-occupancy units rented on a month-by-month basis under §42(i)(3)(B)(iv) of the Code; and

(Q) no low income Units in the Project were occupied by households in which all members were Students.

(2) Review.

(A) The Department staff will review each Owner's Certification of Program Compliance for compliance with the requirements of the Code, §42.

(B) The Department will perform on-site inspections of all buildings in each low income housing Project by the end of the second calendar year following the year the last building in the Project is placed in service and, for at least 20% of the low income Units in each Project, inspect the Units and review the low income certifications, the documentation the Project Owner has received to support the certifications, the rent records for each low income tenant in those Units, and any additional information that the Department deems necessary.

(C) The Department will perform on site monitoring reviews (unless the Project is required to have fewer than ten low income Units) at least once every three years on low income housing Projects. A monitoring review will include an inspection of the income certification, the documentation the Project Owner has received to support that certification, the rent record for each low income tenant, and a property inspection including individual Units and any additional information that the Department deems necessary, for at least 20% of the low income Units in those Projects.

(D) The Department may, at the time and in the form designated by the Department, require the Project Owners to submit for compliance review, information on tenant income and rent for each low income Unit, and may require a Project Owner to submit for compliance review copies of the tenant files, including copies of the income certification, the documentation the Project Owner has received to support that certification and the rent record for any low income tenant.

(E) The Department will randomly select which low income Units and tenant records are to be inspected and reviewed by it. The Department may determine to review tenant records wherever they are stored, whether on-site or off-site. Units and tenant records to be inspected and reviewed will be selected in a manner that will not give Project Owners advance notice that a particular Unit and tenant records for a particular year will or will not be inspected or reviewed. However, the Department will give reasonable notice to the Project Owner that an on-site inspection or a tenant record review will occur, so that the Project Owner may notify tenants of the inspection or assemble tenant records for review.

(3) Exception. The Department may, at its discretion, enter into a Memorandum of Understanding with the TxRD-USDA, whereby the TxRD-USDA agrees to provide to the Department information concerning the income and rent of the tenants in buildings financed by the TxRD-USDA under its §515 program. Owners of such buildings may be excepted from the review procedures of subparagraph (B) or (C) of this paragraph or both; however, if the information provided by TxRD-USDA is not sufficient for the Department to make a determination that the income limitation and rent restrictions of the Code, §42(g)(1) and (2), are met, the Project Owner must provide the Department with additional information.

(h) Inspection provision. The Department retains the right to perform an on site inspection of any low income housing Project including all books and record pertaining thereto through either the end of the Compliance Period or the end of the period covered by any Extended Low Income Housing Commitment, whichever is later. An inspection under this subsection may be in addition to any review under paragraph (g)(2) of this section.

(i) Notices to Owner. The Department will provide prompt written notice to the Project Owner if the Department does not receive the certification described in paragraph (g)(1) of this section or discovers through audit, inspection, review or any other manner, that the Project is not in compliance with the provisions of the Code, §42 or the LURA. The notice will specify a correction period which will not exceed 90 days, during which the Project Owner may respond to the Department's findings, bring the Project into compliance, or supply any missing certifications. The Department may extend the correction period for up to six months if it determines there is good cause for granting an extension. If any communication to the Project Owner under this section is returned to the Department as unclaimed or undeliverable, the Project may be considered not in compliance without further notice to the Project Owner.

(j) Notice to the IRS.

(1) Regardless of whether the noncompliance is corrected, the Department is required to file IRS Form 8823 with the IRS. IRS Form 8823 will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner, but will not be filed before the end of the correction period. The Department will explain on IRS Form 8823 the nature of the noncompliance and will indicate whether the Project Owner has corrected the noncompliance or has otherwise responded to the Department's findings.

(2) The Department will retain records of noncompliance or failure to certify for six years beyond the Department's filing of the respective IRS Form 8823. In all other cases, the Department will retain the certification and records described in this section for three years from the end of the calendar year the Department receives the certifications and records.

(k) Notices to the Department. A Project Owner must notify the Department in writing of the events listed in paragraphs (1) through (3) of this subsection.

(1) prior to any sale, transfer, exchange, or renaming of the Project or any portion of the Project. For Rural Projects that are federally assisted or purchased from HUD, the Department shall not authorize the sale of any portion of the Project;

(2) any change of address to which subsequent notices or communications shall be sent; or

(3) within thirty days of the placement in service of each building, the Department must be provided the in service date of each building.

(l) Liability. Compliance with the requirements of the Code, §42 is the sole responsibility of the Project Owner of the building for which the credit is allowable. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Project Owner including the Project Owner's noncompliance with the Code, §42.

(m) These provisions apply to all buildings for which a low income housing credit is, or has been, allowable at any time. The Department is not required to monitor whether a building or Project was in compliance with the requirements of the Code, §42, prior to January 1, 1992. However, if the Department becomes aware of noncompliance that occurred prior to January 1, 1992, the Department is required to notify the IRS in a manner consistent with subsection (j) of this section.

§50.9. Housing Credit Allocations.

(a) In making a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Applicant's Application to determine whether a building is eligible for the credit under the Code, §42. The Applicant shall bear full responsibility for claiming the credit and assuring that the Project complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that an Applicant who receives a housing credit allocation from the Department will qualify for the housing credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Project throughout the Compliance Period. Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and/or the date the building is placed in service. Any Housing Credit Allocation Amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department dependent upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the department in no way or manner represents or warrants to any applicant, sponsor, investor, lender or other entity that the project is, in fact, feasible or viable.

(c) The General Contractor hired by the Applicant must meet specific criteria as defined by the Seventy-fifth Legislature. A general contractor hired by an applicant or an applicant, if the applicant serves as general contractor must demonstrate a history of constructing similar types of housings without the use of federal tax credits. Evidence must be submitted to the Department which sufficiently documents that the general contractor has constructed some housing without the use of low income housing credits. This documentation will be required as a condition of the commitment notice or carryover agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) All Carryover Allocations will be contingent upon the following:

(1) submission of the most recent Phase I Environmental Assessment (ESA) of the subject Property, dated not more than 12 months prior to the Carryover deadline, and performed in accordance with the Environmental Study Guidelines provided in the Application Submission Procedures Manual. If the ESA is not addressed to the Department, the party generating the ESA must grant use of the ESA to the Department. This ESA must be provided unless the Project has an obligation of TxRD-USDA funds. While an ESA is not required of Projects which have an obligation of TxRD-USDA funds, the Project Owners of such Projects are hereby notified that it is their responsibility to ensure that the Property is maintained in compliance with all state and federal environmental hazard requirements. Those Projects which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this paragraph. In the event that an ESA on the Project is older than 12 months, the Project Owner may supply the Department with an update letter from the Person or organization which prepared the initial assessment; provided, however, that the Department will not accept any ESA which is more than 24 months old. An environmental report that is not submitted by the Carryover deadline will cause the Project to be terminated.

(A) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, then the Project Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Carryover submittal. If the ESA represents that there are non-mitigable environmental conditions, the Department may not issue a Carryover Allocation.

(B) For Projects which have had a Phase II Environmental Assessment performed and hazards identified, the Applicant is required to provide a copy of that Assessment to the Department as part of this Exhibit. The Applicant must also maintain a copy of said assessment on site available for review by all persons which either occupy the Property or are applying for tenancy, unless the condition is remedied through the construction or rehabilitation of the Property.

(2) the Project Owner's closing of the construction loan shall occur not later than the second Friday in June of the year after the execution of the Carryover Allocation Document with the possibility of a one-time 30 day extension as described in §50.11 of this title. Copies of the closing documents must be submitted to the Department within two weeks after the closing. The Carryover Allocation will automatically be revoked if the Project Owner fails to meet the aforementioned closing deadline, and all credits previously allocated to that Project will be returned to the general pool for reallocation.

(3) the Project Owner must commence and continue substantial construction activities not later than the second Friday in November of the year after the execution of the Carryover Allocation Document with the possibility of an extension as described in §50.11(h) of this title. Substantial construction activities for new projects will generally be defined as post foundation construction activities. Evidence of such activity shall be provided in a format prescribed by the Department in the LIHTC Progress Report - Commencement of Construction which will document progress towards placing the Project in service in an expeditious manner.

(e) An allocation will be made in the name of the Applicant identified in the related Commitment Notice or Determination Notice. If an allocation is made in the name of the party expected to be the general partner in an eventual owner partnership, the Department may, upon request, approve a transfer of allocation to such owner partnership in which such party is the sole general partner. Any other transfer of an allocation will be subject to review and approval by the Department. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete documentation regarding the new owner including all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(f) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Project Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §50.11 of this title, have been received by the Department. For Tax Exempt Bond Projects, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Project with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Project Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Project Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for low income housing tax credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification requests. A separate housing credit allocation shall be made with respect to each building within a Project which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a project basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Project until the issuance of IRS Form 8609s with respect to such buildings.

(g) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum applicable percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The housing credit allocation made by the Department shall not exceed the amount necessary to support the extended low income housing commitment as required by the Code, §42(h)(6)(C)(i).

(h) Project inspections shall be required to show that the Project is built or rehabilitated according to required plans and specifications. At a minimum, all Project inspections must include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Project is placed in service. All such Project inspections shall be performed by the Department or by an independent, third party inspector acceptable to the Department. The Project Owner shall pay all fees and costs of said inspections as described in §50.11(e) of this title.

(i) After the entire Project is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document, the Project Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. A newly constructed or rehabilitated building is not placed in service until all units in such building have been completed and certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire project, therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the new construction or rehabilitation and, if applicable, a closing statement for the acquisition of the Project as well as for the closing of all interim and permanent financing for the Project. If the Applicant does not fulfill all representations made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609 or may withhold issuance of the IRS Form 8609s until these representations are met.

§50.10. Department Records; Certain Required Filings.

(a) At all times during each calendar year the Department shall maintain a record of the following:

(1) the cumulative amount of the State Housing Credit Ceiling that has been reserved pursuant to reservation notices during such calendar year;

(2) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(3) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(4) the cumulative amount of housing credit allocations made during such calendar year; and

(5) the remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes housing credit allocations, the original of each completed (as to Part I) IRS Form 8609, a copy of which was mailed or delivered by the Department to a Project Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low Income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of IRS Form 8609 will be mailed or delivered to the Project Owner by the Department in the year in which the building(s) is placed in service, and thereafter the original will be mailed to the Internal Revenue Service in the time sequence in this subsection. The original of the Carryover Allocation Document will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The original of all executed Agreement and Election Statements shall be filed by the Department with the Department's IRS Form 8610 for the year a housing credit allocation is made as provided in this section. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§50.11. Program Fees and Extensions.

(a) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, a non refundable Application fee, as set forth in the Application Submission Procedures Manual.

(b) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Project by an independent third party underwriter in accordance with §50.7(a)(3) of this title if such a review is required. The cost for the third party underwriting will be set forth in the Application Submission Procedures Manual, and must be received by the Department prior to the engagement of the underwriter. The fees paid by the Project Owner to the Department for the third party underwriting will be credited against the commitment fee established in subsection (c) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Project Owner.

(c) Commitment or Determination Notice Fee. Each Project Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the commitment billing notice, a non refundable commitment fee, as set forth in the Application Submission Procedures Manual. The commitment fee shall be paid by cashier's check. Projects located within one of the targeted Texas counties, as indicated in the Reference Manual,

will be exempt from the requirement to pay a commitment fee, in the event that Commitment Notice is issued.

(d) Compliance Monitoring Fee. Upon the Project being placed in service, the Project Owner will pay a compliance monitoring fee in the form of a cashier's check, as set forth in the Application Submission Procedures Manual. The compliance monitoring fee must be received by the Department prior to the release of the IRS Form 8609 on the Project.

(e) Building Inspection Fee. Project Owners must pay for any inspections that the Department requires, whether during construction or after completion, and estimated charges for all such inspections may be aggregated and distributed among the projects according to project size, cost or other criteria. All outstanding building inspection fees must be received by the Department prior to the release of the IRS Form 8609.

(f) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Government Code, Chapter 552. The General Services Commission determines the cost of copying, and other costs of production.

(g) Amendment of Fees by the Department. All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses.

(h) Extension Requests. All extension requests relating to the Commitment Notice, Carryover, Closing of Construction Loan, Substantial Construction Commencement, Placed in Service or Cost Certification requirements shall be submitted to the Department in writing and be accompanied by a non refundable extension fee. Such requests must be submitted to the Department at least ten business days prior to the date for which an extension is being requested. The extension fee amount shall be set forth in the Application Submission Procedures Manual. The extension request shall specify a requested extension date and the reason why such an extension is required. The Department, in its sole discretion, may consider and grant such extension requests for all items except for the Closing of Construction Loan and Substantial Construction Commencement. The Committee may grant extensions, in its sole discretion, for the Closing of Construction Loan and Substantial Construction Commencement. The Committee may, in its sole discretion, waive related fees.

§50.12. Manner and Place of Filing Applications and Other Required Documentation.

(a) An Application for a Housing Credit Allocation from the State Housing Credit Ceiling and the required Application fee as described in §50.11(a) of this title must be filed during the Application Acceptance Periods published periodically in the Texas Register.

(b) Applications for a Determination Notice for a Tax Exempt Bond Project may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2001 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application per the requirements of §50.7(h) of this title not later than 60 days after the date of the TBRB lottery. Such filing must be accompanied by the Application fee described in §50.11(a) of this title.

(2) Applicants which receive advance notice of a Program Year 2001 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 of the Application prior to the Applicant's bond reservation date as assigned by the TBRB. The Application fee described in §50.11(a) of this title and any outstanding documentation required under §50.7(h) of this title must be submitted to the Department at least 45 days prior to the Ad Hoc Tax Credit Committee meeting at which the decision to issue a Determination Notice would be made.

(c) All Applications, letters, documents, or other papers filed with the Department will be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(d) All Applications and related documents submitted to the Department shall be mailed to the Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941 or be delivered by hand or courier to 507 Sabine, Suite 300, Austin, Texas 78701.

§50.13. Withdrawals, Cancellations, Amendments.

(a) An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation.

(b) The Committee, in its sole discretion, may allocate credits to a Project Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Project's financial viability as a qualified low income Project.

(c) The Department may, at any time and without additional administrative process, determine to award credits to projects previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity. The Department may also consider an amendment to a Commitment Notice, Determination Notice or Carryover Allocation or other requirement with respect to a Project if the revisions:

(1) are consistent with the Code and the tax credit program;

(2) do not occur while the Project is under consideration for tax credits;

(3) do not involve a change in the number of points scored (unless the Project's ranking is adjusted because of such change);

(4) do not involve a change in the Project's site; or

(5) do not involve a change in the set-aside election.

(d) The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Project if:

(1) the Project Owner or any member of the Development Team, or the Project, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Project Owner in the applications process for the Project;

(2) any statement or representation made by the Project Owner or made with respect to the Project Owner, the Development Team or the Project is untrue or misleading;

(3) an event occurs with respect to any member of the Development Team which would have made the Project's Application ineligible for funding pursuant to §50.5 of this title if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) the Project Owner, any member of the Development Team, or the Project, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

§50.14. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules in cases of natural disasters such as fires, hurricanes, tornadoes, earthquakes, or other acts of nature as declared by Federal or State authorities.

(b) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Government Code, Chapter 2001, as may be amended from time to time.

§50.15. Forward Reservations; Binding Commitments.

(a) Anything in §50.4 of this title or elsewhere in this chapter to the contrary notwithstanding, the Department with approval of the Board may determine to issue commitments of tax credit authority with respect to Projects from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment"). The Department may make such forward commitments:

(1) with respect to Projects placed on a waiting list in any previous Application Round during the year; or

(2) pursuant to an additional Application Round.

(b) If the Department determines to make forward commitments pursuant to a new Application Round, it shall provide information concerning such round in the Texas Register. In inviting and evaluating Applications pursuant to an additional Allocation Round, the Department may waive or modify any of the set-asides set forth in §50.6 of this title and make such modifications as it determines appropriate in the Threshold Criteria, evaluation factors and Selection Criteria set forth in §50.7 of this title and in the dates and times by which actions are required to be performed under this chapter. The Department may also, in an additional Application Round, include Projects previously evaluated within the calendar year and rank such Projects together with those for which Applications are newly received.

(c) Unless otherwise provided in the Commitment Notice with respect to a Project selected to receive a forward commitment or in the announcement of an Application Round for Projects seeking a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the anticipated allocation rather than in the calendar year of the forward commitment.

(d) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. No more than 15% of the per capita component of State Housing Credit Ceiling anticipated to be available in the State of Texas in a particular year shall be allocated pursuant to forward commitments to Project Applications carried forward without being ranked in the new Application Round pursuant to subsection (f) of this section. If a forward commitment shall be made with respect to a Project placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(e) If tax credit authority shall become available to the Department later in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Project which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Project.

(f) In addition to or in lieu of making forward commitments pursuant to subsection (a) of this section, the Department may determine to carry forward Project Applications on a waiting list or otherwise received and ranked in any Application Round within a calendar year to the subsequent calendar year, requiring such additional information, Applications and/or fees, if any, as it determines appropriate. Project Applications carried forward may, within the discretion of the Department, either be awarded credits in a separate allocation round on the basis of rankings previously assigned or may be ranked together with Project Applications invited and received in a new Application Round. The Department may determine in a particular calendar year to carry forward some Project Applications under the authority provided in this subsection, while issuing forward commitments pursuant to subsection (a) of this section with respect to others.

§50.16. Deadlines for Allocation of Low Income Housing Tax Credits.

(a) Not later than November 15 of each year, the Department shall prepare and submit to the Board for adoption the draft Qualified Allocation Plan required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the low income housing tax credit program.

(b) The Board shall adopt and submit to the Governor the Qualified Allocation Plan not later than January 31 of each year.

(c) The Governor shall approve, reject, or modify and approve the Qualified Allocation Plan not later than February 28.

(d) An Applicant for a low income housing tax credit to be issued a Commitment Notice during the initial Application Round in a calendar year must submit an Application to the Department not later than May 15.

(e) The Board shall authorize the Department to issue a Commitment Notice for allocation for the initial Application Round of low income housing tax credits each year in accordance with the Qualified Allocation Plan not later than July 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 November 20, 2000.

TRD-200008082
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 475-3726

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 2. GENERAL POLICIES AND PROCEDURES

SUBCHAPTER A. PRINCIPLES AND PROCEDURES OF THE COMMISSION

13 TAC §2.70

The Texas State Library and Archives Commission proposes new §2.70 relating to the Statewide Vehicle Fleet Management Plan. The new section adopts and provides for the implementation of the Statewide Vehicle Fleet Management Plan, provides for the designation of an agency vehicle fleet manager, and sets out the duties of the position. The section also provides that agency vehicles be pooled for use and places restrictions on the assignment of vehicles to individual administrative or executive employees on a regular basis.

Michael Heskett, State Records Administrator and Director of the State and Local Records Management Division, has determined that for each year of the first five years the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Dr. Heskett has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that commission vehicles will be used and managed in accordance with the cost-effective best management practices contained in the Statewide Vehicle Management Plan. There will be no effect on small businesses or individuals.

Written comments on the proposed new section may be sent to Tim Nolan, State and Local Records Management Division, Texas State Library, P.O. Box 12927, Austin, Texas 78711 or electronically to tim.nolan@tsl.state.tx.us, or faxed to (512) 323-6100.

The new section is proposed under the Government Code, §2171.1045, that requires each state agency to adopt rules relating to the assignment and use of its vehicles that are consistent with the Statewide Vehicle Fleet Management Plan.

The proposed new section implements the requirements of the Government Code, §2171.1045.

§2.70. Vehicle Fleet Management.

(a) The commission adopts and will implement the State Vehicle Fleet Management Plan issued by the Office of Vehicle Fleet Management (OVFM) of the General Services Commission.

(b) The director and librarian will designate a vehicle fleet manager for the commission.

(c) The vehicle fleet manager, with executive approval, is responsible for:

(1) managing the commission's vehicle fleet in accordance with the State Vehicle Fleet Management Plan;

(2) observing and enforcing statewide fleet management policies and procedures at the agency level; and

(3) developing written policies and procedures for managing commission vehicles that implement, to the extent feasible, the Best Practices guidelines of the State Vehicle Fleet Management Plan.

(d) Each commission vehicle is assigned to the commission motor pool and is available for checkout for official business by employees who are authorized to drive agency vehicles, with the advance approval of the executive or the vehicle fleet manager.

(e) The commission may assign a vehicle to an individual administrative or executive employee on a regular or everyday basis only if the commission makes a written documented finding that the assignment is critical to the needs and mission of the commission.

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

Filed with the Office of the Secretary of State, on November 16, 2000.

TRD-200008011
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 463-5459

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER K. RELATIONSHIPS WITH AFFILIATES

16 TAC §25.275

The Public Utility Commission of Texas (commission) proposes new §25.275 relating to Code of Conduct for Municipally Owned Electric Utilities and Electric Cooperatives and Their Competitive Affiliates. The proposed new rule will implement the Public Utility Regulatory Act, Texas Utilities Code Annotated §39.157(e) (Vernon 1998, Supplement 2000) (PURA) as it relates to adopting a code of conduct for municipally owned electric utilities (MOUs) and electric cooperatives (COOPs) once they decide to implement retail choice and begin providing service outside their certificated areas. Project Number 22361 has been assigned to this proceeding.

PURA §39.157(e) directs the commission to establish a code of conduct that must be observed by COOPs and MOUs and their affiliates to protect against anticompetitive practices, and requires that the code of conduct be consistent with PURA Chapters 40 and 41 and not be more restrictive than the rules adopted for transmission and distribution utilities under PURA §39.157(d). Accordingly, the proposed section establishes broad safeguards to govern the interaction between the transmission and distribution business unit (TDBU) of a MOU or COOP and its affiliates. The proposed section sets rules and enforcement procedures to govern transactions between the TDBU and its affiliates to avoid potential anticompetitive practices such as cross-subsidization between regulated and competitive activities. The rule also establishes certain reporting requirements for MOUs and COOPs.

Although certain aspects of the proposed code of conduct are similar to §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) which was previously adopted under PURA §39.157(d), a number of aspects necessarily differ due to the distinct nature of MOUs and COOPs. The energy services provided by MOUs are an integrated part of municipal operations, a portion of municipal utility revenues

support general government, and municipal utility facilities are financed with public debt. COOPs are operated as nonprofit corporations and some debt of a COOP may be financed through arrangements with the federal government. Specifically, PURA §40.054(d) and §41.054(d) mandate that the commission make accommodations in the code of conduct for specific legal requirements imposed by state or federal law applicable to MOUs or COOPs. The governing bodies of MOUs and COOPs have sole discretion to decide if, and when, the MOU or COOP will adopt retail electric customer choice.

As part of the drafting process, commission staff conducted workshops in Austin to receive input from potentially affected persons on August 16, 2000 and October 17, 2000. Written comments from a number of interested parties were submitted in connection with both of these workshops.

The commission seeks comments on the proposed rule from interested persons. Comments should be organized in a manner consistent with the organization of the proposed rule. When commenting on specific subsections of the proposed rule, parties are encouraged to describe "best practice" examples of regulatory policies, and their rationale, that have been proposed or implemented successfully in other states already undergoing electric industry restructuring, if the parties believe that Texas would benefit from application of the same policies. The commission is only interested in receiving "leading edge" examples that are specifically related and directly applicable to the Texas statute, rather than broad citations to other state restructuring efforts.

In addition to comments on specific subsections of the proposed rule, the commission requests that parties specifically address the following three issues which are explained in greater detail below: (1) compliance variation depending on size of the TDBU; (2) when the code of conduct becomes applicable; and (3) mandatory provision of products and services by the TDBU.

One challenge in developing a uniform code of conduct for MOUs and COOPs is the fact that public electric systems vary greatly in size. For example, in 1999 the electric system for the City of San Antonio had an annual system peak demand of 3,684 megawatts (MWs) with total annual system energy sales of 16,356,874 megawatt hours (MWh), while the City of Mason had an annual system peak demand of five MWs with total annual system energy sales of 1,450 MWh. Using alternative methods for size comparison, the largest COOP, Pedernales Electric Cooperative, served 134,943 meters with 555 employees, while Gate City Electric Cooperative served only 1,864 meters with 11 employees. Given this variation, it is critical to recognize that there is a delicate balance between the amount of regulation necessary to ensure that MOUs or COOPs do not engage in anticompetitive practices and an amount of regulation that becomes so burdensome that the MOU or COOP decides not to participate in customer choice. The decision of a MOU or COOP to not participate in customer choice is the ultimate barrier to entry for other competitors in the State. In addition, smaller MOUs or COOPs may have limited ability to exercise potential market power. Considering these factors, the proposed rule has three levels of regulation based on the amount of metered electric energy (MWh) delivered through the TDBU's system for sale at retail and wholesale. The commission seeks specific comment on the appropriateness of this standard. Some examples of alternative methods for measuring size include number of employees, number of meters served, or the relative amount of market share as compared to other energy service providers within ERCOT or throughout the State. In addition, should the threshold at which a TDBU passes from the small to the mid-sized category be modified if there is not an adjustment for normal growth within the service area of the MOU or COOP?

The draft rule provides that the code of conduct should not apply until the MOU or COOP begins providing service outside its certificated area. However, proposed subsection (n)(1) requires the MOU or COOP to file with the commission a plan for implementing the code of conduct provisions 120 days prior to providing service outside its certificated service territory. The commission seeks comments on whether it would be appropriate to require MOUs or COOPs to adhere to an internal code of conduct during this 120-day transition period.

Finally, the commission proposes subsection (k)(2), regarding products and services available on a non-discriminatory basis. This section requires a TDBU to make available to all similarly situated entities any product or service, other than corporate support services, that it makes available to its competitive affiliate. Proposed subsection (k)(2) requires the TDBU to make the product or service available to third parties at the same price and on the same basis and manner that it was made available to the competitive affiliate. MOUs have private use restrictions arising from the funding of facilities by tax-exempt debt, including such facilities as computer systems, vehicle and equipment fleets, warehouse facilities and other structures, and other assets that prevent the use of these facilities for the benefit of private parties. COOPs have tax restrictions on the amount of income they may earn from activities other than service to their own customers. The commission notes that both MOUs and COOPs will file tariffs concerning the terms and conditions for distribution access in accordance with proposed §25.215 of this title (relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice). Therefore, access to the transmission and distribution systems of MOUs and COOPs will be provided on a non-discriminatory basis and in accordance with the tariffs developed pursuant to that section. The commission seeks comment on what specific products or services the TDBU might provide to its competitive affiliate, other than corporate support services, that would not be provided pursuant to a tariff. Is it appropriate to require the TDBU to provide any such non-tariffed products or services to similarly situated third parties? If non-discriminatory provision of non-tariffed services is required, should there be consideration of the size of the TDBU?

Bridget R. Headrick, Senior Policy Analyst, Policy Development Division, has determined that for each year of the first five-year period the proposed section is in effect for COOPs there will be no fiscal implications for state or local government as a result of enforcing or administering the section. For each year of the first five-year period the proposed section is in effect for MOUs, there may be fiscal implications for local government as a result of enforcing or administering the section; however, the costs will differ from MOU to MOU and are difficult to ascertain. It is believed that the benefits accruing from implementation of the proposed section will outweigh these costs. The governing body of the MOU has the authority to determine whether or not to adopt customer choice, and at that time, can assess any negative fiscal implications for local government.

Ms. Headrick has also determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be improved regulatory oversight of MOUs and COOPs and enhanced competition in the provision of energy related services. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section.

It is anticipated that there will be economic costs to the entities required to comply with the new section as proposed. These costs may vary from entity to entity, and are difficult to ascertain. However, it is believed that the benefits accruing from implementation of the proposed section will outweigh these costs.

Ms. Headrick has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and, therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. All comments should refer to Project Number 22361.

The commission staff will conduct a public hearing on this rulemaking pursuant to Texas Government Code §2001.029 on Monday, January 22, 2001, beginning at 9:30 a.m., in the Commissioners' Hearing Room located on the seventh floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.002, 39.157(e), 40.001, 40.004, 40.054, 40.056, 41.001, 41.004, 41.054, and 41.056 (Vernon 1998, Supplement 2000) (PURA). Section 14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Section 39.157(e) requires the commission to establish a code of conduct that must be observed by COOPs and MOUs and their affiliates to protect against anticompetitive practices. Chapter 40 addresses competition for MOUs and river authorities and Chapter 41 addresses competition for COOPs. Specifically, §40.001 addresses the law applicable to MOUs. Section 40.004 gives the commission jurisdiction over MOUs for certain purposes. Section 40.054 subjects the MOU to the commission's authority in certain instances. Section 40.056 grants the commission authority over complaints for anticompetitive actions. Section 41.001 addresses the law applicable to COOPs. Section 41.004 gives the commission jurisdiction over COOPs for certain purposes. Section 41.054 subjects the COOP to the commission's authority in certain instances. Section 41.056 grants the commission authority over complaints for anticompetitive actions.

Cross Reference to Statutes: PURA §§14.002, 39.157(e), 40.001, 40.004, 40.054, 40.056, 41.001, 41.004, 41.054, and 41.056.

§25.275. Code of Conduct for Municipally Owned Electric Utilities and Electric Cooperatives and Their Competitive Affiliates.

(a) Purpose. The provisions of this section establish safeguards to govern the interaction between the transmission and distribution business unit (TDBU), as defined in subsection (c)(14) of this section, of a municipally owned utility (MOU) or electric cooperative (COOP) and its competitive affiliates to protect against anticompetitive practices, consistent with the provisions of the Public Utility Regulatory Act (PURA) §39.157(e) and Chapters 40 and 41.

(b) Application.

(1) General application. This section applies to the TDBU of a municipally owned utility or an electric cooperative (collectively referred to as MOU/COOP) operating in the State of Texas, and the transactions or activities between the TDBU and its competitive affiliates provided that each of the following conditions is met:

(A) The MOU/COOP has chosen to participate in customer choice pursuant to PURA §40.051(b) or PURA §41.051(b).

(B) The competitive affiliate of a MOU/COOP is providing electric energy at retail to consumers in Texas outside its TDBU's certificated retail service area. For the purposes of this section, a MOU/COOP shall not be considered to be providing electric energy to retail consumers outside its certificated retail service area if:

(i) the MOU/COOP was serving the area prior to September 1, 1999;

(ii) after receiving notice that the MOU/COOP is selling electric energy at retail outside its retail service area, which identifies the service location, the MOU/COOP promptly investigates and thereafter takes reasonable steps to cease the provision of service outside its service area as soon as reasonably practicable; or

(iii) there is a dispute concerning the service area boundary and no commission order resolving the dispute has become final or the commission's order is subject to appeal.

(2) Small TDBU. A small TDBU is subject to the following provisions of this section only:

(A) paragraphs (1) and (4)-(8) of this subsection, application;

(B) subsection (i)(4) of this section, separate books and records;

(C) subsection (j)(1) of this section, transactions with competitive affiliates; however, transactions provided for under subsection (j)(1) of this section shall be conducted at pricing levels that are fair and reasonable to the customers of the small TDBU and that reflect not less than the book value of the assets and the cost of employee time determined on the basis of aggregate percentage of time devoted by the employee to the competitive function or transmission and distribution function and do not include any discounts, rebates, fee waivers or alternative tariff terms and conditions;

(D) subsection (k)(1) of this section, tying arrangements prohibited;

(E) subsection (k)(2) of this section, products and services available on a non- discriminatory basis; and

(F) subsection (n) of this section, remedies and enforcement.

(3) Mid-size TDBU. A mid-size TDBU is subject to the following provisions of this section only:

(A) paragraphs (1) and (4)-(8) of this subsection, application;

(B) subsection (d) of this section, annual report of code-related activities; however, a mid-size TDBU shall report only with respect to the activities for which it is subject to regulation under this section, including copies of policies implementing subsection (m)(3) of this section, requests for specific competitive affiliate information;

(C) subsection (e) of this section, copies of contracts or agreements;

(D) subsection (g) of this section, reporting deviations from the code of conduct; however, a mid-sized TDBU shall only report deviations with respect to the activities for which it is subject to regulation under this section;

(E) subsection (i) of this section, separation of a TDBU from its competitive affiliates; however, sharing of employees, facilities, or other resources with competitive affiliates shall be allowed, and the safeguards shall be deemed achieved through compliance with the transactional, information transfer, and marketing and advertising standards applicable to a mid-size TDBU under subsections (j), (k), and (l) of this section;

(F) subsection (j)(1) of this section, transactions with competitive affiliates; however, transactions provided for under subsection (j)(1) of this section shall be conducted at pricing levels that are fair and reasonable to the customers of the mid-size TDBU and that reflect not less than the book value of the assets and the cost of employee time determined on the basis of aggregate percentage of time devoted by the employee to the competitive function or transmission and distribution function and do not include any discounts, rebates, fee waivers or alternative tariff terms and conditions;

(G) subsection (j)(2) of this section, records of transactions;

(H) subsection (k)(1) of this section, tying arrangements prohibited;

(I) subsection (k)(2) of this section, products and services available on a non- discriminatory basis;

(J) subsection (l)(1) of this section, proprietary customer information; however, with respect to subsection (l)(2) of this section, nondiscriminatory availability of aggregate customer information, a mid-size TDBU shall make aggregate customer information available to all non-affiliates under the same terms and conditions and at the same price or fully allocated cost that it is made available to any of its competitive affiliates, but is not otherwise subject to subsection (l)(2) of this section. With respect to subsection (l)(3) of this section, no preferential access to transmission and distribution information, a mid-size TDBU shall comply with this paragraph except to the extent preferential access may not practicably be avoided due to cross-functional responsibilities of employees or other operating constraints as reasonably determined by the mid-size TDBU;

(K) instead of the restrictions in subsection (m)(2) of this section, a mid-sized TDBU may participate in joint marketing, advertising, and promotional activities with a competitive affiliate, provided that the mid-size TDBU informs the customer that the competitive energy services to which the promotional activities are directed are available from other providers as well as the mid-size TDBU and makes available to the customer upon request a copy of the most recent list of competitive energy service providers as developed and maintained by the commission;

(L) instead of the restrictions in subsections (m)(3) and (m)(4) of this section, if a customer or potential customer of a mid-size TDBU makes an unsolicited request for distribution service, competitive service, or information relating to such services, the mid-size TDBU shall inform the customer that competitive energy services are available not only from the mid-size TDBU but also from other providers. The mid-size TDBU shall make available to a customer upon request a copy of the most recent list of competitive energy service providers as developed and maintained by the commission and may make available telephone numbers and other commonly available information; and

(M) subsection (n) of this section, remedies and enforcement.

(4) Duration of code application. This section applies to a TDBU, regardless of whether it is classified as large, mid-size or small, only so long as each of the conditions of paragraph (1) of this subsection continue to be met.

(5) Report of energy system sales and declaration of code applicability. A report of total metered electric energy (MWh) delivered through the TDBU's system for sale at retail and wholesale, for the average of the three most recent calendar years shall be filed annually with the commission by each MOU/COOP subject to the provisions of this section. The initial report shall be filed in conjunction with subsection (n)(1) of this section. After the initial report filing, the report of energy system sales shall be filed annually by June 1, and shall encompass the period from January 1 through December 31 of the preceding year. The annual report of energy system sales shall be filed under a control number designated by the commission for each calendar year. Both the initial and annual reports of energy sales shall include a statement from the MOU/COOP affirming that it is classified as either a small, mid-size, or large TDBU.

(A) In the event that the MWhs delivered through the TDBU's system increase so that a TDBU is reclassified to a larger size, the TDBU shall notify the commission through the annual report of energy system sales. The TDBU shall have six months from the date of the reclassification to implement the applicable provisions of this section.

(B) Petition for exception to reclassification. Any TDBU may petition the commission for exception to the size determination. Upon request, if a small TDBU is reclassified as a mid-sized TDBU, the commission may consider an adjustment for growth based upon total Texas retail sales.

(6) No circumvention of the code of conduct. A MOU/COOP shall not circumvent the provisions of PURA §39.157(e) or this section by using any affiliate to provide information, services, products, or subsidies that would be prohibited by this section between a competitive affiliate and a TDBU.

(7) Good cause exception. A MOU/COOP that is or may become subject to this section may petition the commission at any time for an exception or waiver of any provision of this section on a showing of good cause. Good cause may be demonstrated by showing that the cost or difficulty of achieving compliance outweighs the benefit to be achieved or that there are other alternative actions that are likely to produce reasonable results under the circumstances.

(8) Notice of conflict with other regulation and petition for waiver. Nothing in this section shall affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to a MOU/COOP or its affiliates, whether competitive or noncompetitive, under orders or regulations of the Federal Energy Regulatory Commission (FERC), Securities and Exchange Commission (SEC), or shall violate PURA, Chapters 40 and 41, subchapter C. A MOU/COOP shall file with the commission a notice of any provision in this section that conflicts with FERC or SEC orders or regulations. A MOU/COOP that is subject to statutes or regulations in any state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.

(c) Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise:

(1) Affiliate - An entity, including a business unit or division, that controls, is controlled by, or is under common control with, a MOU/COOP. Control means the power and authority to direct the management or policies of an entity through directly or indirectly owning or holding at least a 5.0% voting or ownership interest. Affiliate includes an entity determined to be an affiliate by the commission after notice and hearing based on criteria parallel to those prescribed in PURA §11.006.

(2) Competitive affiliate - An affiliate of a MOU/COOP that provides services or sells products at retail in a competitive energy-related market in this state, including telecommunications services to the extent those services are energy-related. An affiliate of a MOU/COOP that is selling energy only in the capacity of a provider of last resort within the scope of PURA §40.053(c) and (d) or PURA §41.053 (c) and (d) is not a competitive affiliate under this definition. The term competitive affiliate shall include both competitive divisions and competitive subsidiaries.

(3) Competitive division (CD) - A competitive affiliate that is organized as a division or other part of a MOU/COOP.

(4) Competitive subsidiary (CS) - A competitive affiliate that is organized as a corporation or other legally distinct entity.

(5) Confidential information - Any information not intended for public disclosure and considered to be confidential or proprietary by persons privy to such information. Confidential information includes, but is not limited to, information relating to the interconnection of customers to a MOU/COOP's transmission or distribution systems, proprietary customer information, trade secrets, competitive information relating to internal manufacturing processes, and information about a MOU/COOP's transmission or distribution system, operations, or plans for expansion.

(6) Corporate support services - Services shared by a MOU/COOP, a MOU/COOP TDBU, or by an affiliate created to perform corporate support services, with the MOU/COOP's affiliates of joint corporate oversight, governance, support systems, and personnel.

(A) Examples of services that may be shared, to the extent the services comply with this section, include human resources, procurement, information technology, regulatory services, administrative services, real estate services, legal services, accounting, environmental services, research and development unrelated to marketing activity and/or business development for the competitive affiliate regarding its services and products, internal audit, community relations, corporate communications, financial services, financial planning and management support, corporate services, corporate secretary, lobbying, corporate planning, and community economic development if the economic development activities are within the MOU/COOP's certificated retail service area.

(B) Examples of services that may not be shared, except as otherwise allowed under the terms of this section, include engineering, purchasing of electric transmission facilities and service, transmission and distribution system operations, and marketing.

(7) Fully allocated cost - The cost of a product, service, or asset based on book values for the component elements established through regularly accepted accounting principles; or alternatively, an internal transfer price based upon the actual or expected (budgeted) operating and maintenance expenses and a capital component, as appropriate, divided by the expected or actual units for the service or product produced. Such transfer prices may be set as needed, but shall not be used beyond a three year period without review. The operating and maintenance expenses shall be fully loaded with applicable overheads. The capital component shall consider the original cost of the associated assets, and a reasonable return. Such internal prices may include an allowance for transfers to a municipal general fund at the discretion of the municipality.

(8) Large transmission and distribution business unit (TDBU) - A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail and wholesale for the average of the three most recent calendar years greater than 6,000,000 MWh; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) of this section.

(9) Mid-size transmission and distribution business unit (TDBU) - A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail and wholesale for the average of the three most recent calendar years that is less than or equal to 6,000,000 MWh and is greater than 500,000 MWh; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) and (b)(3) of this section.

(10) Municipally owned utility/electric cooperative (MOU/COOP) - A municipally owned utility (MOU) as defined in PURA §11.003(11) and an electric cooperative (COOP) as defined in PURA §11.003(9). As used in this section, MOU/COOP does not include a competitive affiliate but does include a MOU, COOP, or river authority that controls a TDBU that is a division or part of the MOU/COOP.

(11) Proprietary customer information - Any information compiled by a TDBU on a customer in the normal course of providing electric service that makes possible the identification of any individual customer by matching such information with the customer's name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.

(12) Small transmission and distribution business unit (TDBU) - A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail and wholesale for the average of the three most recent calendar years that is less than 500,000 MWh; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) and (b)(2) of this section.

(13) Transaction - Any interaction between a TDBU and its competitive affiliates in which a service, good, asset, product, property, right, or other item is transferred or received by either the TDBU or its competitive affiliates.

(14) Transmission and distribution business unit (TDBU) - The business unit of a MOU/COOP, whether structurally unbundled as a separate legal entity or functionally unbundled as a division, that owns or operates for compensation in this state equipment or facilities to transmit or distribute electricity, except for facilities necessary to interconnect a generation facility with the transmission or distribution network, a facility not dedicated to public use, or a facility otherwise excluded from the definition of electric utility in a qualifying power region certified under PURA §39.152. TDBU does not include

a MOU/COOP that owns, controls, or is an affiliate of the TDBU, if the TDBU is organized as a separate corporation or other legally distinct entity. A TDBU shall not provide competitive energy services.

(d) Annual report of code-related activities. A report of activities related to this section shall be filed annually with the commission. Using forms approved by the commission, a TDBU shall report activities among itself and its competitive affiliates in accordance with the requirements of this section. The report shall be filed by June 1, and shall encompass the period from January 1 through December 31 of the preceding year during which the MOU/COOP was subject to this section.

(e) Copies of contracts or agreements. A TDBU shall reduce to writing and file with the commission copies of any contracts or agreements it has with its competitive affiliates. The filing of an earnings report does not satisfy the requirements of this section. All contracts or agreements shall be filed by June 1 of each year as attachments to the annual report of code-related activities required in subsection (d) of this section. In subsequent years, if no significant changes have been made to the contract or agreement, an amendment sheet may be filed in lieu of refiling the entire contract or agreement.

(f) Tracking migration of employees. A MOU/COOP shall track and document the movement between the TDBU and its competitive affiliates of all employees engaged in transmission or distribution system operations, including persons employed by the MOU/COOP who are engaged in transmission or distribution system operations on a day- to-day basis or have knowledge of transmission or distribution system operations. Employee migration information shall be included in the MOU/COOP's annual report of code-related activities. The tracking information shall include an identification code for the migrating employee, the respective titles held while employed at the TDBU and the competitive affiliate, and the effective dates of the migration.

(g) Reporting deviations from the code of conduct. A TDBU shall report information regarding the instances in which deviations from this section were necessary to ensure public safety or system reliability pursuant to this section. The information reported shall include the nature of the circumstances involved, and the date of the deviation. Within 30 days of each deviation relating to a competitive affiliate, the MOU/COOP shall report this information to the commission and shall conspicuously post the information on its Internet site or a public electronic bulletin board for 30 consecutive calendar days. Information regarding a deviation shall be summarized in the MOU/COOP's annual report of code-related activities.

(h) Ensuring compliance for new competitive affiliates. A MOU/COOP and a new competitive affiliate are bound by this code of conduct, to the extent applicable, immediately upon creation of the new competitive affiliate. The MOU/COOP shall post a conspicuous notice of any newly created competitive affiliates on its Internet site or a public electronic bulletin board for 30 consecutive calendar days. Additionally, the MOU/COOP shall ensure that its annual report of code-related activities reflects all changes that result from the creation of new competitive affiliates.

(i) Separation of a TDBU from its competitive affiliates.

(1) Sharing of employees, officers and directors, property, equipment, computer and information systems, other resources, and corporate support services. A MOU/COOP and its competitive affiliate may share common employees, officers and trustees/directors, property, equipment, computer and information systems, other resources, and corporate support services, if the TDBU implements safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to confidential information in a manner that would allow or provide a means to transfer confidential information from the TDBU to the competitive affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of a competitive affiliate.

(2) Employee transfers and temporary assignments.

(A) A MOU/COOP shall not assign for less than one year employees engaged in transmission or distribution system operations to a competitive affiliate unless safeguards are in place to prevent transfer of confidential information. TDBU employees engaged in transmission or distribution system operations, including persons employed by a structurally unbundled service company affiliate of the TDBU who are engaged on a day-to-day basis in or have knowledge of transmission or distribution system operations, and are transferred to a competitive affiliate shall not remove or otherwise provide or use confidential information or information gained from the TDBU or affiliated service company in a discriminatory or exclusive fashion, to the benefit of the competitive affiliate or to the detriment of non-affiliated electric suppliers.

(B) Movement of employees to a competitive affiliate may be accomplished through either the employee's termination of employment with the TDBU and acceptance of employment with the CS, or a transfer to the CD as long as the transfer results in the TDBU bearing no ongoing costs associated with that employee.

(C) Transferring employees shall sign a statement indicating that they are aware of and understand the restrictions set forth in this section. The TDBU also shall post a conspicuous notice of such a transfer on its Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days.

(D) Employees may be temporarily assigned to an affiliate or non-affiliated TDBU to assist in restoring power in the event of a major service interruption or assist in resolving emergency situations affecting system reliability. Any such deviation shall be reported and posted on the TDBU's Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days.

(3) Sharing of office space. A TDBU's office space shall be physically separate from the office space of competitive affiliates. Physical separation is accomplished by having office space in separate buildings or, if within the same building, by a method such as having offices on separate floors or with separate access.

(4) Separate books and records. A TDBU shall maintain separate books of accounts and records from those of any CS. In a proceeding under subsection (n)(3) of this section, filing a complaint, the commission may review records relating to a transaction between a TDBU and a CS. Costs of CDs, other than those costs related to corporate support services, shall be segregated by account.

(A) In accordance with generally accepted accounting principles, a TDBU shall record all transactions with its CS whether they involve direct or indirect expenses, and all transactions with CDs that relate to the transmission and distribution function.

(B) A TDBU shall prepare financial statements that are not consolidated with those of a CS.

(5) Limitations on credit support by a TDBU for a competitive affiliate. A TDBU and its affiliates may share credit, investment, or financing arrangements with a competitive affiliate if the TDBU implements adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from the TDBU

to the competitive affiliate or lead to customer confusion. Nothing in this section shall impair the existing contracts, covenants, or obligations between a MOU/COOP and its lenders and holders of bonds issued on behalf of or by a MOU/COOP.

(A) MOU. In issuing debt related to competitive affiliates, a MOU shall be governed by and maintained, operated, and managed in accordance with the laws of the State of Texas, including the ordinances and resolutions authorizing the issuance of any form of indebtedness and the provisions thereof, which require that funds reasonably necessary for operation and maintenance expenses (including TDBU operation and maintenance expenses) have priority in any pledge of gross revenues of the municipally owned utility system.

(B) COOP. A COOP TDBU shall not allow a competitive affiliate to obtain credit under any arrangement that would include a specific pledge of assets reasonably necessary for TDBU operations or a pledge of gross revenues of the TDBU.

(j) Transactions between a TDBU and its competitive affiliates.

(1) Transactions with competitive affiliates. Except for transfers implementing unbundling, transfers of property pursuant to a rate order having the effect of a financing order, credit support, and corporate support services provided by a TDBU to its competitive affiliate, any transaction between a TDBU and its competitive affiliate shall be accomplished at pricing levels that are fair and reasonable to the customers of the TDBU and that reflect the approximate market value of the assets or the fully allocated cost of the assets, service or product, and that do not include any preferential discounts, rebates, fee waivers or alternative tariff terms and conditions. Such transfers include, but are not limited to, the following:

(A) sale or provision of products or services by a TDBU to its competitive affiliate;

(B) purchase or acquisition of products, services, or assets by a TDBU from a competitive affiliate; or

(C) assets transferred from a TDBU to a competitive affiliate.

(2) Records of transactions. Each transaction between a TDBU and its competitive affiliates, other than those involving corporate support services or transactions governed by tariffs of general applicability filed at the commission or approved by the TDBU's governing body, shall be reflected in a contemporaneous written record of the transaction including the date of the transaction, name of the competitive affiliate, name of a TDBU employee knowledgeable about the transaction, and description of the transaction. Such records shall be maintained for three years.

(3) Provision of corporate support services. Provisions of corporate support services by a TDBU to its competitive affiliate shall be carried out in such a way as to not allow or provide the means for the transfer of confidential information from the TDBU to the competitive affiliate, the opportunity for preferential treatment or unfair competitive advantage, customer confusion, or significant opportunities for cross-subsidization of the competitive affiliate.

(k) Safeguards relating to provision of products and services.

(1) Tying arrangements prohibited. A TDBU shall not condition the provision of any product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the TDBU or its competitive affiliate.

(2) Products and services available on a non-discriminatory basis. Any product or service, other than corporate support services, made available by a TDBU to its competitive affiliate shall be made available to all similarly situated entities at the same price and on the same basis and manner that the product or service was made available to the competitive affiliate. Any service required to be provided in compliance with §25.215 of this title (relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice) shall be provided in a non-discriminatory manner and in accordance with the tariffs developed pursuant to that section.

(l) Information safeguards.

(1) Proprietary customer information. A TDBU shall provide a customer with the customer's proprietary customer information, upon request by the customer. Unless a TDBU obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, or unless otherwise permitted under this subsection, it shall not release any proprietary customer information to a competitive affiliate or to any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services in accordance with subsection (j)(3) of this section. The TDBU shall maintain records that include the date, time, and nature of information released when it releases customer proprietary information to another entity in accordance with this paragraph. The TDBU shall maintain records of such information for a minimum of three years, and shall make the records available for third party review within three business days of a written request, or at a time mutually agreeable to the TDBU and the third party. When the third party requesting review of the records is not the customer, commission, or Office of Public Utility Counsel, the records may be redacted in such a way as to protect the customer's identity. If proprietary customer information is released to an independent organization or a provider of corporate support services, the independent organization or entity providing corporate support services is subject to the rules in this subsection with respect to releasing the information to other persons.

(A) Exception for law, regulation, or legal process. A TDBU may release proprietary customer information to another entity without customer authorization where authorized or requested to do so by the commission or by law, regulation, or legal process. Nothing in this rule requires disclosure of information that may be withheld from disclosure under Texas Government Code, Chapter 552.

(B) Exception for release to governmental entity. A TDBU may release proprietary customer information without customer authorization to a federal, state, or local governmental entity or in connection with a court or administrative proceeding involving the customer or the TDBU; provided, however, that the TDBU shall take all reasonable actions to protect the confidentiality of such information, including, but not limited to, providing such information under a confidentiality agreement or protective order, and shall also promptly notify the affected customer in writing that such information has been requested.

(C) Exception to facilitate transition to customer choice. In order to facilitate the transition to customer choice, a MOU/COOP may release proprietary customer information to its competitive affiliate, where either entity will be exercising the function of retail electric provider or provider of last resort, without authorization of those customers, provided that such information may be released only during the six-month period prior to implementation of customer choice, during the six-month period prior to implementation or expansion of a pilot project, or such additional periods as may be prescribed by the commission.

(D) Exception for release to providers of last resort. On or after January 1, 2002, a TDBU may provide proprietary customer information to a provider of last resort without customer authorization for the purpose of serving customers who have been switched to the provider of last resort.

(E) Exception for release to customer's selected competitive retailer. A TDBU shall release proprietary customer information for a particular customer to the competitive retailer chosen by that customer, subject to demonstration by the competitive retailer that the customer has selected that competitive retailer, in connection with provision of metering data or otherwise in compliance with the Access Tariff applicable to the TDBU under §25.215 of this title.

(2) Nondiscriminatory availability of aggregate customer information. A TDBU may aggregate non-proprietary customer information, including, but not limited to, information about a TDBU's energy-related goods or services. However, except in circumstances solely involving the provision of corporate support services in accordance with subsection (j)(3) of this section, a TDBU shall aggregate non-proprietary customer information for a competitive affiliate only if the TDBU makes such aggregation service available to all non-affiliates under the same terms and conditions and at the same price or fully allocated cost as it is made available to any of its competitive affiliates. In addition, no later than 24 hours prior to a TDBU's provision to its competitive affiliate of aggregate customer information, the TDBU shall post a conspicuous notice on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days, providing the following information: the name of the competitive affiliate to which the information will be provided, the rate charged or cost allocated for the information, a meaningful description of the information provided, and the procedures by which non-affiliates may obtain the same information under the terms and conditions. The TDBU shall maintain records of such disclosure information for a minimum of three years, and shall make such records available for third party review within three business days of a written request, or at a time mutually agreeable to the TDBU and the third party.

(3) No preferential access to transmission and distribution information. A TDBU shall not allow preferential access by its competitive affiliates to information about its transmission and distribution systems.

(4) Other limitations on information disclosure. Nothing in this rule is intended to alter the specific limitations on disclosure of confidential information in the Texas Utilities Code, the Texas Government Code, Chapter 552, or the commission's substantive and procedural rules.

(5) Other information. Except as otherwise allowed in this subsection, a utility shall not share information, except for information required to perform allowed corporate support services, with competitive affiliates unless the utility can prove to the commission that the sharing will not compromise the public interest prior to any such sharing. Information that is publicly available, or that is unrelated in any way to utility activities, may be shared.

(m) Safeguards relating to joint marketing and advertising.

(1) Name and logo. A TDBU may not, prior to September 1, 2005, allow the use of its corporate trademark, name, brand, or logo by a CS on employee business cards or in any written or auditory advertisements of specific services to existing or potential residential or small commercial customers located within the TDBU's certificated service area, whether through radio or television, Internet-based, or other electronic format accessible to the public, unless the CS includes a disclaimer with its use of the TDBU's corporate trademark, name, brand, or logo. Such disclaimer of the corporate trademark, name, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium, and shall state the following: "{Name of CS} is not the same entity as {name of TDBU} and you do not have to buy {name of CS}'s products to continue to receive quality services from {name of TDBU}." A TDBU may allow the use of its corporate name, brand, or logo by a CD in any context.

(2) Joint marketing, advertising, and promotional activities.

(A) A TDBU shall not:

(i) provide or acquire leads on behalf of its competitive affiliates;

(ii) solicit business or acquire information on behalf of its competitive affiliates;

(iii) give the appearance of speaking or acting on behalf of any of its competitive affiliates in connection with any marketing, advertising or promotional activities, other than community economic development activities;

(iv) share market analysis reports or other types of proprietary or non- publicly available reports relating to retail energy sales, including, but not limited to, market forecast, planning, or strategic reports with its competitive affiliates; or

(v) request authorization from its customers to pass on information exclusively to its competitive affiliate.

(B) A TDBU shall not engage in joint marketing, advertising, or promotional activities of its products or services with those of a competitive affiliate in a manner that favors the competitive affiliate. Such joint marketing, advertising, or promotional activities include, but are not limited to, the following activities:

(i) acting or appearing to act on behalf of a competitive affiliate in any communications and contacts with any existing or potential customers;

(ii) joint sales calls;

(iii) joint proposals, either as requests for proposals or responses to requests for proposals;

(iv) joint promotional communications or correspondence, except that a TDBU may allow a competitive affiliate access to customer bill advertising inserts so long as access to such inserts is made available on the same terms and conditions to non-affiliates offering similar services as the competitive affiliate that uses bill inserts;

(v) joint presentations at trade shows, conferences, or other marketing events within the state of Texas; and

(vi) providing links from a TDBU's Internet web site to a competitive affiliate's Internet web site.

(C) At a customer's unsolicited request, a TDBU may participate in meetings with a competitive affiliate to discuss technical or operational subjects regarding the TDBU's provision of transmission or distribution services to the customer, but only in the same manner and to the same extent the TDBU participates in such meetings with unaffiliated electric or energy services suppliers and their customers. Representatives of a TDBU may be present during a sales discussion between a customer and the TDBU's competitive affiliate, but shall not participate in the discussion or purport to act on behalf of the competitive affiliate.

(3) Requests for specific competitive affiliate information. If a customer or potential customer makes an unsolicited request to a TDBU for information specifically about any of its competitive affiliates, the TDBU may refer the customer or potential customer to the competitive affiliate for more information. Under this paragraph, the only information that a TDBU may provide to the customer or potential customer is the competitive affiliate's address and telephone number. The TDBU shall not transfer the customer directly to the competitive affiliate's customer service office via telephone or provide any other electronic link whereby the customer could contact the competitive affiliate through the TDBU. When providing the customer or potential customer information about the competitive affiliate, the TDBU shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall it offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider.

(4) Requests for general information about products or services offered by competitive affiliates and their competitors. If a customer or potential customer requests general information from a TDBU about products or services provided by its competitive affiliate or the competitors of its CS or CD, the TDBU shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall the TDBU offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider. The TDBU may direct the customer or potential customer to a telephone directory or to the commission, or provide the customer with a recent list of suppliers developed and maintained by the commission, but the TDBU may not refer the customer or potential customer to the competitive affiliate except as provided for in paragraph (3) of this subsection.

(n) Remedies and enforcement.

(1) Code implementation filing.

(A) Not later than 120 days prior to the implementation of customer choice by a MOU/COOP, a TDBU shall file with the commission its plan for implementing the provisions of this section, addressing all applicable requirements of this section in the context of its operations as they will be conducted in the competitive retail market. The TDBU shall post notice of its filing on its Internet site or a public electronic bulletin board for 30 consecutive days and shall provide copies of the filing to requesting parties. Interested parties may file comments on the filing with the commission within 30 days following the filing and shall provide copies of such comments to the TDBU. Commission staff shall review the code implementation filing, and provide to the TDBU its comments and recommendations as to any suggested changes in the filing within 60 days following the date of the filing. The TDBU may amend its initial filing based on the comments and recommendations and shall file any such amendments not later than 75 days following the date of the initial filing. The filing provided for in this paragraph is not subject to the contested hearings process, except upon complaint by an interested party or the commission staff.

(B) In lieu of the implementation filing provided for in subparagraph (A) of this paragraph, a MOU/COOP may file with the commission a statement that it does not at this time intend to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section. Subsequently, if a MOU/COOP intends to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section, it shall file the implementation filing provided for in subparagraph (A) of this paragraph with the commission not later than 120 days prior to the time it provides retail electric energy in Texas outside its certificated retail service area.

(2) Informal complaint procedure. A TDBU shall establish and file with the commission a complaint procedure for addressing alleged violations of this section. This procedure shall contain a mechanism whereby all complaints shall be placed in writing and shall be referred to a designated officer or other person employed by the TDBU.

(A) All complaints shall contain:

(i) the name of the complainant;

(ii) a detailed factual report of the complaint, including all relevant dates, entities or divisions involved, employees involved, and the specific claim.

(B) A complaint must be filed with the TDBU within 90 days of the date the complaining party was on notice, knew, or with diligent investigation should have known, that the violation occurred.

(C) The designated officer shall acknowledge receipt of the complaint in writing within five working days of receipt. The designated officer shall provide a written report communicating the results of the preliminary investigation to the complainant within 30 days after receipt of the complaint, including a description of any course of action that will be taken.

(D) In the event the TDBU and the complainant are unable to resolve the complaint, the complainant may file a formal complaint with the commission. In the event the complainant advises the TDBU that the complainant does not consider the complaint fully resolved by the course of action proposed by the TDBU then the TDBU shall notify the complainant of his or her right to file a formal complaint with the commission, and shall provide the complainant with the commission's address and telephone number. The informal complaint process shall be a prerequisite for filing a formal complaint with the commission.

(E) A large TDBU shall report to the commission regarding the nature and status of informal complaints handled in accordance with this paragraph in its annual report of code-related activities filed pursuant to subsection (d) of this section. The information reported to the commission shall include the name of the complainant and a summary report of the complaint, including all relevant dates, companies involved, employees involved, the specific claim, and any actions taken to address the complaint. Such information on all informal complaints that were initiated or remained unresolved during the reporting period shall be included in the large TDBU's annual report of code-related activities.

(3) Filing a complaint. Following the informal process, a formal complaint may be filed with the commission alleging a violation of this section. No complaint shall be valid unless filed with the commission within 30 days after the designated officer or employee of the TDBU mails its written report communicating the results of the preliminary investigation to the complainant. Each complaint shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, entities or divisions involved, employees involved, and the specific claim. Additionally, each complaint shall identify the specific provisions of this section that are alleged to have been violated, contain a sworn affidavit that the facts alleged are true and correct to the best of the affiant's knowledge and belief, and if the complainant is a corporation, a statement from a corporate officer that he or she is authorized to file the complaint.

(4) Notification of complaint and opportunity to respond. The commission shall provide a copy of the complaint to the TDBU. The TDBU shall respond to the complaint in writing within 15 days. The TDBU and the complainant shall make a good faith effort to resolve the complaint on an informal basis as promptly as practicable.

(5) Settlement conference. Upon request by the MOU/COOP subject to the complaint, commission staff shall conduct a settlement conference. At such settlement conference, each party including the commission staff shall recommend what steps are necessary to cure any violation that it believes has occurred. Discussions at the settlement conference including the recommendations to cure the violation shall not be admissible at a hearing on the complaint.

(6) Opportunity to cure. The MOU/COOP shall have three months to cure the violation in accordance with an agreement arising from the settlement conference or following a hearing. A MOU/COOP may cure the violation in any reasonable manner as set forth in the settlement agreement or hearing, including taking action designed to prevent recurrence of the violation or amending the rule or order.

(7) Enforcement by the commission. In the event the commission finds there has been a violation which has not been reasonably cured, the commission may enforce the provisions of this section.

(A) The commission may recommend actions to be taken by the MOU/COOP within a prescribed time and if such actions are not taken, the commission may:

(i) seek an injunction to eliminate or remedy the violation or series or set of violations; or

(ii) limit or prohibit retail service outside the TDBU's certificated retail service area until the violation or violations are adequately remedied. This remedy shall not be applied in a manner that would interfere with or abrogate the rights or obligations of parties to a lawful contract.

(B) In assessing enforcement remedies, the commission shall consider the following factors:

(i) the TDBU's prior history of violations; if any, found by the commission after hearing;

(ii) the TDBU's efforts to comply with the commission's rules;

(iii) the nature and extent of economic benefit gained by the TDBU's competitive affiliate;

(iv) the damages or potential damages resulting from the violation or series or set of violations;

(v) the size of the business of the competitive affiliate involved; and

(vi) such other factors deemed appropriate and material to the particular circumstances of the violation or series or set of violations.

(C) The commission may conduct a compliance audit of affiliate activities to ensure compliance with the code of conduct.

(8) No immunity from antitrust enforcement. Nothing in these affiliate rules shall confer immunity from state or federal antitrust laws. Enforcement actions by the commission for violations of this section do not affect or preempt antitrust liability, but rather are in addition to any antitrust liability that may apply to the anti-competitive activity. Therefore, antitrust remedies also may be sought in federal or state court to cure anti-competitive activities.

(9) No immunity from civil relief. Nothing in these affiliate rules shall preclude any form of civil relief that may be available under federal or state law, including, but not limited to, filing a complaint with the commission consistent with this subsection.

(10) Preemption. This section supersedes any procedures or protocols adopted by an independent organization as defined by PURA §39.151, or similar entity, that conflict with the provisions of this section.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008068
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 936-7308

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 193. STANDING DELEGATION ORDERS

22 TAC §193.6

The Texas State Board of Medical Examiners proposes an amendment to §193.6(h), relating to standing delegation orders. The amendment will clarify cite references to the Texas Occupations Code Annotated.

Michele Shackelford, Acting General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state and local government as a result of enforcing the section.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be clarified cite references to the Texas Occupations Code Annotated. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Occupations Code, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The Texas Occupations Code, Annotated, §§157.001-157.007; 157.051-157.060; and 157.101 are affected by the amendment.

§193.6. Delegation of the Carrying Out or Signing of Prescription Drug Orders to Physician Assistants and Advanced Practice Nurses.

(a)-(g) (No change.)

(h) Violations. Violation of this section by the supervising physician may result in a refusal to approve supervision or cancellation of the physician's authority to supervise a physician assistant or

advanced practice nurse under this section. Violation of this section may also subject the physician to disciplinary action as provided by the Medical Practice Act, Texas Occupations Code Annotated, §164.001 for violation of Texas Occupations Code Annotated, §164.051. If an advanced practice nurse violates this section or the Medical Practice Act, Texas Occupations Code Annotated, §§157.051-157.060 [~~Texas Civil Statutes, Article 4495b, §3.06(d)(5) or (6)~~], the board shall promptly notify the Texas Board of Nurse Examiners of the alleged violation. If a physician assistant violates this section or the Medical Practice Act, Texas Occupations Code Annotated, §§157.051-157.060, the board shall promptly notify the Texas State Board of Physician Assistant Examiners.

(i)-(m) (No change.)

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

Filed with the Office of the Secretary of State, on November 20, 2000.

TRD-200008095
F.M. Langley, DVM, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-7016

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PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 221. ADVANCED PRACTICE NURSES

22 TAC §§221.1-221.15

(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 Board of Nurse Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Board of Nurse Examiners for the State of Texas proposes the repeal of §§221.1-221.15, relating to Advanced Practice Nurses.

The repeal is the result of the Board's effort to implement the mandate of House Bill 1 and would allow for the adoption of new sections. House Bill 1, §167, Article IX, passed by the 75th Legislative Session required that each rule adopted by an agency be reviewed within four years of the date of its adoption to determine whether the reason for adopting the rule continues to exist. Rules which were adopted prior to September 1, 1997 are required to be reviewed by August 31, 2001.

The new rules are being proposed to replace the repealed rules and are being published simultaneously with this notice.

Katherine Thomas, Executive Director, has determined that for the first five-year period the repeal is effective there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Thomas has determined that the public benefit of enforcing the repeal is to clarify the process and procedures regarding Advanced Practice Nurse regulations. There will be no effect on small businesses. There will be no anticipated costs to persons required to comply with the repeal as proposed.

Written comments on the proposed repeal may be submitted to Katherine Thomas, Executive Director, Board of Nurse Examiners for the State of Texas, 333 Guadalupe, Suite 3-460, Austin, Texas 78701. Comments will be accepted and considered for 30 days following the publication of this proposal in the *Texas Register*.

The repeal is proposed under the authority of the Texas Occupations Code, §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt and enforce rules consistent with its legislative authority under the Nurse Practice Act including rules relating to registered nurses approved, or seeking approval, as an advanced practice nurse.

The repeal affects the Nursing Practice Act, Texas Occupations Code, §301.152 and §301.157 as they pertain to advanced practice nurses.

§221.1. Definitions.
§221.2. Titles.
§221.3. Education.
§221.4. Requirements for Initial Authorization to Practice.
§221.5. Petitions for Waiver.
§221.6. Interim Approval.
§221.7. New Graduates.
§221.8. Maintaining Authorization as an Advanced Practice Nurse.
§221.9. Inactive Status.
§221.10. Reinstatement or Reactivation of Advanced Practice Nurse Status.
§221.11. Identification.
§221.12. Functions.
§221.13. Scope of Practice.
§221.14. Provisions of Anesthesia Services by Nurse Anesthetists in Outpatient Settings.
§221.15. Enforcement.

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

Filed with the Office of the Secretary of State, on November 15, 2000.

TRD-200008000
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-6811

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22 TAC §§221.1-221.17

The Board of Nurse Examiners for the State of Texas proposes new §§221.1-221.17, relating to Advanced Practice Nurses.

House Bill 1 (HB 1), §167, Article IX, passed by the 75th Legislative Session required that each rule adopted by an agency be reviewed within four years of the date of its adoption to determine whether the reason for adopting the rule continues to exist. Rules which were adopted prior to September 1, 1997 are required to be reviewed by August 31, 2001. Proposed new §§221.1-221.17 is the result of the Board's effort to implement the mandate of HB 1.

The Board's Advanced Practice Advisory Committee has been working since March 2000 to review the rules and recommend changes where necessary. The committee is comprised of Advanced Practice Nurse Educators, Advanced Practice Nurses in practice, and representatives from Advanced Practice professional organizations, including Texas Nurses Association, Texas Nurse Practitioners, Texas Association of Nurse Anesthetists, Consortium of Texas Certified Nurse Midwives, and Texas Organization of Nurse Executives. Committee members shared information regarding the current rules and how these rules have impacted their practices. They worked to make the rules easier to use and understand. In addition, they tried to insure consistency between the rules, especially where terms have been defined. The Committee finished discussion of Chapter 221 and made recommendations for the Board's consideration. The Committee's recommendations are the basis of the proposed rule changes.

The proposed rules was not intended to make significant substantive changes in the advanced practice rules of the Board. Rather the proposals seek to clarify the advanced practice rules in order to make them better understood by Advanced Practice Nurses. For example, many policies have been set by the Board over the several years since the rules were last reviewed and have now been included in the new rules for clarity and completeness (e.g. curricular requirements adopted by the Board in collaboration with the Texas Higher Education Coordinating Board). Many of these policies impact an applicant's ability to be granted authorization to practice. However, the rules do provide substantive changes regarding the minimum number of clinical hours needed for authorization to practice (e.g. 500 hours in APN program) contained in new §221.3(e); the date after which a Masters Degree will be required for authorization to practice (e.g. Masters Degree will be required by January 1, 2003) contained in new §221.3(b)(4); and limitations on graduate authorization to practice after certification exam failure contained in new §221.5.

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

Ms. Thomas has determined that the public benefit of enforcing the rules is to clarify the process and procedures regarding the Advanced Practice Nurse regulation. There will be no effect on small businesses. There will be no anticipated costs to persons required to comply with these sections as proposed.

Written comments on the proposed new rules may be submitted to Katherine Thomas, Executive Director, Board of Nurse Examiners for the State of Texas, 333 Guadalupe, Suite 3-460, Austin, Texas 78701. Comments will be accepted and considered for 30 days following the publication of this proposal in the *Texas Register*.

The new rules are proposed under the authority of the Texas Occupations Code, §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt and enforce rules consistent with its legislative authority under the Nurse Practice Act including rules relating to registered nurses approved, or seeking approval, as an advance practice nurse.

The new rules affect the Nursing Practice Act, Texas Occupations Code, §301.152 and §301.157 as they pertain to advanced practice nursing.

§221.1. Definitions.

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

(1) Accredited program--A program which has been deemed to have met certain standards set by the board or by a national accrediting body recognized by the board.

(2) Advanced educational program--A post-basic advanced practice nurse program at the certificate or master's degree level. Beginning January 1, 2003, a master's degree in the advanced practice role and specialty will be required for recognition as an Advanced Practice Nurse.

(3) Advanced practice nurse--A registered nurse approved by the board to practice as an advanced practice nurse based on completing an advanced educational program acceptable to the board. The term includes a nurse practitioner, nurse-midwife, nurse anesthetist, and a clinical nurse specialist. The advanced practice nurse is prepared to practice in an expanded role to provide health care to individuals, families, and/or groups in a variety of settings including but not limited to homes, hospitals, institutions, offices, industry, schools, community agencies, public and private clinics, and private practice. The advanced practice nurse acts independently and/or in collaboration with other health care professionals in the delivery of health care services.

(4) Authorization to practice--The process of reviewing the educational, licensing, certification and other credentials of the registered nurse to determine compliance with the board's requirements for approval as an advanced practice nurse.

(5) Board--The Board of Nurse Examiners for the State of Texas.

(6) Current certification--Initial certification and maintenance of certification by national certifying bodies recognized by the board.

(7) Current practice--Maintaining competence as an advanced practice nurse by practicing in the advanced role and specialty in the clinical setting, practicing as an educator in the clinical and/or didactic portion of an advanced educational program of study, or practicing as a consultant or an administrator within the advanced specialty and role.

(8) Graduate advanced practice nurse--A registered nurse who has completed an advanced educational program of study and has been granted provisional or interim authorization by the board to practice in the advanced specialty and role.

(9) Monitored anesthesia care--Refers to situations where a patient undergoing a diagnostic or therapeutic procedure receive doses of medication that create a risk of loss of normal protective reflexes or loss of consciousness and the patient remains able to protect the airway for the majority of the procedure. If, for an extended period of time, the patient is rendered unconscious and/or loses normal protective reflexes, then anesthesia care shall be considered a general anesthetic.

(10) Outpatient setting--Any facility, clinic, center, office, or other setting that is not a part of a licensed hospital or a licensed ambulatory surgical center with the exception of all of the following:

(A) clinic located on land recognized as tribal land by the federal government and maintained or operated by a federally recognized Indian tribe or tribal organization as listed under 25 U.S.C. Section 479-1 or as listed under a successor federal statute or regulation;

(B) a facility maintained or operated by a state or governmental entity;

(C) a clinic directly maintained or operated by the United States or by any of its departments, officers, or agencies; and

(D) an outpatient setting accredited by either the Joint Commission on Accreditation of Healthcare Organizations relating to ambulatory surgical centers, the American Association for the Accreditation of Ambulatory Surgery Facilities, or the Accreditation Association for Ambulatory Health Care.

(11) Party state--Any state that has entered into the Nurse Licensure Compact.

(12) Protocols or other written authorization--Written authorization to provide medical aspects of patient care which are agreed upon and signed by the advanced practice nurse and the physician, reviewed and signed at least annually, and maintained in the practice setting of the advanced practice nurse. Protocols or other written authorization shall be defined to promote the exercise of professional judgment by the advanced practice nurse commensurate with his/her education and experience. Such protocols or other written authorization need not describe the exact steps that the advanced practice nurse must take with respect to each specific condition, disease, or symptom and may state types or categories of drugs which may be prescribed rather that just list specific drugs.

(13) Shall and must--Mandatory requirements.

(14) Should--A recommendation.

(15) Unencumbered--A license to practice registered nursing which does not have stipulations against the license.

§221.2. Authorization and Restrictions to Use of Advanced Practice Titles.

(a) Registered nurses holding themselves out to be advanced practice nurses may include, but not be limited to, the following categories of advanced practice nurses:

(1) nurse anesthetist,

(2) nurse-midwife,

(3) nurse practitioner,

(4) clinical nurse specialist.

(b) Registered nurses who hold current authorization to practice as advanced practice nurses issued by the board may use the title specified on that authorization. "Advanced practice nurse" shall not be used as a title.

(c) Unless authorized as an advanced practice nurse by the board as provided for by §§221.5-221.8 of this chapter (relating to Provisional Authorization; Interim Approval; Petitions for Waiver; and Maintaining Active Authorization as an Advanced Practice Nurse), a registered nurse shall not:

(1) claim to be an advanced practice nurse or hold himself/herself out to be an advanced practice nurse in this state; and/or

(2) use a title or any other designation tending to imply that the person is authorized as an advanced practice nurse.

(d) A registered nurse who violates subsection (c) of this section may be subject to an administrative penalty under §301.501 of the Nursing Practice Act.

§221.3. Education.

(a) In order to be eligible to apply for authorization as an advanced practice nurse, the registered nurse must have completed an advanced educational program of study appropriate for practice in an advanced nursing specialty and role recognized by the board.

(b) Applicants for authorization as advanced practice nurses must submit verification of completion of all requirements of an advanced educational program that meets the following criteria:

(1) Advanced educational programs in the State of Texas shall be accredited by the board or a national accrediting body recognized by the board.

(2) Programs in states other than Texas shall be accredited by a national accrediting body recognized by the board or by the appropriate licensing body in that state. A state licensing body's accreditation process must meet or exceed the requirements of accrediting bodies specified in board policy.

(3) Programs of study shall be at least one academic year in length and may include a formal preceptorship.

(4) Beginning January 1, 2003, the program of study shall be at the master's degree level.

(c) Applicants for authorization as clinical nurse specialists must submit verification of the following requirements in addition to those specified in subsection (b) of this section:

(1) completion of a master's degree in the discipline of nursing, and

(2) completion of a minimum of nine semester credit hours or the equivalent in a specific clinical major. Clinical major courses must include didactic content and offer clinical experiences in a specific clinical specialty/practice area.

(d) Those applicants who completed nurse practitioner or clinical nurse specialist programs on or after January 1, 1998 must demonstrate evidence of completion of the following curricular requirements:

(1) separate courses in pharmacotherapeutics, advanced assessment and pathophysiology and/or psychopathology. These must be advanced level academic courses with a minimum of 45 clock hours per course;

(2) evidence of theoretical and clinical role preparation;

(3) evidence of clinical major courses in the specialty area; and

(4) evidence of a practicum/preceptorship/internship to integrate clinical experiences as reflected in essential content and the clinical major courses.

(5) In this subsection, the following terms have the following definitions:

(A) Advanced Assessment Course means a course that offers content supported by related clinical experience such that students gain the knowledge and skills needed to perform comprehensive assessments to acquire data, make diagnoses of health status and formulate effective clinical management plans.

(B) Pharmacotherapeutics means a course that offers content in pharmacokinetics and pharmacodynamics, pharmacology of current/commonly used medications, and the application of drug therapy to the treatment of disease and/or the promotion of health.

(C) Role preparation means formal didactic and clinical experiences/content that prepare nurses to function in an advanced nursing role.

(D) Clinical major courses means courses that include didactic content and offer clinical experiences in a specific clinical specialty/practice area.

(E) Clinical specialty area means specialty area of clinical practice based upon formal didactic preparation and clinical experiences.

(F) Essential content means didactic and clinical content essential for the educational preparation of individuals to function within the scope of advanced nursing practice. The essential content includes but is not limited to: advanced assessment, pharmacotherapeutics, role preparation, nursing specialty practice theory, physiology/pathology, diagnosis and clinical management of health status, and research.

(G) Practicum/Preceptorship/Internship means a designated portion of a formal educational program that is offered in a health care setting and affords students the opportunity to integrate theory and role in both the clinical specialty/practice area and advanced nursing practice through direct patient care/client management. Practicums/Preceptorships/Internships are planned and monitored by either a designated faculty member or qualified preceptor.

(e) Those applicants who complete nurse practitioner or clinical nurse specialist programs on or after January 1, 2003 must demonstrate evidence of completion of a minimum of 500 clinical hours within the advanced educational program.

§221.4. Requirements for Full Authorization to Practice.

(a) The registered professional nurse who seeks authorization to practice as an advanced practice nurse must:

(1) hold a current, valid, unencumbered license as a registered nurse in the State of Texas or reside in any party state and hold a current, valid, unencumbered registered nurse license in that state;

(2) submit to the board such evidence as required by the board to insure compliance with §221.3 of this chapter (relating to Education);

(3) attest, on forms provided by the board to having met the minimum of 400 hours of current practice within the preceding biennium unless the applicant has completed an advanced educational program within the preceding biennium;

(4) attest, on forms provided by the board, to having obtained 20 contact hours of continuing education in the advanced specialty and role recognized by the board every two years. Continuing education in the advanced specialty and role must meet the requirements of Chapter 216 of this title (relating to Continuing Education). The 20 contact hours required for RN licensure may be met by the 20 hours required by this subsection; and

(5) submit the required credentialing fee, which is not refundable.

(b) The applicant for advanced practice nurse authorization who completed an advanced educational program on or after January 1, 1996 must submit to the board such evidence as required by the board to ensure the applicant holds current certification in an advanced nursing role and specialty recognized by the board. Such certification must be granted by a national certifying body recognized by the board. The board reserves the right to designate an available national examination in a closely related specialty which must be taken in lieu of an examination specifically related to the specialty. If an appropriate certification examination is not available and the board has not designated an alternate examination, the applicant may petition the board for waiver from the certification requirement, according to §221.7(c) of this chapter (relating to Petitions for Waiver).

(c) Advanced practice nurse applicants who wish to be authorized by the board for more than one designation shall complete additional education in the desired area(s) of approval in compliance with §221.3 of this chapter and obtain national certification in the advanced role and specialty from a national certifying body recognized by the board. To apply for authorization for more than one designation, the applicant shall submit a separate application and fee for each desired designation.

(d) After review by the board, notification of acceptability of credentials and a certificate verifying approval shall be sent to the advanced practice nurse.

§221.5. Provisional Authorization.

(a) A registered nurse who has completed an advanced educational program as required by §221.3 of this chapter (relating to Education) and registered for a board approved national certification examination following completion of the program may be issued a provisional authorization to practice as a Graduate Advanced Practice Nurse pending notification of the results of the certification examination. An applicant may be eligible for provisional authorization only one time per authorized role. The applicant must apply for provisional authorization within six months of program completion.

(b) The applicant for advanced practice nurse authorization shall pass the certification examination within the first two years of completion of the advanced educational program.

(c) If the applicant fails to pass the certification examination on the first attempt, he/she shall be required to practice under the direction of a sponsor. The sponsor and the conditions of sponsorship shall be approved by the board prior to beginning the sponsored practice.

(d) Failure to pass the examination after two attempts will render the applicant ineligible to practice in the advanced practice role. In this case, the applicant must return the provisional authorization to practice document to the board's office.

(1) The applicant who has not passed the certification examination after two attempts may continue to test until two years from the date of completion of the advanced educational program.

(2) An applicant who fails to pass the certification examination after two attempts may continue to practice as a registered nurse. He/she may utilize the advanced knowledge, skills, and abilities while under direct supervision of another advanced practice nurse or physician within the specialty area.

(e) A candidate who fails to pass the certification examination within two years following completion of an advanced educational program may reapply for authorization to practice as an advanced practice nurse after:

(1) Successfully completing an accredited advanced educational program that meets the requirements as outlined in guidelines prepared by the board and §221.3 of this chapter; and

(2) obtaining national certification in the advanced role and specialty.

(f) The applicant shall request the respective certifying body to notify the board of the applicant's certification examination results.

§221.6. Interim Approval.

(a) Interim approval may be granted by the board pending completion of the application process for a period not to exceed 90 days. Extensions of the interim approval period shall not be granted.

(1) The registered nurse seeking interim approval as an advanced practice nurse must complete documentation provided by the board verifying that he/she meets all requirements of this chapter and has completed and mailed the appropriate documents to the educational program or organization for completion.

(2) A letter shall be issued by the board granting interim approval.

(3) An applicant is eligible for interim approval one time only per specialty and role.

(b) An applicant who submits a request for waiver from the requirements of the rules as set forth in §221.4 (relating to Full Authorization to Practice) and §221.5 (relating to Provisional Authorization) of this chapter shall not be eligible for interim approval.

(c) If an applicant is deemed ineligible for advanced practice authorization, the interim approval will be rescinded immediately, effective on the date the notice is sent by mail. The applicant must cease holding him/herself out as or using titles to imply that he/she is an advanced practice nurse.

§221.7. Petitions for Waiver.

(a) A registered nurse who submits a request for waiver from requirements of the rules must submit documentation as required by the board to support his or her petition and assure the board that he or she possesses the knowledge, skills and abilities appropriate for the role and specialty desired. Those petitioners who are under investigation or current board order are not eligible for waiver.

(b) Petitions for waiver from the program accreditation requirements of §221.3 of this chapter (relating to Education), may be granted by the board for individuals who completed their educational programs on or before December 31, 1996. Petitioners must meet the length of academic program requirements of §221.3 of this chapter and obtain national certification in the advanced role and specialty area.

(c) Petitions for waiver from the current certification requirements of §221.4 of this chapter (relating to Requirements for Full Authorization to Practice) and §221.8 of this chapter (relating to Maintaining Active Authorization as an Advanced Practice Nurse) may be granted by the board.

(1) Under this section, only those petitioners for which no national certification examination within the advanced role and specialty or a related advanced specialty exists will be considered for waiver by the board.

(2) The board may determine that an available national certification examination in a related specialty and/or role must be taken in lieu of an examination specific to the advanced specialty area.

(d) Waivers from the master's degree requirement will be granted to qualified certificate-prepared nurse-midwives and women's health care nurse practitioners who complete their programs on or after January 1, 2003 through December 31, 2006. Applicants must meet all other requirements as stated in §221.4 of this chapter.

(1) Those individuals approved on the basis of this waiver shall be limited to providing advanced practice nursing care within the geographical boundaries of the State of Texas. This shall not prevent the individual from utilizing Nurse Licensure Compact privileges to function as a registered nurse.

(2) The applicant must submit all required documentation necessary to demonstrate that the requirements (except for the master's degree) for authorization to practice have been met.

(3) The applicant must submit a written request for waiver of the master's degree requirement.

(4) Interim, provisional or full authorization may be granted to qualified certificate-prepared nurse-midwives and women's health care nurse practitioners.

§221.8. Maintaining Active Authorization as an Advanced Practice Nurse.

(a) In conjunction with RN license renewal, the advanced practice nurse seeking to maintain active advanced practice authorization(s) shall:

(1) attest on forms provided by the board to maintaining current national certification by the appropriate certifying body recognized by the board. This requirement shall apply to advanced practice nurses who:

(A) completed an advanced educational program on or after January 1, 1996, or

(B) were authorized as advanced practice nurses based upon obtaining national certification.

(2) attest, on forms provided by the board, to having a minimum of 400 hours of current practice within the preceding biennium;

(3) attest, on forms provided by the board, to having obtained 20 contact hours of continuing education in the advanced specialty area and role within the preceding biennium. Continuing education in the advanced practice specialty and role must meet requirements of Chapter 216 of this title (relating to Continuing Education). The 20 contact hours required for RN licensure may be met by the 20 hours required by this subsection; and

(4) submit the required fee, which is not refundable.

(b) Failure to renew the registered nurse license or to provide the required fee and documentation for maintaining authorization shall result in expiration of the board's authorization as an advanced practice nurse and limited prescriptive authority where applicable. The individual whose advanced practice authorization has expired may not practice as or use titles to imply that he/she is an advanced practice nurse.

§221.9. Inactive Status.

(a) The advanced practice nurse may choose to change advanced practice nurse status to inactive by providing a written request for such change.

(b) Inactive advanced practice status means that the registered professional nurse may not practice in the advanced practice specialty and role and may not hold himself/herself out to be an advanced practice nurse by using titles which imply that he/she is an advanced practice nurse. The inactive advanced practice nurse may not utilize his/her limited prescriptive authority.

§221.10. Reinstatement or Reactivation of Advanced Practice Nurse Status.

(a) To reinstate an authorization which has expired due to nonpayment of renewal fees for registered nurse licensure and/or advanced practice authorization, the advanced practice nurse shall meet the requirements as stated in §221.8 of this chapter (relating to Maintaining Active Authorization as an Advanced Practice Nurse) and pay all required fees.

(b) If less than four years but more than two years have lapsed since completion of the advanced educational program and/or the applicant does not have 400 hours of current practice in the advanced role and specialty during the previous biennium, the advanced practice nurse shall meet the requirements as stated in §221.8 of this chapter and pay all required fees. The applicant shall be required to demonstrate proof of completion of 400 hours of current practice as well as the continuing education requirement as outlined in Chapter 216 of this title (relating to Continuing Education). The 400 hours of current practice shall be obtained under the direct supervision of an advanced practice nurse authorized by the board in the same role and specialty or by a physician the same specialty.

(c) If more than four years have lapsed since completion of the advanced practice educational program and/or the applicant has not practiced in the advanced role during the previous four years, the applicant shall apply for reactivation and meet current requirements for maintaining authorization to practice under §221.8 of this chapter and shall:

(1) hold a current, valid, unencumbered license as a registered nurse in the State of Texas or reside in any party state and hold a current, valid, unencumbered registered nurse license in that state; and

(2) successfully complete a refresher course or extensive orientation in the appropriate advanced practice specialty and role which includes a supervised clinical component by a qualified instructor/sponsor.

(A) The course(s)/orientation shall be of sufficient length to satisfy the learning needs of the inactive advanced practice nurse and to assure that he/she meets the minimum standard for safe, competent care. The course(s)/orientation shall cover the entire scope of the authorized advanced specialty area. Content shall include, but not be limited to that which is specified in board guidelines.

(B) The instructor/sponsor must provide written verification of satisfactory completion of the course/orientation on forms provided by the board and assurance that the individual has reviewed current practice-related information pertinent to his/her advanced specialty and role.

§221.11. Identification.

When providing advanced practice nursing care to patients, the advanced practice nurse shall wear clear identification which indicates the individual is a registered nurse with the appropriate advanced practice designation authorized by the board.

§221.12. Scope of Practice.

The advanced practice nurse provides a broad range of health services, the scope of which shall be based upon educational preparation, continued advanced practice experience and the accepted scope of professional practice of the particular specialty area. Advanced practice nurses practice in a variety of settings and, according to their practice specialty and role, they provide a broad range of health care services to a variety of patient populations.

(1) The scope of practice of particular specialty areas shall be defined by national professional specialty organizations or advanced practice nursing organizations recognized by the Board. The advanced practice nurse may perform only those functions which are within that scope of practice and which are consistent with the Nursing Practice Act, Board rules, and other laws and regulations of the State of Texas.

(2) The advanced practice nurse's scope of practice shall be in addition to the scope of practice permitted a registered nurse and does not prohibit the advanced practice nurse from practicing in those areas deemed to be within the scope of practice of a registered nurse.

§221.13. Core Standards for Advanced Practice.

(a) The advanced practice nurse shall know and conform to the Texas Nursing Practice Act; current board rules, regulations, and standards of professional nursing; and all federal, state, and local laws, rules, and regulations affecting the advanced role and specialty area. When collaborating with other health care providers, the advanced practice nurse shall be accountable for knowledge of the statutes and rules relating to advanced practice nursing and function within the boundaries of the appropriate advanced practice category.

(b) The advanced practice nurse shall practice within the advanced specialty and role appropriate to his/her advanced educational preparation.

(c) The advanced practice nurse acts independently and/or in collaboration with the health team in the observation, assessment, diagnosis, intervention, evaluation, rehabilitation, care and counsel, and health teachings of persons who are ill, injured or infirm or experiencing changes in normal health processes; and in the promotion and maintenance of health or prevention of illness.

(d) When providing medical aspects of care, advanced practice nurses shall utilize mechanisms which provide authority for that care. These mechanisms may include, but are not limited to, Protocols or other written authorization. This shall not be construed as requiring authority for nursing aspects of care.

(1) Protocols or other written authorization shall promote the exercise of professional judgment by the advanced practice nurse commensurate with his/her education and experience. The degree of detail within protocols/policies/practice guidelines/clinical practice privileges may vary in relation to the complexity of the situations covered by such Protocols, the advanced specialty area of practice, the advanced educational preparation of the individual, and the experience level of the individual advanced practice nurse.

(2) Protocols or other written authorization:

(A) should be jointly developed by the advanced practice nurse and the appropriate physician(s),

(B) shall be signed by both the advanced practice nurse and the physician(s),

(C) shall be reviewed and re-signed at least annually,

(D) shall be maintained in the practice setting of the advanced practice nurse, and

(E) shall be made available as necessary to verify authority to provide medical aspects of care.

(e) The advanced practice nurse shall retain professional accountability for advanced practice nursing care.

§221.14. Nurse-Midwives Providing Controlled Substances.

(a) In this section "provide" means to supply, for a term not to exceed 48 hours, one or more unit doses of a controlled substance for the immediate needs of a patient;

(b) An advanced practice nurse recognized by the board as a nurse-midwife may provide one or more unit doses of a controlled substance during intra-partum or immediate post-partum care subject to the following conditions:

(1) Physician delegation of authority to provide controlled substances must be made through a physician's order, medical order, standing delegation order, or protocol that requires adequate and documented availability for access to medical care. Delegation may not include the use of a prescription sticker or the use or issuance of an official prescription form under §481.075, Health and Safety Code;

(2) The nurse-midwife's protocols or other orders must require the reporting of or monitoring of each patient's progress, including complications of pregnancy and delivery and the administration and provision of controlled substances to the patient;

(3) delegation is limited to three full-time equivalent nurse-midwives at the designated facility where the nurse- midwife practices; and

(4) the controlled substance must be supplied in a suitable container that is labeled in compliance with the applicable drug laws and must include:

(A) the patient's name and address;

(B) the drug to be provided;

(C) the name, address, and telephone number of the physician;

(D) the name, address, and telephone number of the nurse-midwife; and

(E) the date.

§221.15. Provision of Anesthesia Services by Nurse Anesthetists in Licensed Hospitals or Ambulatory Surgical Centers.

(a) In a licensed hospital or ambulatory surgical center, consistent with facility policy or medical staff bylaws, a nurse anesthetist may select, obtain, and administer drugs including determination of appropriate dosages, techniques and medical devices for their administration and in maintaining the patient in sound physiologic status pursuant to a physician's order for anesthesia or an anesthesia-related service. This order need not be drug specific, dosage specific, or administration-technique specific.

(b) Pursuant to a physician's order for anesthesia or an anesthesia-related service, the nurse anesthetist may order anesthesia-related medications during perianesthesia periods in the preparation for or recovery from anesthesia. Another RN may carry out these orders.

(c) In providing anesthesia or an anesthesia-related service, the nurse anesthetist shall select, order, obtain and administer drugs which fall within categories of drugs generally utilized for anesthesia or anesthesia-related services and provide the concomitant care required to maintain the patient in sound physiologic status during those experiences.

§221.16. Provision of Anesthesia Services by Nurse Anesthetists in Outpatient Settings.

(a) Purpose. The purpose of these rules is to identify the roles, and responsibilities of certified registered nurse anesthetists authorized to provide anesthesia services in outpatient settings and to provide the minimum acceptable standards for the provision of anesthesia services in outpatient settings.

(1) On or after August 31, 2000 certified registered nurse anesthetists shall comply with subsection (b)(2)-(e) of this section in order to be authorized to provide general anesthesia, regional anesthesia, or monitored anesthesia care in outpatient settings.

(2) Subsections (b)(2)-(e) of this section do not apply to the registered nurse anesthetist who practices in the following:

(A) an outpatient setting in which only local anesthesia, peripheral nerve blocks, or both are used;

(B) an outpatient setting in which only anxiolytics and analgesics are used and only in doses that do not have the probability of placing the patient at risk for loss of the patient's life-preserving protective reflexes;

(C) a licensed hospital, including an outpatient facility of the hospital that is separately located apart from the hospital;

(D) a licensed ambulatory surgical center;

(E) a clinic located on land recognized as tribal land by the federal government and maintained or operated by a federally recognized Indian tribe or tribal organization as listed by the United States secretary of the interior under 25 U.S.C. Section 479-1 or as listed under a successor federal statute or regulation

(F) a facility maintained or operated by a state or governmental entity;

(G) a clinic directly maintained or operated by the United States or by any of its departments, officers, or agencies; and

(H) an outpatient setting accredited by

(i) the Joint Commission on Accreditation of Healthcare Organizations relating to ambulatory surgical centers;

(ii) the American Association for the Accreditation of Ambulatory Surgery Facilities,

(iii) the Accreditation Association for Ambulatory Health Care.

(b) Roles and Responsibilities

(1) Certified registered nurse anesthetists shall follow current, applicable standards and guidelines as put forth by the American Association of Nurse Anesthetists (AANA) and other relevant national standards regarding the practice of nurse anesthesia as adopted by the AANA or the Board.

(2) Certified registered nurse anesthetists shall comply with all building, fire, and safety codes. A two-way communication source not dependent on electrical current shall be available. Each location should have sufficient electrical outlets to satisfy anesthesia machine and monitoring equipment requirements, including clearly labeled outlets connected to an emergency power supply. Sites shall also have a secondary power source as appropriate for equipment in use in case of power failure.

(3) In an outpatient setting, where a physician has delegated to a certified registered nurse anesthetist the ordering of drugs and devices necessary for the nurse anesthetist to administer an anesthetic or an anesthesia-related service ordered by a physician, a certified registered nurse anesthetist may select, obtain and administer drugs, including determination of appropriate dosages, techniques and medical devices for their administration and in maintaining the patient in sound physiologic status. This order need not be drug-specific, dosage specific, or administration-technique specific. Pursuant to a physician's order for anesthesia or an anesthesia-related service, the certified registered nurse anesthetist may order anesthesia-related medications during perianesthesia periods in the preparation for or recovery from anesthesia. In providing anesthesia or an anesthesia-related service, the certified registered nurse anesthetist shall select, order, obtain and administer drugs which fall within categories of drugs generally utilized for anesthesia or anesthesia-related services and provide the concomitant care required to maintain the patient in sound physiologic status during those experiences.

(c) Standards

(1) The certified registered nurse anesthetist shall perform a pre-anesthetic assessment, counsel the patient, and prepare the patient for anesthesia per current AANA standards. Informed consent for the planned anesthetic intervention shall be obtained from the patient/legal guardian and maintained as part of the medical record. The consent must include explanation of the technique, expected results, and potential risks/complications. Appropriate pre-anesthesia diagnostic testing and consults shall be obtained per indications and assessment findings.

(2) Physiologic monitoring of the patient shall be determined by the type of anesthesia and individual patient needs. Minimum monitoring shall include continuous monitoring of ventilation, oxygenation, and cardiovascular status. Monitors shall include, but not be limited to, pulse oximetry and EKG continuously and non-invasive blood pressure to be measured at least every five minutes. If general anesthesia is utilized, then an O_2 analyzer and end-tidal CO_2 analyzer must also be used. A means to measure temperature shall be readily available and utilized for continuous monitoring when indicated per

current AANA standards. An audible signal alarm device capable of detecting disconnection of any component of the breathing system shall be utilized. The patient shall be monitored continuously throughout the duration of the procedure by the certified registered nurse anesthetist. Postoperatively, the patient shall be evaluated by continuous monitoring and clinical observation until stable by a licensed health care provider. Monitoring and observations shall be documented per current AANA standards. In the event of an electrical outage which disrupts the capability to continuously monitor all specified patient parameters, at a minimum, heart rate and breath sounds will be monitored on a continuous basis using a precordial stethoscope or similar device, and blood pressure measurements will be reestablished using a non-electrical blood pressure measuring device until electricity is restored.

(3) All anesthesia-related equipment and monitors shall be maintained to current operating room standards. All devices shall have regular service/maintenance checks at least annually or per manufacturer recommendations. Service/maintenance checks shall be performed by appropriately qualified biomedical personnel. Prior to the administration of anesthesia, all equipment/monitors shall be checked using the current FDA recommendations as a guideline. Records of equipment checks shall be maintained in a separate, dedicated log which must be made available upon request. Documentation of any criteria deemed to be substandard shall include a clear description of the problem and the intervention. If equipment is utilized despite the problem, documentation must clearly indicate that patient safety is not in jeopardy. All documentation relating to equipment shall be maintained for a period of time as determined by board guidelines.

(4) Each location must have emergency supplies immediately available. Supplies should include emergency drugs and equipment appropriate for the purpose of cardiopulmonary resuscitation. This must include a defibrillator, difficult airway equipment, and drugs and equipment necessary for the treatment of malignant hyperthermia if "triggering agents" associated with malignant hyperthermia are used or if the patient is at risk for malignant hyperthermia. Equipment shall be appropriately sized for the patient population being served. Resources for determining appropriate drug dosages shall be readily available. The emergency supplies shall be maintained and inspected by qualified personnel for presence and function of all appropriate equipment and drugs at intervals established by protocol to ensure that equipment is functional and present, drugs are not expired, and office personnel are familiar with equipment and supplies. Records of emergency supply checks shall be maintained in a separate, dedicated log and made available upon request. Records of emergency supply checks shall be maintained for a period of time as determined by board guidelines.

(5) Certified registered nurse anesthetists shall maintain current competency in advanced cardiac life support and must demonstrate proof of continued competency upon re-registration with the Board. Competency in pediatric advanced life support shall be maintained for those certified registered nurse anesthetists whose practice includes pediatric patients. Certified registered nurse anesthetists shall verify that at least one person in the setting other than the person performing the operative procedure maintains current competency in basic life support (BLS) at a minimum.

(6) Certified registered nurse anesthetists shall verify that the appropriate policies or procedures are in place. Policies, procedures, or protocols shall be evaluated and reviewed at least annually. Agreements with local emergency medical service (EMS) shall be in place for purposes of transfer of patients to the hospital in case of an emergency. EMS agreements shall be evaluated and re-signed at least annually. Policies, procedures, and transfer agreements shall be kept on file in the setting where procedures are performed and shall be made available upon request. Policies or procedures must include, but are not limited to:

(A) Management of outpatient anesthesia--At a minimum, these must address:

(i) Patient selection criteria

(ii) Patients/providers with latex allergy

(iii) Pediatric drug dosage calculations, where applicable

(iv) ACLS algorithms

(v) Infection control

(vi) Documentation and tracking use of pharmaceuticals: including controlled substances, expired drugs and wasting of drugs

(vii) Discharge criteria

(B) Management of emergencies to include, but not be limited to:

(i) Cardiopulmonary emergencies

(ii) Fire

(iii) Bomb threat

(iv) Chemical spill

(v) Natural disasters

(vi) Power outage

(C) EMS response and transport- Delineation of responsibilities of the certified registered nurse anesthetist and person performing the procedure upon arrival of EMS personnel. This policy should be developed jointly with EMS personnel to allow for greater accuracy.

(D) Pursuant to §217.11(16) of this title (relating to Standards of Professional Nursing Practice), adverse reactions/events, including but not limited to those resulting in a patient's death intraoperatively or within the immediate postoperative period shall be reported in writing to the Board and other applicable agencies within 15 days. Immediate postoperative period shall be defined as 72 hours.

(d) Registration.

(1) Beginning April 1, 2000, each certified registered nurse anesthetist who intends to provide anesthesia services in an outpatient setting must register with the board and submit the required registration fee, which is non-refundable. The information provided on the registration form shall include, but not be limited to, the name and business address of each outpatient setting(s) and proof of current competency in advanced life support.

(2) Registration as an outpatient anesthesia provider must be renewed and the registration renewal fee paid on a biennial basis, at the time of registered nurse licensure renewal.

(e) Inspections and Advisory Opinions.

(1) The Board may conduct on-site inspections of outpatient settings, including inspections of the equipment owned or leased by a certified registered nurse anesthetist and of documents that relate to provision of anesthesia in an outpatient setting, for the purpose of enforcing compliance with the minimum standards. Inspections may be conducted as an audit to determine compliance with the minimum

standards or in response to a complaint. The Board may contract with another state agency or qualified person to conduct these inspections. Unless it would jeopardize an ongoing investigation, the board shall provide the certified registered nurse anesthetist at least five business days' notice before conducting an on-site inspection.

(2) The Board may, at its discretion and on payment of a fee, conduct on-site inspections of outpatient settings in response to a request from a certified registered nurse anesthetist for an inspection and advisory opinion.

(A) The Board may require a certified registered nurse anesthetist to submit and comply with a corrective action plan to remedy or address current or potential deficiencies with the nurse anesthetist's provision of anesthesia in an outpatient setting.

(B) A certified registered nurse anesthetist who requests and relies on an advisory opinion of the board may use the opinion as mitigating evidence in an action or proceeding by the board to impose an administrative penalty or assess a monetary fine. The board shall take proof of reliance on an advisory opinion into consideration and mitigate the imposition of administrative penalties or the assessment of a monetary fine accordingly.

(C) An advisory opinion issued by the board is not binding on the board and the board, except as provided for in subsection (a) of this section, may take any action in relation to the situation addressed by the advisory opinion that the Board considers appropriate.

§221.17. Enforcement.

(a) The board may conduct an audit to determine compliance with §221.4 of this chapter (relating to Requirements for Permanent Authorization to Practice), §221.8 of this chapter (relating to Maintaining Active Authorization as an Advanced Practice Nurse), and §221.16 of this chapter (relating to Provision of Anesthesia Services by Nurse Anesthetists in Outpatient Settings).

(b) Any nurse who violates the rules set forth in this chapter shall be subject to disciplinary action and/or termination of the authorization by the board under Texas Occupations Code, §301.452.

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

Filed with the Office of the Secretary of State, on November 15, 2000.

TRD-200008001
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-6811

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CHAPTER 222. ADVANCED PRACTICE NURSES WITH LIMITED PRESCRIPTIVE AUTHORITY

22 TAC §§222.1-222.7

(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 Board of Nurse Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Board of Nurse Examiners for the State of Texas proposes the repeal of §§222.1-222.7, relating to Advanced Practice Nurses and Limited Prescriptive Authority.

The repeal is the result of the Board's effort to implement the mandate of House Bill 1 and would allow for the adoption of new sections. House Bill 1, §167, Article IX, passed by the 75th Legislative Session required that each rule adopted by an agency be reviewed within four years of the date of its adoption to determine whether the reason for adopting the rule continues to exist. Rules which were adopted prior to September 1, 1997 are required to be reviewed by August 31, 2001.

The new rules are being proposed to replace the repealed rules and are being published simultaneously with this notice.

Katherine Thomas, Executive Director, has determined that for the first five-year period the repeal is effective there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Thomas has determined that the public benefit of enforcing the repeal is to clarify the process and procedures regarding Advanced Practice Nurse regulations and Limited Prescriptive Authority. There will be no effect on small businesses. There will be no anticipated costs to persons required to comply with the repeal as proposed.

Written comments on the proposed repeal may be submitted to Katherine Thomas, Executive Director, Board of Nurse Examiners for the State of Texas, 333 Guadalupe, Suite 3-460, Austin, Texas 78701. Comments will be accepted and considered for 30 days following the publication of this proposal in the *Texas Register.*

The repeal is proposed under the authority of the Texas Occupations Code, §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt and enforce rules consistent with its legislative authority under the Nurse Practice Act including rules relating to registered nurses approved, or seeking approval, as an advanced practice nurse.

The repeal affects the Nursing Practice Act, Texas Occupations Code, §301.152 and §301.157 as they pertain to advanced practice nurses.

§222.1. Definitions.

§222.2. Application for Approval.

§222.3. Renewal of Limited Prescriptive Authority.

§222.4. Functions.

§222.5. Nurse Midwives Administering or Providing Controlled Substances.

§222.6. Nurse Anesthetist Authorization to Select, Obtain, Order, Administer and/or Utilize Drugs, Devices and Anesthesia Techniques in the Provision of Anesthesia and Anesthesia-Related Services.

§222.7. Enforcement.

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

Filed with the Office of the Secretary of State, on November 15, 2000.

TRD-200008002

Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-6811

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CHAPTER 222. ADVANCED PRACTICE NURSES AND LIMITED PRESCRIPTIVE AUTHORITY

22 TAC §§222.1-222.9

The Board of Nurse Examiners for the State of Texas proposes new §§222.1-222.9, relating to Advanced Practice Nurses and Limited Prescriptive Authority.

House Bill 1 (HB 1), §167, Article IX, passed by the 75th Legislative Session required that each rule adopted by an agency be reviewed within four years of the date of its adoption to determine whether the reason for adopting the rule continues to exist. Rules which were adopted prior to September 1, 1997 are required to be reviewed by August 31, 2001. Proposed new §§222.1-222.9 is the result of the Board's effort to implement the mandate of HB 1.

The Board's Advanced Practice Advisory Committee has been working since March 2000 to review the rule and recommend changes where necessary. The committee is comprised of Advanced Practice Nurse Educators, Advanced Practice Nurses in practice, and representatives from Advanced Practice professional organizations, including Texas Nurses Association, Texas Nurse Practitioners, Texas Association of Nurse Anesthetists, Consortium of Texas Certified Nurse Midwives, and Texas Organization of Nurse Executives. Committee members shared information regarding the current rules and how these rules have impacted their practices. They worked to make the rules easier to use and understand. In addition, they tried to insure consistency between the rules, especially where terms have been defined. The Committee finished discussion of Chapter 222 and made recommendations for the Board's consideration. The Committee's recommendations are the basis of the proposed rule changes.

The proposed rules are not intended to make significant substantive changes in the advanced practice rules of the Board. Rather the proposal seeks to clarify the advanced practice rules in order to make them better understood by Advanced Practice Nurses.

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

Ms. Thomas has determined that the public benefit of enforcing the rules is to clarify the process and procedures regarding the Limited Prescriptive Authority. There will be no effect on small businesses. There will be no anticipated costs to persons required to comply with these sections as proposed.

Written comments on the proposed new sections may be submitted to Katherine Thomas, Executive Director, Board of Nurse Examiners for the State of Texas, 333 Guadalupe, Suite 3-460, Austin, Texas 78701. Comments will be accepted and considered for 30 days following the publication of this proposal in the *Texas Register.*

The new rules are proposed under the authority of the Texas Occupations Code, §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt and enforce rules consistent with its legislative authority under the Nurse Practice Act including rules relating to registered nurses approved, or seeking approval, as an advance practice nurse.

The new rules affect the Nursing Practice Act, Texas Occupations Code, §301.152 and §301.157 as they pertain to advanced practice nursing.

§222.1. Definitions.

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

(1) Advanced practice nurse--A registered nurse approved by the board to practice as an advanced practice nurse based on completing an advanced educational program acceptable to the board. The term includes a nurse practitioner, nurse-midwife, nurse anesthetist, and a clinical nurse specialist. The advanced practice nurse is prepared to practice in an expanded role to provide health care to individuals, families, and/or groups in a variety of settings including but not limited to homes, hospitals, institutions, offices, industry, schools, community agencies, public and private clinics, and private practice. The advanced practice nurse acts independently and/or in collaboration with other health care professionals in the delivery of health care services.

(2) Board--The Board of Nurse Examiners for the State of Texas

(3) Carrying out or signing a prescription drug order--Completing a prescription drug order presigned by the delegating physician or signing (writing) a prescription by an advanced practice nurse after that person has been designated to the Board of Medical Examiners by the delegating physician as a person delegated to sign a prescription.

(4) Dangerous drug--A device or a drug that is unsafe for self medication and that is not included in schedules I-V or penalty groups I-IV of chapter 481 Texas Health and Safety Code (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend: "Caution: federal law prohibits dispensing without prescription."

(5) Diagnosis and management course--A course offering both didactic and clinical content in clinical decision-making and aspects of medical diagnosis and medical management of diseases and conditions. Supervised clinical practice must include the opportunity to provide pharmacological and non-pharmacological management of diseases and problems considered within the scope of practice of the advanced practice nurse's specialty and role.

(6) Eligible sites--Sites serving medically underserved populations; a physician's primary practice site; or a facility-based practice site.

(7) Facility-based practice site - A licensed hospital or licensed long term care facility that serves as the practice location for the advanced practice nurse.

(8) Health Manpower Shortage Area--An urban or rural area, population group, or public or nonprofit private medical facility or other facility that the Secretary of the United States Department of Health and Human Services (USDHHS) designates as having a health manpower shortage, as described by 42 USC Section 254e(a)(1) or a successor federal statute or regulation.

(9) Medically Underserved Area (MUA)--

(A) An urban or rural area or population group that the Secretary of the United States Department of Health and Human Services (USDHHS) designates as having a shortage of those services as described by 42 USC Section 300e-1(7) or a successor federal statute or regulation; or

(B) an area defined as medically underserved by rules adopted by the Texas Board of Health (Texas Department of Health) based on demographics specific to this State, geographic factors that affect access to health care, and environmental health factors.

(10) Pharmacotherapeutics course--A course that offers content in pharmacokinetics and pharmacodynamics, pharmacology of current/commonly used medications, and the application of drug therapy to the treatment of disease and/or the promotion of health.

(11) Physician's primary practice site--

(A) the practice location at which the physician spends the majority of the physician's time;

(B) a licensed hospital, a licensed long-term care facility, or a licensed adult care center where both the physician and the APN are authorized to practice;

(C) a clinic operated by or for the benefit of a public school district to provide care to the students of that district and the siblings of those students, if consent to treatment at that clinic is obtained in a manner that complies with Chapter 32, Family Code;

(D) the residence of an established patient; or

(E) another location at which the physician is physically present with the advanced practice nurse.

(12) Protocols or other written authorization--Written authorization to provide medical aspects of patient care which are agreed upon and signed by the APN and the physician, reviewed and signed at least annually, and maintained in the practice setting of the APN. Protocols or other written authorization shall be defined to promote the exercise of professional judgment by the APN commensurate with his/her education and experience. Such protocols or other written authorization need not describe the exact steps that the APN must take with respect to each specific condition, disease, or symptom and may state types or categories of drugs which may be prescribed rather than just list specific drugs.

(13) Shall and must--Mandatory requirements.

(14) Should--A recommendation

(15) Site serving a medically underserved population--

(A) a site located in a medically underserved area;

(B) a site located in a health manpower shortage area;

(C) a clinic designated as a rural health clinic under 42 USC 1395x(aa);

(D) a public health clinic or a family planning clinic under contract with the Texas Department of Human Services or the Texas Department of Health;

(E) a site located in an area in which the Texas department of Health determines there is an insufficient number of physicians providing services to eligible clients of federal, state, or locally funded health care programs; or

(F) a site that the Texas Department of Health determines serves a disproportionate number of clients eligible to participate in federal, state, or locally funded health care programs

§222.2. Approval for Limited Prescriptive Authority.

(a) Credentials: To be approved by the board to carry out or sign prescription drug orders and issued a prescription authorization number, a Registered Nurse (RN) shall:

(1) have permanent or provisional authorization by the board to practice as an advanced practice nurse. RNs with Interim Authorization to practice as advanced practice nurses are not eligible for a prescription authorization number;

(2) file a complete application for Limited Prescriptive Authority and submit such evidence as required by the board to verify the following educational qualifications

(A) To be eligible for Limited Prescriptive Authority, advanced practice nurses must have successfully completed courses in pharmacotherapeutics, pathophysiology, and advanced assessment, diagnosis and management of problems within the clinical specialty.

(i) Nurse Practitioners, Nurse-Midwives and Nurse Anesthetists will be considered to have met the course requirements of this section on the basis of courses completed in the advanced educational program.

(ii) Clinical Nurse Specialists shall submit documentation of successful completion of separate courses in the content areas described in subsection (b) of this section. These courses shall be academic courses from a regionally accredited institution with a minimum of 45 clock hours per course.

(iii) The board, by policy, may determine that certain specialties of Clinical Nurse Specialists meet one or more of the course requirements on the basis of the advanced educational program.

(B) Clinical Nurse Specialists who have been approved by the board as advanced practice nurses by petition on the basis of completion of a non-nursing master's degree shall not be eligible for prescriptive authority.

(b) Sites: Prescribing privileges are limited to eligible sites to include sites serving certain medically underserved populations, physician's primary practice sites, and facility-based practice sites.

§222.3. Renewal of Limited Prescriptive Authority.

(a) The advanced practice nurse shall renew the privilege to carry out or sign prescription drug orders in conjunction with the RN license renewal application.

(b) The advanced practice nurse seeking to maintain prescriptive authority shall attest, on forms provided by the board, to completing at least five contact hours of continuing education in pharmacotherapeutics within the preceding biennium.

(c) The continuing education requirement in subsection (b) of this section, shall be in addition to continuing education required under Chapter 216 of this title (relating to Continuing Education).

§222.4. Minimum Standards for Carrying Out or Signing Prescriptions.

(a) General Provisions: The advanced practice nurse with a valid prescription authorization number:

(1) shall carry out or sign prescription drug orders for only those drugs that are:

(A) classified as dangerous drugs;

(B) authorized by Protocols or other written authorization for medical aspects of patient care; and

(C) prescribed for patient populations within the accepted scope of professional practice for the advanced practice nurse's specialty area.

(2) shall not authorize or issue prescriptions for controlled substances; and

(3) shall comply with the requirements for adequate physician supervision published in the rules of the Board of Medical Examiners relating to Delegation of the Carrying Out or Signing of Prescription Drug Orders to Physician Assistants and Advanced Practice Nurses as well as other applicable laws,

(b) Protocols or other written authorization shall be defined in a manner that promotes the exercise of professional judgement by the advanced practice nurse commensurate with the education and experience of that person.

(1) A protocol or other written authorization:

(A) is not required to describe the exact steps that the advanced practice nurse must take with respect to each specific condition, disease, or symptom; and

(B) may state types or categories of medications that may be prescribed or contain the types or categories of medications that may not be prescribed.

(2) Protocols or other written authorization:

(A) shall be written, agreed upon and signed by the advanced practice nurse and the physician;

(B) reviewed and signed at least annually; and

(C) maintained in the practice setting of the advanced practice nurse.

(c) Prescription Information: The format and essential elements of the prescription shall comply with the requirements of the Texas Board of Pharmacy. The following information must be provided on each prescription:

(1) the patient's name and address;

(2) the name, strength, and quantity of the dangerous drug to be dispensed;

(3) directions to the patient regarding taking of the drug and the dosage;

(4) the intended use of the drug, if appropriate;

(5) the name, address, and telephone number of the delegating physician;

(6) address and telephone number of the site at which the prescription drug order was carried out or signed;

(7) the date of issuance;

(8) the number of refills permitted; and

(9) the name, prescription authorization number, and original signature of the advanced practice nurse signing or co-signing the prescription drug order.

(A) For written prescriptions, there must be two signature lines of equal prominence, side by side, and under either signature line shall be printed clearly the words "product selection permitted" and under the other signature line shall be printed clearly. "dispense as written."

(B) An appropriate signature on one of the two signature lines shall convey instructions to the pharmacist regarding authority to dispense a generically equivalent drug if available.

§222.5. Prescribing at Sites Serving Certain Medically Underserved Populations.

When carrying out or signing prescription drug orders at a site serving a medically underserved population, the advanced practice nurse shall:

(1) maintain Protocols or other written authorization, reviewing the authorizing documents with the physician and updating signatures of agreement at least annually;

(2) have access to the delegating physician or alternate delegating physician for consultation, assistance with medical emergencies, or patient referral;

(3) provide a daily status report to the physician on any problems or complications encountered that are not covered by protocol; and

(4) shall be available during on-site visits by the physician which shall occur at least every 10 business days that the advanced practice nurse is on site providing care.

§222.6 Prescribing at Physicians' Primary Practice Sites.

When carrying out or signing prescription drug orders at a physician's primary practice site, the advanced practice nurse shall:

(1) maintain Protocols or other written authorization at the practice site, reviewing the authorizing documents with the physician and updating signatures of agreement at least annually;

(2) sign or co-sign prescription drug orders only for those patients with whom the physician has established or will establish a physician-patient relationship although the physician is not required to see the patient within a specified time period.

§222.7. Prescribing at Facility-based Practice Sites.

When carrying out or signing prescription drug orders at a facility-based practice site, the advanced practice nurse shall:

(1) maintain Protocols or other written authorization developed in accordance with facility medical staff policies and reviewing the authorizing documents with the appropriate medical staff at least annually;

(2) sign or co-sign prescription drug orders in the facility in which the delegating physician is the medical director, the chief of medical staff, the chair of the credentialing committee, or a department chair; or a physician who consents to the request of the medical director or chief of the medical staff to delegate; and

(3) sign or co-sign prescription drug orders for the care or treatment of only those patients for whom physicians have given their prior consent.

§222.8. Conditions for Obtaining and Distributing Drug Samples.

The advanced practice nurse with a valid prescription authorization number may request, receive, possess and distribute prescription drug samples provided:

(1) all requirements for the advanced practice nurse to sign prescription drug orders are met;

(2) Protocols or other physician orders authorize the advanced practice nurse to sign the prescription drug orders;

(3) the samples are dangerous drugs only; and

(4) a record of the sample is maintained and samples are labeled as specified in the Dangerous Drug Act (Health and Safety Code, Chapter 483).

§222.9. Enforcement.

(a) Any nurse who violates these rules shall be subject to removal of the authority to prescribe under this rule and disciplinary action by the board under Texas Occupations Code §301.452.

(b) The practice of the advanced practice nurse approved by the board to carry out or sign prescription drug orders is subject to monitoring by the board on a periodic 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 November 15, 2000.

TRD-200008003
Katherine A. Thomas, MN, RN,
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-6811

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.5

The Texas Board of Physical Therapy Examiners proposes an amendment to §329.5, concerning Licensing procedures for foreign-trained applicants. The amendment will exempt applicants who graduated from a physical therapy program outside of the United States from the evaluation checklist requirements, if the program is accredited by the Commission on Accreditation of Physical Therapy Education (CAPTE).

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 increased administrative efficiency. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The amendment is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by this amendment.

§329.5. Licensing Procedures for Foreign-trained Applicants.

(a) - (g) (No change.)

(h) Guidelines for board-approved education credentialing entities.

(1) - (9) (No change.)

(10) If the degree received is equivalent to a four-year Bachelor of Science degree in Physical Therapy as awarded by regionally accredited colleges and universities in the United States, the credentialing entity must use the approved evaluation checklist when considering an applicant's credentials. Deficiencies must be identified and must show the subjects and credit hours necessary to satisfy the requirements of the evaluation checklist. If the degree received is from a CAPTE-accredited program, it is considered equivalent to a U.S. Bachelor of Science degree in Physical Therapy, and the applicant is exempt from meeting the requirements of the evaluation checklist.

(11) - (12) (No change.)

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008020
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-6900

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CHAPTER 341. LICENSE RENEWAL

The Texas Board of Physical Therapy Examiners proposes the repeal of §341.1, concerning Requirements for Renewal, §341.6, concerning Restoration of License, §341.7, concerning Notification of Impending License Expiration, §341.8, concerning Inactive Status, and §341.10, concerning Defaulters on Texas Guaranteed Student Loans. The repealed sections are being replaced by new sections §341.1, Requirements for Renewal, §341.2, Continuing Education Requirements, §341.6, License Restoration, §341.7, Restrictions on License Renewal, and §341.8, Inactive Status. The repeal of these sections and the adoption of the replacement sections will restructure renewal procedure rules, and update the descriptions of the requirements for the inactivation, renewal or restoration of a license to reflect current terminology and changes to the procedures. The changes will also move the description of continuing education requirements and restrictions to renewal to their own clearly identifiable sections. They also make administrative procedures for PT and OT application and licensure as uniform as possible to achieve greater administrative efficiency.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Mr. Maline 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 easier comprehension of and compliance with the renewal process, and greater administrative efficiency. There will be no effect on small businesses. Licensees who place their licenses on inactive status will pay a fee equal to one-half of the renewal fee every two years.

Comments on the proposed changes may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

22 TAC §§341.1, 341.6 - 341.8, 341.10

(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 Board of Physical Therapy Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by these repealed sections.

§341.1. Requirements for Renewal.

§341.6. Restoration of License.

§341.7. Notification of Impending License Expiration.

§341.8. Inactive Status.

§341.10. Defaulters on Texas Guaranteed Student Loans.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008018
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-6900

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22 TAC §§341.1, 341.2, 341.6 - 341.8

The new sections are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by these new sections.

§341.1. Requirements for Renewal.

(a) Biennial renewal. Licensees are required to renew their licenses every two years by the end of the month in which they were originally licensed. A licensee may not provide physical therapy services without a current license or renewal certificate in hand. If a license expires after all required items are submitted, but before the licensee receives the renewal certificate, the licensee may not provide physical therapy services.

(b) General requirements. The renewal application is not complete until all required items are received by the board. The components required for license renewal are:

(1) a signed renewal application form, documenting completion of board-approved continuing education (CE), as described in §341.2 of this title, concerning Continuing Education;

(2) the renewal fee, and any late fees which may be due; and

(3) a passing score on the jurisprudence examination.

(c) Notification of license expiration. The board will mail an application to each licensee at least 30 days prior to the license expiration date. The licensee bears the responsibility for ensuring that the license is renewed. Licensees should contact the board if they do not receive a renewal application 30 days prior to the expiration date.

(d) Late renewal. A renewal application is late if all required items are not postmarked prior to the expiration date of the license. Licensees who do not submit all required items prior to the expiration date are subject to late fees as described.

(1) If the license has been expired for 90 days or less, the late fee is one-half of the examination fee for the license.

(2) If the license has been expired for more than 90 days but less than one year, the late fee is equal to the examination fee for the license.

(3) If the license has been expired for one year or longer, the person may not renew the license. To obtain a new license, the applicant must take and pass the national examination again and comply with the requirements and procedures for obtaining an original license set by §329.1 of this title (relating to General Licensure Procedure).

§341.2. Continuing Education Requirements.

(a) All continuing education (CE) submitted to satisfy renewal requirements must be board-approved, as established in §341.3 of this title, concerning Qualifying Continuing Education.

(b) Physical therapists must complete a total of 30 hours of CE; Physical therapist assistants must complete a total of 20 hours of CE for each biennial renewal.

(c) CE taken to fulfill renewal requirements must be taken within the 24 months prior to the license expiration date.

(d) Effective January 1, 2001, all licensees must take two hours of board-approved courses in ethics and professional responsibility as part of their total CE requirement.

(e) The executive council will conduct an audit of a random sample of licensees at least quarterly to determine compliance with CE requirements. Failure to maintain accurate documentation, or failure to respond to a request to submit documentation for an audit within 30 days of the date on the request, may result in disciplinary action by the board. The board or its committees may request proof of CE claimed for renewal purposes at any time from any licensee.

(f) The licensee must retain original course completion documents or certificates for four years. The documentation for a course must include the name and license number of the licensee, the title, sponsor, date and location of the course, the number of CE units awarded, the signature of an authorized signer, and the course approval number.

§341.6. License Restoration.

(a) Eligibility. A person whose license has been expired for one year or longer may restore the license without reexamination if she or he holds a current license in another state, and has actively practiced in another state, for the two years preceding the application for restoration.

(b) Duration. When a license is restored, the expiration date will be calculated using the original month of issuance. The restored license will be valid for no less than one year, and no more than two years, from the date of issuance.

(c) Requirements. The components required for restoration of a license are:

(1) a notarized restoration application;

(2) a passing score on the jurisprudence examination;

(3) a fee equal to the cost of the examination fee for licensure;

(4) Verification of Licensure from the current licensed state for the two years preceding the application; and

(5) a history of employment for the two years preceding the application.

§341.7. Restrictions on License Renewal and Restoration.

(a) The board will not renew a license if a licensee has defaulted on a loan from the Texas Guaranteed Student Loan Corporation (TGSLC). Upon notice from TGSLC that a repayment agreement has been established, the license shall be renewed.

(b) The board will not renew a license if a licensee has defaulted on court or attorney general's notice of child support. Upon receipt of notification that a repayment agreement has been established, the license shall be renewed.

§341.8. Inactive Status.

(a) Inactive status indicates the voluntary termination of the right or privilege to practice physical therapy in Texas. The board may allow a licensee who is not actively engaged in the practice of physical therapy in Texas to inactivate the license instead of renewing it at time of renewal. A licensee may remain on inactive status for no more than six consecutive years.

(b) Requirements for initiation of inactive status. The components required to put a license on inactive status are:

(1) a signed renewal application form, documenting completion of board-approved continuing education (CE), as described in §341.2 of this title, concerning Continuing Education; and

(2) the inactive fee, and any late fees which may be due.

(c) Requirements for renewal of inactive status. An inactive licensee must renew the inactive status every two years. The components required to maintain the inactive status are:

(1) a signed renewal application form, documenting completion of board-approved continuing education (CE), as described in §341.2 of this title, concerning Continuing Education; and

(2) the inactive renewal fee, and any late fees which may be due.

(d) Requirements for reinstatement of active status. A licensee on inactive status may request a return to active status at any time. After the licensee has submitted a complete application for reinstatement, the board will send a renewal certificate for the remainder of the current renewal period to the licensee.

(1) The components required to return to active status are:

(A) a signed renewal application form, documenting completion of board-approved continuing education (CE), as described in §341.2 of this title, concerning Continuing Education;

(B) the renewal fee, and any late fees which may be due; and

(C) a passing score on the jurisprudence exam.

(2) The board will allow the licensee to substitute one of the following actions for the continuing education requirements:

(A) re-take and pass the national licensure exam;

(B) attend a university review course pre-approved by the board; or

(C) complete an internship (equal to 150 hours of continuing education) pre-approved by the board.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008019
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-6900

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 363. EXAMINATIONS

22 TAC §363.2

The Texas State Board of Plumbing Examiners proposes amendments to §363.2 which generally state the requirements necessary for an individual to meet when applying for examination by the Board. The proposed rule amendment is part of the Board's intent to comply with House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167, and the Board's rule review plan, which requires the Board to complete a review of §363 of the Board Rules by August 31, 2001.

The amendments to §363.2 delete superfluous language in §363.2 that is also contained elsewhere in the Board Rules and add language for simplicity and clarification purposes.

Robert L. Maxwell, Administrator of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on local government as a result of the rule amendment as proposed.

Mr. Maxwell has determined that each year of the first five years the rule is in effect the public benefit will be a clear understanding by applicants for examination by the Board that they must meet all examination requirements and pay any required fees prior to examination. As a result of the rule amendment, there will be no economic cost to the persons that will be require to comply with the rule.

Comments on the proposed rule change may be submitted within thirty (30) days of publication of this proposed rule amendment in the *Texas Register,* to Robert L. Maxwell, Administrator, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas, 78765-4200.

The amendments to §363.2 are proposed under and affect Texas Revised Civil Statutes Annotated Article 6243-101("Act"), Section 5(a), (Vernon Supp. 2000), the rule it amends and House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 together with the Board's rule review plan. Section 5(a) of the Act authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act and to determine the fitness and qualifications of those applying to the Board for examination. House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 and the Board's rule review plan require the Board to complete a review of Chapter 363 of the Board Rules by August 31, 2001.

No other statute, article, or code is affected by this proposed rule change. The proposed changes have been reviewed by legal counsel and found to be within the state agency's authority to adopt.

§363.2. Application.

Prior to the examination, each applicant shall meet all examination requirements and pay any required fees. [~~furnish to the Board a written application to take the examination, together with any appropriate fees. The application remains in effect for one year from the date of filing or one year from the date of the last examination failure, whichever occurs later. In addition, aliens shall furnish with the application proof of lawful permanent residency in the United States.~~]

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008033
Robert L. Maxwell
Administrator
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 458-2145 ext. 222

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22 TAC §363.4

The Texas State Board of Plumbing Examiners proposes amendments to §363.4 which state the requirements for reporting for scheduled examinations. The proposed rule amendment is part of the Board's intent to comply with House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167, and the Board's rule review plan, which requires the Board to complete a review of §363 of the Board Rules by August 31, 2001.

The amendments to §363.4 clarify the current requirements that examination applicants must meet in order to reschedule an examination and to avoid forfeiture of fees paid. The amendments to §363.4 delete superfluous language and condense and clarify the information contained in §363.4.

Robert L. Maxwell, Administrator of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on local government as a result of the rule amendment as proposed.

Mr. Maxwell has determined that each year of the first five years the rule is in effect the public benefit will be that applicants for examination will have a clear understanding of how to reschedule an examination when necessary and avoid forfeiture of any fees. As a result of the rule amendment, there will be no economic cost to the persons that will be required to comply with the rule.

Comments on the proposed rule change may be submitted within thirty (30) days of publication of this proposed rule amendment in the *Texas Register,* to Robert L. Maxwell, Administrator, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas, 78765-4200.

The amendments to §363.4 are proposed under and affect Texas Revised Civil Statutes Annotated Article 6243-101("Act"), §5(a), (Vernon Supp. 2000), the rule it amends and House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 together with the Board's rule review plan. Section 5(a) of the Act authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act and to determine the fitness and qualifications of those applying to the Board for examination. House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 and the Board's rule review plan require the Board to complete a review of Chapter 363 of the Board Rules by August 31, 2001.

No other statute, article, or code is affected by this proposed rule change. The proposed changes have been reviewed by legal counsel and found to be within the state agency's authority to adopt.

§363.4. Reporting for Examination.

(a) Each Applicant[~~applicant~~] must report promptly at the place of the examination.

(b) If an Applicant[~~applicant~~] is scheduled for an examination and cannot appear, the applicant must notify the Texas State Board of Plumbing Examiners in writing, postmarked no later than ten (10) [~~10~~] business days before the scheduled [~~original~~] examination date. An Applicant who fails to appear or does not give the required ten (10) business days notice shall forfeit the examination fee and must re-apply with a new application and fee.

(c) An Applicant[~~applicant~~] is allowed one emergency reschedule without having to re-apply with a new application and fee. An Applicant must request the emergency reschedule in writing with an explanation of the emergency, postmarked no later than 5 (five) business days after the examination date. Business or work schedule conflicts are not considered emergencies. If the Applicant does not reschedule the examination within the 5 (five) business days after the examination date, the Applicant must re-apply with a new application and fee.

[~~(d) An applicant must request the emergency reschedule in writing with an explanation of the emergency, postmarked no later than 5 (five) business days after the examination date. Business or work schedule conflicts are not considered emergencies.~~]

[~~(e) An applicant who fails to appear or does not give the required 10 (ten) business days notice or does not have an excused emergency, shall forfeit the examination fee and must re-apply with a new application and fee.~~]

[~~(f) If the applicant has an excused emergency, the applicant has 5 (five) business days after the examination date to notify the Board and reschedule the examination. If the applicant does not reschedule the examination within the 5 (five) business days after the examination date, the applicant must re-apply with a new application and fee.~~]

(d) [~~(g)~~] The following are considered excused emergencies:

(1) Death in family;

(2) Illness or hospitalization of Applicant [~~applicant~~] or Applicant's [~~applicants~~] immediate family;

(3) Automobile accident on day of the examination;

(4) Other reasons approved by the Chief Examiner.

(e) [~~(h)~~] Emergencies will be subject to verification by the Chief Examiner.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008034
Robert L. Maxwell
Administrator
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 458-2145 ext.222

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22 TAC §363.5

The Texas State Board of Plumbing Examiners proposes amendments to §363.5 which generally state the description of examinations and how applicants for examination are given detailed descriptions of each examination by the Board. The proposed rule amendment is part of the Board's intent to comply with House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167, and the Board's rule review plan, which requires the Board to complete a review of §363 of the Board Rules by August 31, 2001.

The amendments to §363.5 are grammatical in content and also delete obsolete language that states that the Board may sell study guides to applicants for examination. Board examinations are no longer based on the referenced study guide.

Robert L. Maxwell, Administrator of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on local government as a result of the rule amendment as proposed.

Mr. Maxwell has determined that each year of the first five years the rule is in effect the public benefit will be that applicants for examination will have a clear understanding that the Board will furnish them with a description of the examination. The description will be contained in a document titled "General Examination Data". As a result of the rule amendment, there will be no economic cost to the persons that will be required to comply with the rule.

Comments on the proposed rule change may be submitted within thirty (30) days of publication of this proposed rule amendment in the *Texas Register,* to Robert L. Maxwell, Administrator, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas, 78765-4200.

The amendments to §363.5 are proposed under and affect Texas Revised Civil Statutes Annotated Article 6243-101("Act"), §5(a), (Vernon Supp. 2000), the rule it amends and House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, Section 167 together with the Board's rule review plan. Section 5(a) of the Act authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act and to determine the fitness and qualifications of those applying to the Board for examination. House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 and the Board's rule review plan require the Board to complete a review of Chapter 363 of the Board Rules by August 31, 2001.

No other statute, article, or code is affected by this proposed rule change. The proposed changes have been reviewed by legal counsel and found to be within the state agency's authority to adopt.

§363.5. Description of Examination.
[~~The Board shall conduct~~] For[~~for~~] each License[~~license~~] and Endorsement[~~endorsement~~] category , the Board shall conduct a uniform examination that shall include written and practical applications as deemed appropriate by the Board. The Board shall furnish applicants with information titled "General Examination Data" explaining the scope of the examination. [~~The Board may also sell applicants guides to study for the examination.~~]

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008035
Robert L. Maxwell
Administrator
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 458-2145 ext. 222

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22 TAC §363.8

The Texas State Board of Plumbing Examiners proposes amendments to §363.8 which states that the Board shall notify examination applicants of examination results and, upon request, shall provide an analysis of examinations. The proposed rule amendment is part of the Board's intent to comply with House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167, and the Board's rule review plan, which requires the Board to complete a review of §363 of the Board Rules by August 31, 2001.

The amendments to §363.8 are grammatical in content and also delete unnecessary language. The amendments to §363.8 do not change the requirements of the rule.

Robert L. Maxwell, Administrator of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on local government as a result of the rule amendment as proposed.

Mr. Maxwell has determined that each year of the first five years the rule is in effect the public benefit will be that applicants for examination will have a clear understanding that the Board shall furnish examination results within 30 days after the examination and shall, upon request by an applicant, provide an analysis of the examination. As a result of the rule amendment, there will be no economic cost to the persons that will be required to comply with the rule.

Comments on the proposed rule change may be submitted within thirty (30) days of publication of this proposed rule amendment

in the *Texas Register,* to Robert L. Maxwell, Administrator, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas, 78765-4200.

The amendments to §363.8 are proposed under and affect Texas Revised Civil Statutes Annotated Article 6243-101("Act"), Section 5(a), (Vernon Supp. 2000), the rule it amends and House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 together with the Board's rule review plan. Section 5(a) of the Act authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act and to determine the fitness and qualifications of those applying to the Board for examination. House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 and the Board's rule review plan require the Board to complete a review of Chapter 363 of the Board Rules by August 31, 2001.

No other statute, article, or code is affected by this proposed rule change. The proposed changes have been reviewed by legal counsel and found to be within the state agency's authority to adopt.

§363.8. Notification.

The Board shall notify applicants of their examination results within 30 days after the examination [~~test~~] is administered, and, if requested within two weeks of notification, shall provide an [~~a failed~~] applicant with an analysis of the applicant's examination performance. [~~An applicant who passes may request an analysis of performance at any time.~~]

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

Filed with the Office of the Secretary of State, on November 17, 2000.

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Robert L. Maxwell
Administrator
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 458-2145 ext. 222

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22 TAC §363.9

The Texas State Board of Plumbing Examiners proposes amendments to §363.9 which generally state the requirements for re-taking a failed examination. The proposed rule amendment is part of the Board's intent to comply with House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167, and the Board's rule review plan, which requires the Board to complete a review of §363 of the Board Rules by August 31, 2001.

The amendments to §363.9 are grammatical in content and also delete unnecessary language. The rule amendments do not change the requirements of the reexamination rule, which allow any applicant who fails only one part of an examination to retake only the one failed part.

Robert L. Maxwell, Administrator of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on local government as a result of the rule amendment as proposed.

Mr. Maxwell has determined that each year of the first five years the rule is in effect the public benefit will be that applicants for examination will have a clear understanding of the rule. As a result of the rule amendment, there will be no economic cost to the persons that will be required to comply with the rule.

Comments on the proposed rule change may be submitted within thirty (30) days of publication of this proposed rule amendment in the *Texas Register,* to Robert L. Maxwell, Administrator, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, TX, 78765-4200.

The amendments to §363.9 are proposed under and affect Texas Revised Civil Statutes Annotated Article 6243-101("Act"), Section 5(a), (Vernon Supp. 2000), the rule it amends and House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 together with the Board's rule review plan. Section 5(a) of the Act authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act and to determine the fitness and qualifications of those applying to the Board for examination. House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 and the Board's rule review plan require the Board to complete a review of Chapter 363 of the Board Rules by August 31, 2001.

No other statute, article, or code is affected by this proposed rule change. The proposed changes have been reviewed by legal counsel and found to be within the state agency's authority to adopt.

§363.9. Reexamination.

(a) Any applicant that fails only one part of a multiple part examination and passes all other parts of the same examination may [~~schedule to~~] retake the one part that was failed, without having to retake the entire examination , [~~(~~]subject to the following conditions listed in paragraphs (1)-(4) of this subsection[~~)~~] :

(1) A passing score is a score of at least 70 points,

(2) A failing score is a score of 69.9 points or less,

(3) A time limit of three hours is allotted for reexamination of the one failed part,

(4) The full examination fee must be submitted with the application for reexamination.

(b) Any applicant that fails more than one part of a multiple part examination must schedule to retake the entire examination.

(c) In cases of examination failure (all or part), the Board shall require the following before the applicant retakes a regularly scheduled examination:

(1) First failure: a 30-day training period,

(2) Second failure: a 60-day training period,

(3) Third and subsequent failures: a 90-day training period.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008037

Robert L. Maxwell
Administrator
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 458-2145 ext. 222

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22 TAC §363.11

The Texas State Board of Plumbing Examiners proposes amendments to§363.11 which state the requirements for license endorsement training programs and explain the process of the programs. The proposed rule amendment is part of the Board's intent to comply with House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, Section 167, and the Board's rule review plan, which requires the Board to complete a review of §363 of the Board Rules by August 31, 2001.

The amendments to §363.11 are grammatical in content and also delete unnecessary language. The proposed amendments also delete any reference to the Central Education Agency, since its removal is consistent with prior rule changes regarding Board approved instructors. The rule amendments do not change the manner in which the programs currently function.

Robert L. Maxwell, Administrator of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on local government as a result of the rule amendment as proposed.

Mr. Maxwell has determined that each year of the first five years the rule is in effect the public benefit will be that the public will have a clear understanding of the rule and the Board will maintain its ability to ensure that the quality of the training programs is maintained. As a result of the rule amendment, there will be no economic cost to the persons that will be required to comply with the rule.

Comments on the proposed rule change may be submitted within thirty (30) days of publication of this proposed rule amendment in the *Texas Register,* to Robert L. Maxwell, Administrator, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, TX, 78765-4200.

The amendments to §363.11 are proposed under and affect Texas Revised Civil Statutes Annotated Article 6243-101("Act"), §5(a), §8C and §11A, (Vernon Supp. 2000), the rule it amends and House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 together with the Board's rule review plan. Section 5(a) of the Act authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act and to determine the fitness and qualifications of those applying to the Board for examination. Section 8C authorizes the Board to issue a Medical Gas Piping Installation Endorsement. Section 11A authorizes the Board to issue a Water Supply Protection Specialist Endorsement. House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, Section 167 and the Board's rule review plan require the Board to complete a review of Chapter 363 of the Board Rules by August 31, 2001.

No other statute, article, or code is affected by this proposed rule change. The proposed changes have been reviewed by legal counsel and found to be within the state agency's authority to adopt.

§363.11. Endorsement Training Programs.

(a) Medical Gas[~~gas~~] Piping[~~piping~~] Installation[~~installation~~] Endorsement training programs

(1) Any person wishing to offer a training program in medical gas piping installation to the public must meet criteria as prescribed by the Board , including the standards contained in the latest edition of [~~and included in~~] the National Fire Protection Association (NFPA) 99C Gas and Vacuum Systems [~~Latest Edition~~]. Instructors shall be employed by a program that meets certification requirements of the Board[~~Central Education Agency or is exempted from the Central Education Agency certification requirements under Chapter 32, Texas Education Code, Section 32.12(a), (Proprietary Schools and Veterans Education)~~]. Such persons shall provide [~~to the administrator~~] lesson plans and instructor credentials for Board approval. Approved providers of medical gas training shall furnish a program consisting of a classroom presentation of course material, a test of the enrollee's comprehension of the matter, a shop demonstration of the proper brazing procedures by the instructor, and the enrollee's final brazing evidence to the instructor of an accepted vertical and horizontal practice coupon. A minimum of twenty four (24) hours shall be assigned for [~~to~~] the classroom presentation and testing. [~~;~~] In addition, a minimum of four (4) hours shall be assigned to the brazing demonstrations. The student enrolled in medical gas training will have completed a minimum of eight hours of practice brazing coupons in an equipped shop. These coupons will be presented to the instructor for grading. The aforementioned hours represent the minimum requirements only; additional time may be included in each segment of the program.

(2) Training programs in Medical[~~medical~~] Gas[~~gas~~] Piping[~~piping~~] Installation[~~installation~~] shall be reviewed at least annually by the Board to ensure that programs have been provided equitably across the State[~~state~~] of Texas.

(3) Periodically, the Board shall review training programs in medical gas piping installation for quality in content and instruction in accordance with the standards contained in the latest edition of the National Fire Protection Association (NFPA) 99C Gas and Vacuum Systems. [~~Latest Edition. The Board shall also respond to complaints regarding approved programs.~~]

(4) Instructors in medical gas piping installation will be [~~required to successfully complete a Board approved program and be an active~~] a Licensee[~~licensee~~] of the Board with a Medical Gas Piping Installation Endorsement. Instructors will be required to [~~pass the Board examination as well as~~] successfully complete a Board approved program of 160 [~~clock~~] hours which meets the following generic criteria: [~~The Board will allow credit for approved courses.~~]

(A) 40 hours to provide the instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs.

(B) 40 hours to provide the instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs.

(C) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community.

(D) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media.

(5) [~~(E)~~] To maintain his/her status as an approved instructor of medical gas piping installation training, the instructor shall undergo one of the aforementioned training programs every twelve (12)

months such that the entire training (160 hours) is completed[~~complete~~] within four years.

(6) [~~(5)~~] Each approved provider must notify the Board thirty (30) days before conducting classes; the notice shall contain the date(s), time(s) and place(s) where the classes will occur.

(7) [~~(6)~~] Each approved provider will perform self-monitoring and reporting as required by the Board.

(b) Water Supply [~~supply~~] Protection[~~protection~~] Specialist Endorsement training programs

(1) Any person wishing to offer a Board approved training program in Water[~~water~~] Supply[~~supply~~] Protection[~~protection~~] Specialist Endorsement to the public must meet criteria as prescribed by the Board. Instructors shall be employed by a program that meets certification requirements of the Board. [~~Central Education Agency or is exempted from the Central Education Agency certification requirements under Chapter 32, Section 32.12(a)(5) Texas Education Code (Proprietary Schools and Veterans Education).~~] Such persons shall provide [~~to the administrator~~] lesson plans and instructor qualifications for Board approval. The Board shall provide a course outline and the required minimum hours.

(2) Periodically, the Board shall review Board approved training programs in Water[~~water~~] Supply[~~supply~~] Protection[~~protection~~] Specialist Endorsement for quality in content and instruction and ensure that programs have been provided equitably across the State[~~state~~] of Texas. [~~The Board shall also respond to complaints regarding approved programs.~~]

(3) Instructors in water supply protection will be required to pass the Board examination in water supply protection and be a [~~an active~~] Licensee[~~licensee~~] of the Board with a Water Supply Protection Specialist Endorsement. Instructors will be required to successfully complete a Board approved program of 160 [~~clock~~] hours which meets the following generic criteria. [~~The Board will allow credit for approved courses.~~]

(A) 40 hours to provide the instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs.

(B) 40 hours to provide the instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs.

(C) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community.

(D) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media.

(4) [~~(E)~~] To maintain his/her status as an approved instructor of Water[~~water~~] Supply[~~supply~~] Protection[~~protection~~] Specialist Endorsement training, the instructor shall undergo one of the aforementioned training programs every twelve (12) months such that the entire training (160 hours) is completed [~~complete~~] within four years.

(5) [~~(4)~~] Each approved provider must notify the Board thirty (30) days before conducting classes; the notice shall contain the date(s), time(s) and place(s) where the classes will occur.

(6) [~~(5)~~] Each approved provider will perform self-monitoring and reporting as required by the Board.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008038
Robert L. Maxwell
Administrator
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 458-2145 ext. 222

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PART 18. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

CHAPTER 375. RULES GOVERNING CONDUCT

22 TAC §375.1

The Texas State Board of Podiatric Medical Examiners proposes amendments to §375.1, concerning Definitions. The amendments are being proposed to enhance the existing definition and to define the term *foot.*

Allen M. Hymans, Executive Director, has determined that for each year of the first five years the section is in effect there will be no fiscal implications as a result of enforcing or administering the section.

Mr. Hymans has also determined that for each year for the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be a better understanding of the rule.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer I, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216. Deadline for receiving written comments in this office is 5:00 p.m. on December 27, 2000.

The amendments are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry and §202.001(4) regarding the definition of podiatry.

The proposed amendments implement and affect Texas Occupations Code §202.151.

§375.1. Definitions.

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

(1) Board--The Texas State Board of Podiatric Medical Examiners.

(2) Foot--The foot is the tibia, fibula in articulation with the talus, and all bones to the toes, inclusive of all soft tissues (muscles,

nerves, vascular structures, tendons, ligaments and any other anatomical structures) that insert into the tibia, fibula in articulation with the talus and all bones to the toes.

(3) [~~(2)~~] Medical Records--Any records, reports, notes, charts, x-rays, or statements pertaining to the history, diagnosis, evaluation, treatment or prognosis of the patient including copies of medical records of other health care practitioners contained in the records of the podiatric physician to whom a request for release of records has been made.

(4) [~~(3)~~] Office--In the singular, includes the plural.

(5) [~~(4)~~] Public communication--Any written, printed, visual, or oral statement or other communication made or distributed, or intended for distribution, to a member of the general public or the general public at large.

(6) [~~(5)~~] Solicitation--A private communication to a person concerning the performance of a podiatric service for such person.

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

Filed with the Office of the Secretary of State, on November 14, 2000.

TRD-200007952
Janie Alonzo
Staff Services Officer I
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-7000

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CHAPTER 378. CONTINUING EDUCATION

22 TAC §378.1

The Texas State Board of Podiatric Medical Examiners proposes amendments to §378.1, concerning Continuing Education Required. The amendments are being proposed to change the continuing education regimen including the verification process reporting period, the materials and activities that will be accepted, and the level of credit to be given for specific activities and assessment of penalties.

Allen M. Hymans, Executive Director, has determined that for each year of the first five years the section is in effect there will be no fiscal implications as a result of enforcing or administering the section.

Mr. Hymans has also determined that for each year for the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be more efficient provision of services to the agency's licensees and the public.

Comments on or about the proposal may be submitted to Janie Alonzo, Staff Services Officer I, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216.

The amendments are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry. This rule is also authorized by and affects Texas Occupations Code §202.305 which directs the board to establish continuing education requirements for licensees.

The proposed amendments implement Texas Occupations Code, §202.151.

§378.1. Continuing Education Required.

(a) Each person licensed to practice podiatric medicine in the State of Texas is required to have 30 hours of continuing education every two years for the renewal of their license to practice podiatric medicine. Two hours of the required 30 hours of annual continuing education (CME) may be a course, class, seminar, or workshop in Ethics. It shall be the responsibility of the podiatric physician to ensure that all CME hours being claimed to satisfy the 30 hour bi-annual requirement meet the standards for CME as set by the Board. One hour of CME is defined as a typical fifty-minute classroom instructional session or its equivalent. Practice management, home study and self-study programs will not be given CME credit hours.

(b) Hours of CME obtained by a licensee shall receive 100% credit (one hour of training equals one hour of CME) for podiatric medical meetings and training sponsored by APMA, APMA affiliated organizations, TPMA, state, county or regional podiatric medical association podiatric medical meetings, university sponsored podiatric medical meetings, hospital podiatric medical meetings or hospital podiatric medical grand rounds, medical meetings sponsored by the Foot & Ankle Society or the orthopedic community relating to foot care, and others at the discretion of the Board. [~~These hours of continuing education must be obtained in the 24-month period immediately preceding the year for which the license is issued. The two-year period will begin on September 1 and end on August 31 two years later. The CME requirement will be either odd or even based on whether the original licensure was in an odd or even year. A licensee who completes more than the required 30 hours during the preceding CME period may carry forward a maximum of 10 hours for the next CME period. Each licensee shall maintain records for four years evidencing completion of the continuing education programs completed by the licensee. Notice is hereby given that receipt for proof of completion of the required 30 hours must be received by the State Board of Podiatric Medical Examiners no later than August 31, of the relevant two year CME period. Receipt of completion of such requirement after August 31 date subjects the practitioners to the penalty fees for late license renewal as provided in §379.2 of this title (relating to Fees and License Renewal).~~]

(c) CPR certification is eligible for up to three hours of CME credit and ACLS certification for up to six hours of CME credit (credit can only be obtained for one, not both). [~~The Board may assess the continuing education needs of a licensee and require the licensee to attend continuing education courses specified by the board.~~]

(d) If a podiatric physician has an article published (not just submitted) in a peer review journal, (s)he may receive one hour of CME credit for the article, on a one-time basis. [~~Continuing Education obtained as part of a disciplinary action is not acceptable credit towards the total of 30 hours required every two years.~~]

(e) If a podiatric physician attends a lecture that they are speaking at, they shall only receive CME credit for attending the lecture one time.

(f) Hours of CME credit obtained by a licensee shall receive 50% (one hour of training equals one half hour of CME) for non-podiatric medical sponsored meetings that are relative to podiatric medicine. The yardstick used to determine whether the training is "relative" to podiatric medicine is; "will the training enhance the knowledge and abilities of the podiatric physician in terms of improved quality and delivery of patient care?" Fifty percent

credit shall also be assigned to hospital grand rounds, hospital CME programs, corporate sponsored meetings, and meetings sponsored by the American Medical Association, the orthopedic community, the American Diabetes Association, the Nursing Association, the Physical Therapy Association, and others at the discretion of the Board.

(g) These hours of continuing education must be obtained in the 24-month period immediately preceding the year for which the license was issued. The two-year period will begin on September 1 and end on August 31 two years later. The CME requirement will be either odd or even based on whether the original licensure was in an odd or even year. A licensee who completes more than the required 30 hours during the preceding CME period may carry forward a maximum of 10 hours for the next CME period.

(h) Documentation of CME courses shall be made available to the Board upon request, but should not be sent to the Board via facsimile, or mailed with the annual license renewal form. Each licensee shall maintain their CME records at their practice location for four years, evidencing completion of the CME programs completed by the licensee. The Board shall conduct random checks of licensee CME documentation to ensure compliance with this rule.

(i) A small percentage of podiatric physicians who renew their licenses will be required to produce proof of completion of the CME hours they affirmed obtaining on their annual license renewal notice. The licensees to be reviewed will be chosen randomly out of the pool of annual license renewal forms. Once a licensee has been randomly chosen for the CME audit, he/she will receive a letter requiring them to submit to the Board proof of the hours claimed on their annual renewal form. Original documents will not be required; copies of certificates and forms will be sufficient.

(j) If the licensee does not comply with the request for CME documentation within 30 days of receipt of the letter, or if the licensee is unable to provide proof of the hours claimed on their annual renewal form, the licensee will be investigated by the Board. If the investigation reveals that the requirement was not met, the licensee may be disciplined. The penalty for non-compliance with the bi-annual CME requirement shall be a letter of reprimand and a minimum $2500 Administrative Penalty per violation up to the maximum allowed by law.

(k) The Board may assess the continuing education needs of a licensee and require the licensee to attend continuing education courses specified by the Board.

(l) Continuing Education obtained as a part of a disciplinary action is not acceptable credit towards the total of 30 hours required every two years.

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

Filed with the Office of the Secretary of State, on November 14, 2000.

TRD-200007953
Janie Alonzo
Staff Services Officer I
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-7000

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PART 28. EXECUTIVE COUNCIL OF PHYSICAL THERAPY AND OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 651. FEES

22 TAC §651.2

(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 Executive Council of Physical Therapy and Occupational Therapy Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Executive Council of Physical Therapy and Occupational Therapy Examiners proposes the repeal of §651.2, Physical Therapy Board Fees. The repealed section will be replaced by new §651.2, Physical Therapy Board Fees. The new section adds late renewal and restoration fees for licensees and facilities as set out in the PT Board rules, changes the fee to go inactive, and establishes a renewal fee for an inactive license.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 greater compliance with licensure and registration requirements, and increased administrative efficiency. There will be no effect on small businesses. Licensees who put their licenses on inactive status will pay a fee equal to one-half of the renewal fee every two years.

Comments on the proposed repeal and adoption may be submitted to Jennifer Jones, Executive Assistant, Executive Council of Physical Therapy and Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: jennifer.jones@mail.capnet.state.tx.us.

The repeal is proposed under Title 3, Subtitle H, Chapter 452, Occupations Code, which provides the Executive Council of Physical Therapy and Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 452, Occupations Code is affected by this repealed section.

§651.2. Physical Therapy Board Fees.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008022
John P. Maline
Executive Director
Executive Council of Physical Therapy and Occupational Therapy Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-6900

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The new section is proposed under Title 3, Subtitle H, Chapter 452, Occupations Code, which provides the Executive Council of Physical Therapy and Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 452, Occupations Code is affected by this new section.

§651.2. Physical Therapy Board Fees.

(a) Application /Permanent License.

(1) PT -$150.

(2) PTA -$100.

(b) Application to Retake the Examination.

(1) PT -$25.

(2) PTA -$25.

(c) Temporary License.

(1) PT -$60.

(2) PTA -$40.

(d) Provisional License.

(1) PT -$80.

(2) PTA -$75.

(e) Active to Inactive License.

(1) PT -a fee equal to one-half of the renewal fee.

(2) PTA - a fee equal to one-half of the renewal fee.

(f) License Renewal.

(1) Active license.

(A) PT -$200.

(B) PTA -$150.

(2) Inactive license. (Inactive license renewal fees are effective September 1, 2001)

(A) PT -a fee equal to one-half of the renewal fee.

(B) PTA -a fee equal to one-half of the renewal fee.

(g) Late Fees - Renewal (all licensees).

(1) Late 90 days or less-the renewal fee plus a late fee equal to one-half of the examination fee.

(2) Late more than 90 days but less than one year - the renewal fee plus a fee equal to the examination fee.

(h) License Restoration (all licensees, under the conditions set out in §341.6 of the Physical Therapy Board Rules) - a fee equal to the examination fee.

(i) Facility Registration.

(1) First facility-$300.

(2) Additional site-$100.

(j) Facility Renewal.

(1) First facility-$300.

(2) Additional site-$100.

(k) Late Fees - All Facilities.

(1) Late 90 days or less - a fee equal to one-half of the renewal fee, in addition to the renewal fee.

(2) Late more than 90 days but less than one year - a fee equal to the renewal fee, in addition to the renewal fee.

(l) Facility Restoration (all facilities) - renewal fee(s) plus a restoration fee that is double the renewal fee.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008021

John P. Maline

Executive Director

Executive Council of Physical Therapy and Occupational Therapy Examiners

Earliest possible date of adoption: December 31, 2000

For further information, please call: (512) 305-6900

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PART 35. TEXAS STATE BOARD OF EXAMINERS OF MARRIAGE AND FAMILY THERAPISTS

CHAPTER 801. LICENSURE AND REGULATION OF MARRIAGE AND FAMILY THERAPISTS

The Texas State Board of Examiners of Marriage and Family Therapists (board) proposes the repeal of §§801.20, 801.92-801.95, and amendments to §§801.1 - 801.2, 801.11 - 801.19, 801.41 - 801.45, 801.47 - 801.49, 801.51-801.53, 801.72 - 801.73, 801.91, 801.112 - 801.114, 801.142 - 801.144, 801.171 - 801.174, 801.201 - 801.204, 801.232 - 801.237, 801.262 - 801.268, 801.291 - 801.296, 801.298 - 801.299, 801.331 - 801.332, 801.351, 801.361 - 801.362, 801.364 - 801.365, 801.368 - 801.369 and new §801.92 and §801.93 concerning the licensure and regulation of marriage and family therapists. The amendments cover purpose, definitions, the board, petition for the adoption of a rule, executive director, official records, impartiality and non-discrimination, policy on disabled applicants, license certificate, directory, fees, purpose and scope, rendering professional therapeutic services, professional representation, relationship with clients, sexual misconduct, drug and alcohol use, confidentiality, therapists and the board, consumer information, display of license certificate, advertising and advertisements, general, required application materials, purpose, general, academic requirements, academic course content, experience requirements, supervisor requirements, other conditions for supervised experience, purpose, frequency, applying for examination, purpose, issuance of licenses, provisional license by endorsement, associate license, purpose, general, staggered renewals, licensure renewal, late renewal, inactive status, surrender of license, deadlines, clock hour requirements for continuing education, types of continuing education, continuing education sponsor, criteria for approval of continuing education activities, determination of clock hour credits, submission of continuing education credits,

general, criteria for denial of licensure, procedures for revoking, suspending, probating, or denying a license or reprimanding a license, violations by an unlicensed person, power to sue, complaint procedures, default orders, administrative penalties, suspension of a license for failure to pay child support, licensing of persons with criminal backgrounds, purpose, criminal conviction, informal disposition, purpose, notice, parties to a hearing, subpoenas, hearing procedures, and action after the hearing. The board also proposes to repeal §§801.20 and 801.92 - 801.95. The repeal covers processing applications, qualifications of applicants for examination and licensure, materials considered in determining the qualifications of applicants, finding of non-fitness for licensure, and finding of non- fitness for licensure subsequent to issuance of licensure. The board also proposes new §801.92 and §801.93.

The new sections cover finding of non-fitness for licensure and finding of non-fitness for licensure subsequent to issuance of licensure.

Effective September 1, 1999, Senate Bill 178, 76th Legislature, 1999, added §2001.039 to the Government Code which will be referred to as §39 and refers to an agency's review of rules. The General Appropriations Act, 76th Legislature (1999) Article IX, §9-10.13 also refers to the review of rules including a notice of intention to review rules. Section 39 generally requires each state agency to review a rule not later than the fourth anniversary of the date on which the rule takes effect and every four years after that date. Each state agency is required to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 801.1 - 801.2, 801.11 - 801.20, 801.41 - 801.54, 801.71 - 801.73, 801.91 - 801.95, 801.111 - 801.114, 801.141 - 801.144, 801.171 - 801.174, 801.201 - 801.204, 801.231 - 801.237, 801.261 - 801.268, 801.291 - 801.300, 801.331 - 801.332, 801.351, and 801.361 - 801.369 have been reviewed and the board has determined that reasons for adopting the sections continue to exist. Sections 801.46, 801.50, 801.54, 801.71, 801.111, 801.141, 801.231, 801.261, 801.297, 801.300, 801.363, 801.366, and 801.367 are proposed without changes and are open for comments.

The board published a Notice of Intention to Review for §§801.1 - 801.2, 801.11 - 801.20, 801.41 - 801.54, 801.71 - 801.73, 801.91 - 801.95, 801.111 - 801.114, 801.141 - 801.144, 801.171 - 801.174, 801.201 - 801.204, 801.231 - 801.237, 801.261 - 801.268, 801.291 - 801.300, 801.331 - 801.332, 801.351, and 801.361 - 801.369 in the *Texas Register* on September 17, 1999 (24 TexReg 7774). No comments were received as a result of the publication of the notice.

The board held rules change committee meetings to conduct a preliminary review of its rules. As a result of these meetings, the board is amending its rules located at Title 22, Texas Administrative Code (TAC), Chapter 801 to (i) satisfy the requirements of §39; (ii) delete language no longer needed; (iii) update existing rules to reflect changes in the profession; (iv) amend rules according to changes pursuant to the codification of the Licensed Marriage and Family Therapist Act in the new Occupations Code, Chapter 502; (v) clarify, reorganize and simplify the rules; and (vi) make typographical corrections.

Bobby D. Schmidt, M.Ed., Executive Director, has determined that for each year of the first five-year period the sections are in effect, fiscal implications for state government are anticipated to be negligible. The cost and process for administering the program will be offset by revenues generated from licensing fees. There is no anticipated effect on micro and small businesses as a result of the amendments, repeal or new sections. There will be no fiscal implication for state or local government.

Mr. Schmidt also has determined that for each year of the first five years the sections are in effect, the public benefit as a result of enforcing or administering these sections will be the elimination of duplicative language, the clarification of existing rules, and the updating of rules that will apply to current practice. Furthermore, public benefit is anticipated as a result of enforcing the sections as proposed to assure the appropriate regulation of marriage and family therapists and continue to identify competent providers. There is no anticipated impact on local employment.

Written comments on the proposed amendments may be submitted to Bobby D. Schmidt, M.Ed., Executive Director, Texas State Board of Examiners of Marriage and Family Therapists, 1100 West 49th Street, Austin, Texas 78756-3183, Telephone (512) 834-6657. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register.*

SUBCHAPTER A. INTRODUCTION

22 TAC §801.1, §801.2

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.1. Purpose.

The purpose of this chapter is to implement the provisions in the Licensed Marriage and Family Therapist Act, Occupations Code, Chapter 502, [~~Texas Civil Statutes, Article 4512c-1,~~] concerning the licensure and regulation of marriage and family therapists.

§801.2. Definitions.

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

(1) Act - The Licensed Marriage and Family Therapist Act relating to the relating to the licensing and regulation of marriage and family therapists, Occupations Code, Chapter 502, [~~Texas Civil Statutes, Article 4512-c-1,~~].

(2)-(13) (No change.)

(14) License - A marriage and family therapist license, a [~~temporary~~] marriage and family therapist associate license, or a provisional marriage and family therapist license.

(15)- (25) (No change.)

(26) Supervision - The guidance or management [~~of an associate~~] in the provision of [~~direct~~] clinical services.

(27)-(29) (No change.)

(30) Therapist - For the purposes of this chapter, a Texas licensed marriage and family therapist.

(31) (No change.)

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

Filed with the Office of the Secretary of State, on November 14, 2000.

TRD-200007933
George Pulliam
Chairman
Texas State Board of Examiners of Marriage and Family Therapists
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 458-7236

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SUBCHAPTER B. THE BOARD

22 TAC §§801.11-801.19

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.11. The Board.

(a) Membership. The board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)] is composed of nine members appointed by the governor. Four members must be selected from the general public. Five members must be eligible for licensure under the Act [~~Licensed Marriage and Family Therapist Act~~ (Act)], at least one of whom must be a professional educator in marriage and family therapy. These members must have engaged in the practice or education of marriage and family therapy for at least five years, or have 5,000 hours of clinical experience in the practice of marriage and family therapy.

(b)-(e) (No change.)

(f) Committees. The chair may appoint board members to committees to assist the board in its work. All committees appointed by the chair shall consist of no more than four members and shall make [~~regular~~] reports to the board [~~by interim written reports or~~] at regular meetings. The board shall direct all such reports to the executive director for distribution.

(g) (No change.)

(h) Meetings.

(1) Agendas.

(A)-(B) (No change.)

(C) Any individual wishing to be on the agenda to present or speak on a specified topic at a meeting of the board must provide a written request to the executive director in time to be placed on the agenda [~~chair~~] which describes the topic to be addressed. The chair may limit as appropriate the time for public participation.

(2)-(5) (No change.)

(i)- (j) (No change.)

§801.12. Petition for the Adoption of a Rule.

(a) Purpose. The purpose of this section is to delineate the board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)] procedures for the submission, consideration, and disposition of a petition to the board to adopt a rule.

(b)-(d) (No change.)

§801.13. Executive Director.

(a) (No change.)

(b) The executive director, or the executive director's designee, shall keep the minutes of the meetings and proceedings of the board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)] and shall be the custodian of the files and records of the board.

(c) The executive director shall exercise general supervision over individuals employed in the administration of the Act [~~Licensed Marriage and Family Therapists Act~~ (Act)], at the direction of the board or the commissioner of health.

(d)-(h) (No change.)

§801.14. Official Records.

(a) All official records of the board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)], except files containing information considered confidential under the provisions of the Texas Open Records Act, shall be open for public inspection during regular office hours.

(b)-(c) (No change.)

§801.15. Impartiality and Nondiscrimination.

(a) The board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)] shall make no decision in the discharge of its statutory authority with regard to any person's race, religion, color, gender, [~~sex,~~] national origin, age, [~~or~~] disability, or sexual orientation.

(b) (No change.)

§801.16. Policy on Disabled Applicants.

(a) The board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)] recognizes that disabled applicants may encounter unusual problems in applying for licensure or taking the examination and will make an effort to accommodate these applicants.

(b) The board, on an individual basis, may consider requests for special arrangements for disabled applicants including assistance in taking the examination provided that such requests are reasonable and do not violate this Act [~~License Marriage and Family Therapist Act~~ (Act)] or this chapter.

§801.17. License Certificate.

(a) The board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)] shall prepare and provide to each therapist a license certificate which contains the licensee's name and license number.

(b) (No change.)

§801.18. Directory.

(a) Each year the board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)] shall publish a directory of therapists.

(b) (No change.)

(c) The board shall make [~~a copy of~~] the directory information available to each licensee, and upon request, shall provide copies to other state agencies and the public.

§801.19. Fees.

(a) The board [~~Texas State Board of Examiners of Marriage and Family Therapists~~ (board)] has established the following fees for licenses, license renewals, examinations, and all other administrative expenses under the Licensed Marriage and Family Therapists Act (Act).

(b)-(e) (No change.)

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

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George Pulliam
Chairman
Texas State Board of Examiners of Marriage and Family Therapists
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For further information, please call: (512) 458-7236

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22 TAC §801.20

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

The repeal is proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The repeal affects Texas Occupations Code, Chapter 502.

§801.20. Processing Applications.

This 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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George Pulliam
Chairman
Texas State Board of Examiners of Marriage and Family Therapists
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For further information, please call: (512) 458-7236

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SUBCHAPTER C. RENDERING PROFESSIONAL THERAPEUTIC SERVICES AND CODE OF ETHICS

22 TAC §§801.41-801.45, 801.47-801.49, 801.51-801.53

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.41. Purpose and Scope.

(a) The purpose of this subchapter is to provide guidelines regarding the rendering of professional therapeutic services and to implement the provisions of the Act [~~Licensed Marriage and Family Therapists Act~~ (~~Act~~)], concerning a code of ethics.

(b) (No change.)

§801.42. Rendering Professional Therapeutic Services.

The following are professional therapeutic services which are part of marriage and family therapy when the services involve the professional application of family systems theories and techniques in the delivery of the services:

(1) marriage therapy which utilizes systems, methods, and processes which include[:] interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies to achieve resolution of problems associated with cohabitation and interdependence of adults living as couples through the changing marriage life cycle. These family system approaches assist in stabilizing and alleviating [~~to stabilize and alleviate~~] mental, emotional, or behavioral dysfunctions of either partner;

(2) sex therapy which utilizes systems, methods, and processes which include[:] interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies in the resolution of sexual disorders;

(3) family therapy which utilizes systems, methods, and processes which include[:] interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, affective, and family systems methods and strategies with families to achieve mental, emotional, physical, moral, educational, spiritual, and career development and adjustment through the changing family life cycle. These family system approaches assist in stabilizing and alleviating mental, emotional, or behavioral dysfunctions of a family member;

(4) (No change.)

(5) play therapy which utilizes systems, methods, and processes which include[:] play and play media as the child's natural medium of self-expression, and verbal tracking of the child's play behaviors as part of the therapist's role in helping children overcome their social, emotional, and mental problems;

(6) individual psychotherapy which utilizes systems, methods, and processes which include[:] interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, affective and family systems methods and strategies to achieve mental, emotional, physical, social, moral, educational, spiritual, and career development and adjustment through the developmental life span. These family system approaches assist in stabilizing and alleviating mental, emotional or behavioral dysfunctions in an individual;

(7) divorce therapy which utilizes systems, methods, and processes which include[:] interpersonal, cognitive, cognitive behavioral, developmental, psychodynamic, affective and family system methods and strategies with families to achieve mental, emotional, physical, moral, educational, spiritual, and career development and adjustment through the changing family life cycle. These family system approaches assist in stabilizing and alleviating mental, emotional, or behavioral dysfunctions of the partners;

(8) mediation which utilizes systems, methods, and processes to facilitate resolution of disputes between two or more dissenting parties, including but not limited to any issues in divorce settlements, parenting plan modifications, parent-child conflicts, pre-marital agreements, workplace conflicts, and estate settlements. Mediation involves specialized therapeutic skills that foster cooperative problem

solving, stabilization of relationships, and amicable agreements. Court appointed mediation requires specific training period;

[(8) family mediation which is a mediated divorce settlement in which the couple is assisted in negotiating a marital settlement outside a courtroom. The therapist functions as a facilitator and problem solver. The therapist helps with legal issues involving children and custody situations. It often involves helping couples resolve property issues. Mediation calls on therapeutic skills which help stabilize the divorcing couple's relationship so that they can work in a cooperative problem solving effort for an amicable separation. Legal knowledge by the therapist is required. Special training for mediation work is required;]

(9) group therapy which utilizes systems methods and processes which include[:] interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies to achieve mental, emotional, physical, moral, educational, spiritual, and career development and adjustment throughout the life span;

(10) chemical dependency therapy [counseling] which utilizes systems methods and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic,[and] affective methods and strategies, and 12-step methods to promote the healing of the client [achieve abstinence from the addictive substances and behaviors by the client];

(11) rehabilitation therapy which utilizes systems methods and processes which include[:] interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies to achieve adjustment to a disabling condition and to reintegrate the individual into the mainstream of society;

(12) referral services [counseling] which utilizes systems methods and processes which include[:] evaluating and identifying needs of clients to determine the advisability of referral to other specialists, and informing the client of such judgment and communicating as requested or deemed appropriate to such referral sources. This includes social studies and family assessments of the individual within the family;

(13) diagnostic assessment which utilizes the knowledge organized in the Diagnostic and Statistical Manual of Mental Disorders [diagnostic and statistical manual of mental disorders] (DSM) as well as the International Classification of Diseases [international classification of diseases] (ICD) as part of their therapeutic role to help individuals identify their emotional, mental, and behavioral problems when necessary;

(14) psychotherapy which utilizes systems methods and processes which include[:] interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies to assist clients in their efforts to recover from mental or emotional illness;

(15)-(16) (No change.)

(17) assessment and appraisal [assessing and appraising] which utilizes systems methods and processes which include formal and informal instruments and procedures, for which the therapist has received appropriate training and supervision in individual and group settings for the purposes of determining the client's strengths and weaknesses, mental condition, emotional stability, intellectual ability, interests, aptitudes, achievement level and other personal characteristics for a better understanding of human behavior, and for diagnosing mental problems; and

(18) consultation [consulting] which utilizes systems, methods, and processes which include the application of specific principles and procedures in consulting to provide assistance in understanding and solving current or potential problems that the consultee may have in relation to a third party, whether individuals, groups, or organizations.

§801.43. Professional Representation.

(a)-(c) (No change.)

(d) A therapist shall not encourage, or within the therapist's power, allow[,] a client to hold exaggerated ideas about the efficacy of services provided by the therapist.

[(e) A therapist shall not discriminate against or refuse professional service to anyone on the basis of race, gender, religion, national origin, or sexual orientation.]

§801.44. Relationships with Clients.

(a) (No change.)

[(b) A therapist shall inform the client of the purposes, goals, techniques, rules of procedure, and limitations that may affect the relationship at or before the time that the therapeutic relationship is entered.]

(b) [(c)] No commission or rebate or any other form of renumeration shall be given or received by a therapist for the referral of clients for professional services.

(c) [(d)] A therapist shall not use relationships with clients to promote, for personal gain or for the profit of an agency, commercial enterprises of any kind.

(d) A therapist shall not engage in activities that seek to meet the therapist's personal needs instead of the needs of the client.

(e) Under normal circumstances a therapist shall not be involved in the therapy of family members, intimate friends, close associates, or others whose welfare might be jeopardized by such a dual relationship.

(f) A therapist shall be responsible for setting and maintaining professional boundaries.

[(f) Under normal circumstances a therapist shall not offer professional services to a person concurrently receiving therapy from another professional except with the knowledge of that professional.]

(g) A therapist may disclose confidential information to medical or law enforcement personnel if the therapist determines that there is a probability of imminent physical injury by the client to the client or others or there is a probability of immediate mental or emotional injury to the client.

[(g) A therapist shall personally take reasonable action to inform responsible authorities and appropriate individuals in cases where a client's condition indicates a clear and imminent danger to the client or others.]

(h) In group therapy settings, the therapist shall take reasonable precautions to protect individuals from physical or emotional trauma resulting from interaction within the group.

[(i) A therapist shall not engage in activities that seek to meet the therapist's personal needs at the expense of a client.]

(i) [(j)] A therapist shall keep accurate records of therapeutic services to include, but not be limited to, dates of services, types of services, progress or case notes, and billing information for a minimum of five years for an adult client and 5 years beyond the age of 18 years of age for a minor.

(j) [~~(k)~~]A therapist shall bill clients or third parties for only those services actually rendered or as agreed to by mutual understanding at the beginning of services or as later modified by mutual agreement. [~~Supervisory relationships between a therapist and any other person used by the therapist to provide services to a client shall be clearly explained to the client and shall be so reflected on billing documents.~~]

(k) [~~(l)~~] A therapist shall terminate a professional relationship when it is reasonably clear that the client is not benefiting from it.

(l) A licensee who engages in interactive therapy via the telephone or internet must provide the client with his/her license number and information on how to contact the board by telephone or mail, and must adhere to all other provisions of this chapter.

§801.45. Sexual Misconduct.

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

(1) Mental health services - The assessment, diagnosis, treatment, or therapy [~~counseling~~] in a professional relationship to assist an individual or group in:

(A)-(D) (No change.)

(2) Mental health services provider - A licensee or any other licensed or unlicensed individual who performs or purports to perform mental health services, including a licensee under the provisions of the Act [~~Texas Civil Statutes, Article 4512c-1~~].

(3) (No change.)

(4) Sexual exploitation - A pattern, practice, or scheme of conduct, which may include sexual contact, that can reasonably be construed as being for the purposes of sexual arousal or gratification or sexual abuse of any person. The term does not include obtaining information about a client's sexual history within standard accepted practice. [~~while treating a sexual or marital dysfunction.~~]

(5) Therapeutic deception - A representation by a licensee that sexual contact with, or sexual exploitation by, the licensee is consistent with, or a part of, a client's or former client's therapy.

(b) A licensee shall not engage in sexual contact [~~or sexual exploitation~~] with a person who is:

(1) a client [~~or former client~~];

(2) a former client with whom there has been no therapeutic contact for a minimum of two years;

(3) [~~(2)~~] an associate or an intern for whom the licensee has administrative or clinical responsibility; [~~supervised by the licensee, or a person who has been an associate within the past two years;~~]

[~~(3) a student at an educational institution at which the licensee provides professional or educational services, or a person who has been a student of the licensee within the past two years; or~~]

(4) an intern in a marriage and family therapy graduate program in which the licensee offers professional or educational services; or

(5) [~~(4)~~] a supervisor of the licensee [~~or a person who has been a supervisor of the licensee within the past two years~~].

(c) A therapist shall not provide therapeutic services to a person with whom the therapist has had a sexual relationship.

(d) A licensee shall not practice therapeutic deception or sexual exploitation [~~of a person who is a client or former client~~].

(e) Because sexual contact with former clients are so frequently harmful to the client, and because such contacts undermine public confidence in the marriage and family therapy profession and thereby deter the public's use of needed services, marriage and family therapists do not engage in sexual contact with former clients even after a two year interval except in the most unusual circumstances. The marriage and family therapists who engages in such activity after the two years following cessation or termination of therapy bears the burden of demonstrating that there has been no exploitation, in light of all relevant factors, including:

(1) the amount of time has passed since therapy terminated;

(2) the nature and duration of the therapy;

(3) the circumstances of termination;

(4) the client's personal history;

(5) the client's current mental status;

(6) the likelihood of adverse impact on the client and others; and

(7) any statements or actions made by the therapist during the course of therapy suggesting or inviting the possibility of a post termination sexual or romantic relationship with the client.

[~~(e) It is a defense to a disciplinary action under subsections (b)-(d) of this section, if the licensee terminated mental health services with the person more than five years before the date the sexual exploitation began, the sexual contact occurred, or the therapeutic deception occurred.~~]

(f) (No change.)

(g) Examples of sexual exploitation are:

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

(8) kissing or fondling; [~~of a sexual nature;~~]

(9) (No change.)

(10) any other deliberate or repeated comments, gestures, or physical acts not constituting sexual intimacies but [~~are~~] of a sexual nature;

(11)-(13) (No change.)

(h) (No change.)

(i) A licensee shall report sexual misconduct as follows.

(1) If a licensee has reasonable cause to suspect that a client has been the victim of a sexual exploitation, sexual contact, or therapeutic deception by another licensee or a mental health services provider during therapy or any other course of treatment, or if a client alleges sexual exploitation, sexual contact, or therapeutic deception by another licensee or mental health services provider during therapy or any other course of treatment, the licensee shall report alleged misconduct not later than the 30th day after the date the licensee became aware of the misconduct or the allegations to:

(A) the district [~~prosecuting~~] attorney in the county in which the alleged sexual exploitation, sexual contact, or therapeutic deception occurred;

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

(2)-(3) (No change.)

§801.47. Drug and Alcohol Use.

A therapist shall not abuse the use of alcohol or drugs, use illegal drugs of any kind, or promote, or encourage[, ~~or condone~~] the illegal use or possession of alcohol or drugs.

§801.48. Confidentiality.

(a) A therapist shall follow the rules of confidentiality set forth in the Health and Safety Code, Chapter 611, and other applicable laws. [~~Communication between a therapist and client and the client's records are confidential to the extent authorized by law.~~]

(b) (No change.)

§801.49. Therapists and the Board.

(a) Any person licensed as a therapist is bound by the provisions of the Act [~~Licensed Marriage and Family Therapist Act (Act)~~] and this chapter.

(b) A therapist shall report [~~have the responsibility of reporting~~] alleged misrepresentations or violations of this chapter to the board's [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] executive director.

(c) The licensee shall report name changes, address changes, employment setting changes, etc. to the board.

(d) [~~(c)~~] The board is not responsible for any lost or misdirected mail if sent to the address last reported by the licensee.

(e) [~~(d)~~] The board may ask any applicant for licensure as a therapist whose file contains negative references of substance to come before the board for an interview before the licensure process may proceed.

(f) [~~(e)~~] The board may [~~shall~~] consider the failure of a therapist to respond to a request from the board or executive director for information or other correspondence as unprofessional conduct and grounds for disciplinary proceedings in accordance with Subchapter L of this chapter (relating to Complaints and Violations).

(g) [~~(f)~~] Applicants for licensure shall not use current members of the board as references.

§801.51. Consumer Information.

(a) A licensee shall inform each client of the name, address, and telephone number of the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] for the purpose of reporting violations of the Act [~~Licensed Marriage and Family Therapist Act (Act)~~] or this chapter as follows:

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

(3) on a bill for therapy [~~counseling~~] services provided to a client or third party.

(b)-(c) (No change.)

[~~(d) Upon written request, a person who does not speak English will be provided reasonable access to the board's programs.~~]

§801.52. Display of License Certificate.

(a) A therapist shall display the license certificate and annual renewal card, issued by the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~], in a prominent place in the primary location of practice.

(b)-(d) (No change.)

§801.53. Advertising and Announcements.

(a) (No change.)

(b) The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] imposes no restrictions on advertising by a therapist with regard to the use of any medium, the therapist's personal appearance, or the use of his or her personal voice, the size or duration of an advertisement by a therapist, or the use of a trade name.

(c) All advertisements or announcements of therapeutic services including telephone directory listings by a person licensed by the Board shall clearly state the therapist's licensure status by the use of a title such as "Licensed Therapist", or "Licensed Marriage and Family Therapist", or "L.M.F.T.," "Licensed Marriage and Family Therapist Associate" or "LMFT-A", or a statement such as "licensed by the Texas State Board of Examiners of Marriage and Family Therapists".

(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.

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♦ ♦ ♦

SUBCHAPTER D. APPLICATION PROCEDURES

22 TAC §801.72, §801.73

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.72. General.

(a) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on official board [~~Texas State Board of Examiners of Marriage and Family Therapist (board)~~] forms.

(b) The board will not consider an application as officially submitted until the applicant pays the application fee. The fee must accompany the application form. [~~and both the application and fee must be received at least 90 days prior to the date the applicant wishes to take the examination. Special accommodation requests must be received at the time of application.~~]

(c) The board will send one [~~an annual~~] notice determined by the anniversary date of the filing of an application to an applicant who does not complete an application in a timely manner. An application not completed within 30 days after the date of the board's [~~annual~~] notice may be voided; however, by written request to the board, an applicant may request that his or her application be kept active for an additional year. [~~Following each additional year another annual notice will be sent to the applicant and the applicant may again request that his or her application be kept active for an additional year. Deleted applications will be retained for one year; however, after that year an applicant will be required to submit a new application and to resubmit all required materials in addition to paying a new application fee.~~]

§801.73. Required Application Materials.

(a) Application form. The application form shall contain:

(1) (No change.)

(2) a statement that the applicant has read the Act [~~Licensed Marriage and Family Therapist Act (Act)~~] and the board [~~Texas State Board of Marriage and Family Therapist (board)~~] rules and agrees to abide by them;

(3)-(6) (No change.)

(7) an official transcript. [~~the signature of the school official who can formally attest to the completion of an applicant's clinical practicum.~~]

(b)-(e) (No change.)

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

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SUBCHAPTER E. CRITERIA FOR DETERMINING FITNESS OF APPLICANTS FOR EXAMINATION AND LICENSURE

22 TAC §§801.91-801.93

The amendment and new sections are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendment and new sections affect Texas Occupations Code, Chapter 502.

§801.91. Purpose.

The purpose of this subchapter is to set forth the criteria by which the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] will determine the qualifications required of applicants for approval for examination and licensure.

§801.92. Finding of Non-Fitness for Licensure.

The substantiation of any of the following items related to an applicant may be, as the board determines, the basis for the denial of an associate license or a regular license of the applicant:

(1) lack of the necessary skills and abilities to provide adequate counseling services in independent practice;

(2) any misrepresentation in the application or other materials submitted to the Board;

(3) the violation of any provision of the Act or this chapter in effect at the time of application which is applicable to an unlicensed person; or

(4) the violation of any provision of code of ethics which would have applied if the applicant had been a licensee at the time of the violation.

§801.93. Finding of Non-Fitness for Licensure Subsequent to Issuance of Licensure.

The board may take disciplinary action based upon information received after issuance of a license, if such information had been received prior to issuance of license and would have been the basis for denial.

This 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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22 TAC §§801.92-801.95

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of Examiners of Marriage and Family Therapists or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The repeals affect Texas Occupations Code, Chapter 502.

§801.92. Qualifications of Applicants for Examination and Licensure.
§801.93. Materials Considered in Determining the Qualifications of Applicants.
§801.94. Finding of Non-fitness for Licensure.
§801.95. Finding of Non-fitness for Licensure Subsequent to Issuance of Licensure.

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

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SUBCHAPTER F. ACADEMIC REQUIREMENTS FOR EXAMINATION AND LICENSURE

22 TAC §§801.112-801.114

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.112. General.

(a) The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] shall accept as meeting licensure requirements graduate work done at American universities which hold accreditation or candidacy status from accepted regional educational accrediting associations as reported by the American Association of Collegiate Registrars and Admissions Officers.

(b)-(g) (No change.)

[~~(h) A person who wishes to make up academic deficiencies may be assured that the additional work done will be acceptable to the board by submitting an official application and a proposed plan to complete academic requirements which the board will evaluate.~~]

§801.113. Academic Requirements.

(a) Persons applying for the examination must have completed or be enrolled in a marriage and family therapy graduate internship program, or its equivalent, approved by the Board.

(b) [~~(a)~~] Persons applying for [~~examinations and~~] licensure as a marriage and family therapist or a marriage and family therapist associate must have a master's or doctorate degree in marriage and family therapy or a master's or doctorate degree in a related mental health field with course work and training determined by the board to be substantially equivalent to a graduate degree in marriage and family therapy from a regionally accredited institution of higher education or an institution of higher education approved by the board.

(c) [~~(b)~~] A degree or course work in a related mental health field is substantially equivalent if it is at least 45 semester hours which the applicant completed at a regionally accredited school. The 45 semester hours may be course work taken in the required graduate degree program.

(d) [~~(c)~~] A degree or course work in a related mental health field must have been designed to train a person to provide direct services to assist individuals, families or couples in a therapeutic relationship in the resolution of cognitive, affective, behavioral or relational dysfunctions within the context of marriage or family systems.

§801.114. Academic Course Content.

An applicant having a graduate degree in a mental health related field must have course work in each of the following areas (one course equals three semester hours):

(1) theoretical foundations of marriage [~~marital~~] and family therapy -- one course;

(2) assessment and treatment in marriage [~~marital~~] and family therapy -- four courses;

(3) (No change.)

(4) psychopathology -- one course;

(5) [~~(4)~~] professional ethics -- one course;

(6) [~~(5)~~] applied professional research -- one course; and

(7) [~~(6)~~] supervised clinical practicum -- 12 months/nine hours.

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

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SUBCHAPTER G. EXPERIENCE REQUIREMENTS FOR EXAMINATION AND LICENSURE

22 TAC §§801.142-801.144

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.142. Licensure [~~Experience~~] Requirements.

[~~(a)~~] After receiving a passing grade on the licensure examination, receipt of a degree and course work under Subchapter F of this chapter (relating to Academic Requirements for Examination and Licensure), the applicant must have completed a minimum of two years of work experience in marriage and family therapy services that:

(1) include at least 3,000 [~~1,000~~] hours of [~~direct~~] clinical services to individuals, couples or families, of which at least 1,500 [~~500~~] hours must be direct clinical services, 750 hours to couples or families, [~~;~~] and the remaining 1,500 hours may come from related experiences that may include but not be limited to workshops, public relations, writing case notes, consulting with referral sources, etc;

(2) must be [~~are~~] supervised in a manner acceptable to the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~], including at least 200 hours of supervision [~~of the provision of direct clinical services by the applicant,~~] of which at least 100 hours must be [~~supervised on an~~] individual supervision. Up to 100 of the 200 hours of supervision may be earned during the graduate program. One-half of the supervised hours after graduation must be individual supervision [~~basis~~].

[~~(b) No direct clinical services course intended primarily for practice in the administration and grading of appraisal or assessment instruments shall count toward the 1,000 clock-hour requirement.~~]

[~~(c) Experience shall be acceptable to the board if:~~]

[~~(1) it was begun after the completion of the degree and course work specified in §801.113 and §801.114 of this title (relating to Academic Requirements and Academic Course Content);~~]

[~~(2) it consisted of the provision of direct, face-to-face therapeutic services in the practice of marriage and family therapy to assist individuals, couples, and families; and~~]

[(3) the experience was under the direct supervision of a supervisor meeting the requirements of 801.143 of this title (relating to Supervisor Requirements).]

§801.143. Supervisor Requirements.

(a) Supervisors are recognized by the board when subsection (a) or (b) of this section is met by submiting an application which includes the following four documents: [A supervisor must meet the following requirements before providing any supervision:]

(1) [hold] a license (which is not a provisional or an associate [temporary] license) issued by the board [Texas State Board of Examiners of Marriage and Family Therapists (board)], [hold] a license as a marriage and family therapist in another state or territory, or submit documents to support eligibility [be eligible] for licensure by the board;

(2) [hold] a graduate degree in marriage and family therapy or a graduate degree in a related mental health field, such as counseling and guidance, psychology, psychiatry, and clinical social work, from a regionally accredited institution as defined in §801.2 of this title (relating to Definitions);

(3) [have] one of the following:

(A) a one-semester graduate course in marriage and family therapy supervision from a regionally accredited institution; [(45 contact hours);] or

(B) an equivalent course of study consisting of a 30-hour didactic component and a 15-hour interactive component in the study of marriage and family therapy supervision approved by the Board. The interactive component must include a minimum of four persons; [training to become supervisors of associates;] and

(4) [have] at least 3,000 hours of direct client contact in the practice of marriage and family therapy over a minimum of three years.

(b) (No change.)

[(c) A supervisor may be approved by the board by submitting all required board forms as well as other documentation of credentials.]

§801.144. Other Conditions for Supervised Experience.

(a) An associate may [not] practice marriage and family therapy in any established setting under supervision, such as a private practice, public or private agencies, hospitals, etc. [within his or her own private independent practice of therapy as part of the associate's direct clinical experience; however, the person may be employed in his or her supervisor's private practice of therapy as part of the internship.]

(b) After January 1, 1995, no [an associate in Texas must hold an associate license. No] hours will be counted toward the supervised experience unless the associate was licensed by the board. [except those accumulated during the time the associate is licensed.]

(c) (No change.)

(d) A supervisor may not be related within the second degree by affinity (marriage) or within the third degree by consanguinity (blood or adoption) to the person whom he or she is supervising. [an associate.]

(e) During the period of supervised experience, an associate may be employed on a salary basis or be used within an established supervisory setting. The established settings must be structured with clearly defined job descriptions and areas of responsibility. The board may require that the applicant provide documentation of all work experience.

(f) (No change.)

(g) All supervision [supervised experience] submitted in fulfillment of the board's requirements must have been on a formal basis arranged [by contract or other specific arrangement] prior to the period of supervision. Supervisory arrangements must include all specific conditions agreed to by the supervisor and associate.

(h) If an associate enters into a contract with [contracts with both a supervisor and] an organization with which the supervisor is employed or affiliated:

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

(i)- (j) (No change.)

(k) The 200 hours of supervision must be face-to-face. The associate must receive a minimum of one hour of [face-to-face] supervision every two weeks. A supervision hour is 45 [60] minutes.

(l) (No change.)

(m) If an associate's primary clinical employer has a contract to provide mental health services via telephonic or other electronic media, the associate may receive credit for [petition the board that] up to 300 [100] clock-hours [of this service be applied] toward the required 3,000 [1,000] hours of direct clinical services, as approved by the supervisor. [The petition must include a listing of potential therapeutic issues and a description of the proposed supervision.]

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SUBCHAPTER H. LICENSURE EXAMINATIONS

22 TAC §§801.171-801.174

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.171. Purpose.

The purpose for this subchapter is to establish the rules governing the administration, [content, grading,] and other procedures for examination for licensure.

§801.172. Frequency.

The board, [Texas State Board of Examiners of Marriage and Family Therapists (board),] or its designee, shall administer licensure examinations at least semi-annually or as often as deemed necessary.

§801.173. Applying for Examination.

A person must apply for examination in accordance with Subchapter F of this chapter (relating to Academic Requirements for Examination

and Licensure) and §801.73 of this title (relating to Required Application Materials). The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] shall notify an applicant of application approval or disapproval, and if disapproved, state the reason.

(1) a person may apply to take the examination after he/she [~~they~~] have:

(A)-(B) (No change.)

(2) (No change.)

(3) an applicant who wishes to take a scheduled examination must complete an examination registration form and return it to the board. [~~with the required fee postmarked at least 30 days prior to the date of the examination.~~]

[~~(4) A notice that an application for examination is denied must state the reason for the denial.~~]

§801.174. Examination.

(a) The examination shall be a written examination prescribed by the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] which has been validated by an independent testing professional.

(b) An applicant shall apply to take the examination on a form prescribed by the board. The applicant will pay the examination fee at the examination site. [~~The examination application must be accompanied by the examination fee stated in §801.19(b)(2) of this title (relating to Fees).~~]

(c) (No change.)

(d) Examination results shall be reported as follows:

(1) [~~If the examination is graded or reviewed by the board,~~] the examinee shall be notified of the results of the examination within 45 [~~30~~] days of the examination date.

[~~(2) If the examination is graded or reviewed by a national testing service, the board shall notify each examinee within 15 days of the date which the board receives the results from the national testing service.~~]

(2) [~~(3)~~] If the examination results will be delayed more than 60 [~~90~~] days after the examination date, the board shall notify each examinee of the reason for the delay within 60 [~~90~~] days of the examination date.

(e) Procedures for failure of an applicant to pass an examination are as follows:

(1) An applicant who fails an examination may retake the examination at the next scheduled date. [~~after payment of an additional examination fee.~~]

[~~(A) The applicant must be re-examined within 12 months of the unsuccessful examination.~~]

[~~(B) If the applicant fails the second examination, the board may require the applicant to submit evidence of satisfactory completion of additional courses of study prescribed by the board.~~]

(2) Fee for the examination is in accordance with subsection (b) of this section.

(3) The applicant must resubmit an application.

(4) [~~(2)~~] The board shall furnish the person who failed the examination with an analysis of that person's performance on the examination if so requested in writing by the examinee.

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

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SUBCHAPTER I. ISSUANCE OF LICENSE

22 TAC §§801.201-801.204

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.201. Purpose.

The purpose of this subchapter is to set out licensing procedures of the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~].

§801.202. License Issuance [~~Issuance of Licenses~~].

(a) The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] will send each applicant whose application has been approved and who has passed the examination, an associate [~~if applicable, a~~] licensure form to complete and return with the licensure fee.

(b) (No change.)

(c) The board will replace a lost, damaged, or destroyed license certificate upon a written request from the therapist and payment of the duplicate license fee. Requests must include a [~~notarized~~] statement detailing the loss or destruction of the therapist's original license or be accompanied by the damaged certificate.

(d) (No change.)

§801.203. Provisional License [~~by Endorsement~~].

(a) A provisional license may be granted to a person who:

(1) (No change.)

(2) has successfully passed a national examination relating to marriage and family therapy or an examination approved by the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~]; and

(3)-(6) (No change.)

(b) Upon formal written request, the board may waive the requirement set out in subsection (a)(3) of this section if it is determined that compliance with subsection (a)(3) of this section would cause undue hardship to the applicant.

(c) The board shall issue a license to a holder of a provisional license if:

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

(4) the provisional license holder meets any other requirements set forth under the Act [~~Licensed Marriage and Family Therapist Act (Act)~~].

(d) (No change.)

§801.204. Associate [~~Temporary~~] License.

(a) (No change.)

(b) The associate [~~temporary~~] license will be issued for a period of 36 [~~30~~] months and may be extended for 24 months with the board's or it's designee's approval.

[~~(c) Regular licensure will be issued to an associate if the associate:~~]

[~~(1) submits documentation of direct, clinical experience and supervision as required by Subchapter G of this chapter (relating to Experience Requirements for Examination and Licensure); and~~]

[~~(2) passes the marriage and family therapy licensure examination as required by Subchapter H of this chapter (relating to Licensure 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 J. LICENSURE RENEWAL AND INACTIVE STATUS

22 TAC §§801.232-801.237

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.232. General.

(a)-(b) (No change.)

[~~(c) The Texas State Board of Examiners of Marriage and Family Therapists (board) shall deny the renewal of a license of a therapist who is in violation of the Licensed Marriage and Family Therapist Act (Act) or this chapter at the time of application for renewal.~~]

(c) [~~(d)~~] A therapist must have fulfilled continuing education requirements prescribed by the board rule in order to renew licensure.

(d) [~~(e)~~] A therapist whose license is not renewed due to failure to meet all requirements for licensure renewal shall return his or her license certificate to the board and shall not advertise or represent himself or herself as a licensed marriage and family therapist in any manner.

§801.233. Staggered Renewals.

The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] shall use a staggered system for licensure renewals.

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

§801.234. License [~~Licensure~~] Renewal.

(a) At least 60 [~~30~~] days prior to the expiration date of a person's license, the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] will send notice to the licensee of the expiration date of the license, the amount of the renewal fee due, and a licensure renewal form which the licensee [~~or the licensee's authorized representative~~] must complete and return to the board with the required fee.

(b) (No change.)

(c) The board, or its designee, shall not consider a license to be renewed until it receives the completed licensure renewal form and the renewal fee, and the licensee has complied with the continuing education requirements. No renewal fee shall be processed [~~accepted~~] by the board until the licensee has met the applicable continuing education requirements. The board or its designee may grant the licensee additional time to complete continuing education requirements based on extraordinary circumstances, such as medical complications.

(d)-(f) (No change.)

[~~(g) The board is not responsible for lost, misdirected, or undelivered correspondence if sent to the address last reported to the board.~~]

§801.235. Late Renewal.

(a) A person who renews a license after the expiration date but on or within 90 days after the expiration date shall pay the renewal fee plus one-half the examination fee. If a person's license has been expired for 90 days but less than one year the person may renew the license by paying to the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] the renewal fee and a fee that is equal to the examination fee for licensure. A final notice will be sent 30 days after the expiration date.

(b) A person whose license was not renewed within one year of the expiration date may obtain a new license by submitting to examination [~~re-examination~~] and complying with the original requirements and procedures for obtaining an original license.

(c) (No change.)

§801.236. Inactive Status.

(a) A licensee may request that his or her license be declared inactive by written request to the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] prior to the expiration of the license. Inactive status periods shall not be granted to persons whose licenses are not current and in good standing. Inactive status periods shall not exceed three years; however, consecutive inactive status periods may be approved by the board. An inactive status fee is required for each three-year period of inactive status.

(b) If a licensee fails to renew his or her license because the licensee is called to or on active duty with the armed forces of the United States [~~serving outside the State of Texas~~], the licensee or the licensee's authorized representative may request that the license be declared inactive or be renewed. A request for inactive status shall be made in writing to the board prior to expiration of the license or within one year from the expiration date. This subsection is an exception to the requirement in subsection (a) of this section that the request be made prior to

expiration of the license. A request for renewal may be made before or after the expiration date.

(1) (No change.)

(2) The written request shall include a copy of the official transfer orders of the licensee or other official military documentation showing that the licensee is called to or on active duty [~~serving outside the State of Texas~~].

(3) (No change.)

(4) An active duty licensee shall be allowed to renew under this subsection without submitting proof of continuing education hours if proof is required for renewal; however, the licensee must submit proof of completion of the required number of continuing education hours by the end of the following time period. The time period shall start on the actual date of renewal of the license and be equal to the length of time the licensee was on active duty [~~serving outside the State of Texas~~] during the [~~three-year~~] continuing education period or following expiration of the license. If the licensee fails to submit proof of continuing education by the end of the time period, the board may suspend or revoke or deny renewal of the license.

(5)-(6) (No change.)

(7) Except in extraordinary circumstances, a licensee on active duty [~~serving outside the State of Texas~~] shall notify the board that the licensee is on active duty. The board shall note in the licensee's file that the licensee may be eligible for renewal under this subsection.

(8) If a licensee is a civilian impacted or displaced for business purposes [~~outside of the State of Texas~~] due to a national emergency or war, the licensee or the licensee's authorized representative may request that the license be declared inactive in the same manner as described in this subsection for military personnel. The written request shall include an explanation of how the licensee is impacted or displaced, which explanation shall be on the official letterhead of the licensee's business. [~~The requirements of paragraph (4) this subsection relating to renewal by active duty licensees shall not apply to a civilian under this paragraph.~~]

(c)-(i) (No change.)

§801.237. Surrender of License.

(a) (No change.)

(b) Acceptance by the board [~~Texas State Board of Examiners of Marriage and Family Therapist (board)~~].

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

(c)-(d) (No change.)

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

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SUBCHAPTER K. CONTINUING EDUCATION REQUIREMENTS

22 TAC §§801.262-801.268

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.262. Deadlines.

[~~(a) Continuing education shall be submitted to the Texas State Board of Examiners of Marriage and Family Therapists (board) on a voluntary basis beginning September 1, 1993. Continuing education shall be submitted to the board on a mandatory basis beginning with the licensing cycle after September 1, 1995.~~]

[~~(b)~~] Continuing education requirements for renewal shall be fulfilled during one-year periods beginning on the first day of a therapist's renewal year and ending on the last day of the therapist's renewal year.

§801.263. Clock-Hour Requirements for Continuing Education.

A licensee must complete 15 clock hours of continuing education acceptable to the board [~~Texas State Board of Examiners of Marriage and Family Therapists Board (board)~~] each year as described in §801.262(b) of this title (relating to Deadlines). A three-hour ethics course will be required each year. [~~On or after September 1, 1995, a 3-clock hour marriage and family ethics course must be submitted third year. A clock-hour shall be 60 minutes of attendance and participation in an acceptable continuing education experience.~~]

§801.264. Types of Acceptable Continuing Education.

Continuing education undertaken by a therapist shall be acceptable to the board as credit hours if it is offered by an approved sponsor(s) in the following categories:

(1) participation in state and national conferences such as the American Association of Marriage and Family Therapists (AAMFT) and Texas Association of Marriage and Family Therapists (TAMFT). [~~American Family Therapy Academy (AFTA), American Counselors Association (ACA), American Orthopsychiatric Association (ORTHO), American Pastoral Association, American Psychological Association (APA), and National Association of Social Workers (NASW), which present family systems training;~~]

[~~(2) participation in conferences such as the Texas Association of Marriage and Family Therapists (TAMFT); and Texas associations in counseling, pastoral work, and psychology or social work which offer marriage and family systems training;~~]

(2) [~~(3)~~] participation in local seminars relevant to [~~in~~] marriage and family therapy [~~presented by mental health grouped such as the San Antonio Marriage and Family Therapy Association, Austin Marriage and Family Therapy Association, Dallas Marriage and Family Therapy Association, local hospitals, universities, and local agencies~~];

(3) [~~(4)~~] completing a graduate or institute course in the field of marriage and family therapy;

(4) [~~(5)~~] presenting [~~giving~~] workshops, seminars, or lectures relevant to marriage and family therapy [~~on family issues at the national, state, or local conferences~~] (the same seminar may not be used more than once annually); and

[(6) presenting workshops or seminars on marriage and family therapy to other mental health professionals (the same seminar may not be used more than once annually); and]

[(7) by teaching a graduate or undergraduate course in marriage and family therapy at a college or university (graduate work instruction may count for no more than one-half of annual continuing education); and]

(5) [(8)] by completing correspondence courses, satellite or distance learning courses, and/or audio-video courses relative to marriage and family therapy (no more than 6 [4] hours per year). [Ethics hours may not be obtained in this manner.]

§801.265. Continuing Education Sponsor.

The board [Texas State Board of Examiners of Marriage and Family Therapists (board)] is not responsible for approving individual continuing education programs. The board [Texas State Board of Examiners of Marriage and Family Therapists (board)] will approve an institute, agency, [office,] organization, association, or individual as a continuing education sponsor of continuing education units. The board will grant a three-year approval [certificate] to organizations who pay the continuing education sponsor fee which shall permit the organizations to approve continuing education units for their marriage and family therapy courses, seminars, and conferences. These organizations do not need prior permission from the board but must submit an annual list of their seminars, workshops, and courses with the presenter's name [name(s)] to the board. Any university, professional organization, or individual who meets the required criteria may advertise as approved sponsors of continuing education for licensed marriage and family therapists.

(1) (No change.)

(2) Sponsors shall maintain all continuing education records and documentation for at least three [five] years.

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

§801.266. Criteria for Approval of Continuing Education Activities.

Each continuing education experience submitted by a licensee [or sponsor] will be evaluated on the basis of the following criteria.

(1) Attendance at programs shall be in accordance with §801.264 of this title (relating to Types of Acceptable Continuing Education). [and shall consider the following:]

[(A) relevance of the subject matter to increase or support the development of skill and competence in marriage and family therapy or in areas of studies or disciplines related to marriage and family therapy;]

[(B) objectives of specific information and skill to be learned;]

[(C) subject matter, educational methods, materials, and facilities utilized including the frequency and duration of the sessions and the adequacy to implement learner objectives; and]

[(D) sponsorship and leadership of programs including the name of the sponsoring individual(s) or organizations(s); program leaders if different from sponsors; and contact person if different from the preceding.]

[(2) Teaching in approved programs shall be in accordance with §801.264 of this title. Documentation from sponsor(s) including an evaluative statement of performance is required.]

(2) [(3)] Completion of academic work shall be in accordance with §801.264 of this title. Official graduate transcripts from an accredited school showing completion of graduate hours in appropriate areas for which the licensee received at least a grade of "B" or "pass" is required.

(3) [(4)] Credit may be earned for clinical supervision of marriage and family therapy interns and [or] associates. Supervision may count for no more than one-half or [of] 7.5 hours of annual continuing education.

(4) [(5)] A presenter of a continuing education activity or an author of a published work which enhances a marriage and family therapist's knowledge or skill may be granted five credit hours for each presentation or publication not to exceed one-half of the annual continuing education required.

§801.267. Determination of Clock Hour Credits.

The board [Texas State Board of Examiners of Marriage and Family Therapists (board)] shall credit continuing education as follows.

(1) (No change.)

(2) A graduate course of three credit hours [with a total of 45 clock-hours (three credit hours)] or an institute's [post-graduate] course of at least 30- [with a total of 45] clock-hours or other intensive training approved by the board will be accepted as two years [(40 clock hours)] of continuing education. [Other types of continuing education need to be submitted annually.]

§801.268. Submission of Continuing Education.

Continuing education units of no less than 15 hours must be reported annually by the licensee at the time of renewal. These hours will be reported on the form provided by the board. [Texas State Board of Examiners of Marriage and Family Therapists (board).] The board shall conduct an annual random audit requesting documentation of continuing education. Individual continuing education certificates of attendance shall not be submitted unless the licensee is requested to do so by the board.

[(1)] Continuing education credits from organizations which are not approved sponsors may be accepted if relevance to marriage and family therapy can be documented.

[(2) Continuing education documentation shall be kept by the licensee for no less than five years.]

This 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 L. COMPLAINTS AND VIOLATIONS

22 TAC §§801.291-801.296, 801.298, 801.299

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt

rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.291. General.

The purpose of this subchapter is to inform licensees of the valid reasons for the denial, revocation, probation, or suspension of a license, reprimand of a licensee, or imposition of an administrative penalty, and the procedures for filing complaints and allegations of statutory or rule violations.

(1) The following shall be grounds for revocation, probation or suspension of a license, imposition of an administrative penalty, or reprimand of a licensee if a licensee [~~person~~] has:

(A)-(J) (No change.)

(2) If the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] suspends a license, the suspension shall remain in effect for the period of time stated in the order or until the board determines that the reason for the suspension no longer exists.

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

§801.292. Criteria for Denial of a License [~~Licensure~~].

The substantiation of any of the following items related to an applicant may be, as the board [~~Texas State Board of Marriage and Family Therapists (board)~~] determines, the basis for the denial of licensure of the applicant:

(1)-(5) (No change.)

(6) engaging in sexual contact or intimacies of any kind with any client or former client except as noted in §801.45 of this title (relating to Sexual Misconduct);

(7)-(8) (No change.)

(9) any misrepresentation in the application or other materials submitted to the board; [~~and~~]

(10) the violation of any provision of the Licensed Marriage and Family Therapist Act or this chapter; and[~~.~~]

(11) any other criteria listed in §801.291 of this title (relating to General).

§801.293. Procedures for Revoking, Suspending, Probating or Denying a License, or Reprimanding a Licensee.

(a) The board's [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] executive director or executive director's designee will give written notice to the person that the board intends to deny, suspend, probate, or revoke the license, impose an administrative penalty, or reprimand the licensee, after a hearing in accordance with the provisions of the Administrative Procedure Act (APA), and the board's hearing procedures in Subchapter O of this chapter (relating to Formal Hearings).

(b) Prior to denying, revoking, probating or suspending a license; imposing an administrative penalty; or reprimanding a licensee, the ethics committee shall give the applicant or licensee the opportunity for an informal settlement conference [~~disposition~~] or a formal hearing or both settlement conferences [~~an informal disposition and a formal hearing~~] in accordance with the provisions of this subchapter, Subchapter N of this chapter (relating to Informal Settlement Conferences [~~Dispositions~~]), and Subchapter O of this chapter (relating to Formal Hearings).

§801.294. Violations by an Unlicensed Person.

(a) A person commits an offense if he or she knowingly or intentionally acts as a [~~licensed professional marriage and family~~] therapist without being licensed by the board. [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] Such an offense is a Class B misdemeanor.

(b) An unlicensed person who facilitates or coordinates the provision of professional services but does not act as a [~~licensed marriage and family~~] therapist is not in violation of the Act. [~~Licensed Marriage and Family Therapist Act.~~]

§801.295. Power to Sue.

The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] may institute a suit in its own name and avail itself of any other action, proceeding, or remedy authorized by law to enjoin the violation of the Act. [~~Licensed Marriage and Family Therapist Act (Act).~~]

§801.296. Complaint Procedures.

(a) A person wishing to report a complaint [~~against~~] or allege a [~~alleged~~] violation of the Act [~~Licensed Marriage and Family Therapist Act (Act)~~] or this chapter by a licensee or other person shall notify the executive director, Texas State Board of Examiners of Marriage and Family Therapists, 1100 West 49th Street, Austin, Texas 78756-3183, or by calling 1-800-942-5540 (for complaints only). The initial notification of a complaint may be in writing, by telephone, or by personal visit to the board office.

(b) Upon receipt of a complaint, the executive director or executive director's designee may send to the complainant an official form which the complainant should complete and return to the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] office.

(c)-(d) (No change.)

(e) The executive director or executive director's designee shall keep an information file about each complaint which will include the following [~~information~~]:

(1) (No change.)

(2) a summary of findings made in [~~at~~] each step of the complaint process;

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

(f)-(h) (No change.)

(i) If the ethics committee determines that there are sufficient grounds to support the complaint, the ethics committee will report [~~may recommend~~] to the board any proposed disciplinary actions to be taken against the licensee [~~that the license be denied, suspended, probated, or revoked, that the licensee be reprimanded, that an administrative penalty be imposed, or that other appropriate action as authorized by law be taken~~].

(j) If the committee determines that a violation exists and that the violation is not a serious complaint affecting the health and safety of clients or other persons, the committee may resolve the complaint by informal methods such as a cease and desist order or an informal agreement with the violator to correct the violation. The informal agreement is subject to approval by the board.

§801.298. Default Orders.

(a) If a right to a hearing is waived, the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] shall consider an order taking disciplinary action as described in written notice to the licensee or applicant.

(b)-(c) (No change.)

§801.299. Administrative Penalties.

(a) The assessment of an administrative penalty is governed by the Act, §502.401. [~~Licensed Marriage and Family Therapist Act (Act),~~ §25A.]

(b) References in the Act to the "commissioner of health" or the "department" are references to the commissioner of health or his designee. The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] shall request that the commissioner of health appoint the executive director of the board as his designee.

(c)-(e) (No change.)

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

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SUBCHAPTER M. LICENSING OF PERSONS WITH CRIMINAL BACKGROUNDS

22 TAC §801.331, §801.332

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.331. Purpose.

The purpose of this subchapter is to establish guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain licenses as a marriage and family therapist [~~therapists~~].

§801.332. Criminal Conviction.

(a) The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] may suspend or revoke an existing license, disqualify a person from receiving a license, or deny a person the opportunity to be examined for a license because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a therapist or if the crime involves moral turpitude.

(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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SUBCHAPTER N. SETTLEMENT CONFERENCES

22 TAC §801.351

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.351. Settlement Conference [~~Informal Disposition~~].

(a) Informal disposition of any complaint or contested case involving a licensee or an applicant for licensure may be made through an informal settlement conference held to determine whether an agreed [~~settlement~~] order may be approved.

(b) If the executive director or the ethics committee of the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] determines that the public interest may [~~might~~] be served by attempting to resolve a complaint or contested case with an agreed order in lieu of a formal hearing, the provisions of this subchapter shall apply. A licensee or applicant may request an informal settlement conference; however, the decision to hold a conference shall be made by the executive director or the ethics committee.

(c) (No change.)

(d) The executive director shall decide upon the time, date and place of the settlement conference, and provide written notice to the licensee or applicant [~~of the same~~]. Notice shall be provided no less than ten days prior to the date of the conference by certified mail, return receipt requested, to the last known address of the licensee or applicant or by personal delivery. The ten days shall begin on the date of mailing or delivery. The licensee or applicant may waive the ten-day notice requirement.

(e) A copy of the board's rules concerning informal settlement conference [~~disposition~~] shall be enclosed with the notice of the settlement conference. The notice shall inform the licensee or applicant [~~of the nature of the alleged violation~~] of the following:

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

(3) that at least one member of the ethics committee members shall [~~may~~] be present;

(4) (No change.)

(5) that the licensee's or applicant's attendance and participation is voluntary; and

(6) that the complainant and any client involved in the alleged violations may be present. [~~; and~~]

[~~(7) that the settlement conference shall be cancelled if the licensee or applicant notifies the executive director that he or she or his or her legal counsel will not attend.~~]

(f) (No change.)

(g) At least one member [~~Members~~] of the ethics committee shall [~~may~~] be present at a settlement conference.

(h)-(j) (No change.)

[~~(k) The licensee shall be afforded the opportunity to make statements that are material and relevant.~~]

(k) [~~(l)~~] Access to the board's investigative file may be prohibited or limited in accordance with the Open Records Act, [~~and~~] the Administrative Procedure Act (APA), and other applicable law.

(l) [~~(m)~~] At the discretion of the executive director or the ethics committee members, a tape recording may be made of some or all of the settlement conference.

(m) [~~(n)~~] The ethics committee members or the executive director shall exclude from the settlement conference all persons except witnesses during their testimony. The [~~, the~~] licensee or applicant, the licensee's or applicant's attorney, and board staff may remain for all portions of the settlement conference.

(n) [~~(o)~~] The complainant shall not be considered a party in the settlement conference but shall be given the opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(o) [~~(p)~~] At the conclusion of the settlement conference, the ethics committee member(s) [~~members~~] or executive director may make a proposal for an informal settlement [~~recommendations for informal disposition~~] of the complaint or contested case. The proposed settlement [~~recommendations~~] may include administrative penalties or any disciplinary action authorized by the Act. [~~Licensed Marriage and Family Therapist Act (Act).~~] The ethics committee member(s) [~~member~~] or executive director may also propose to recommend [~~conclude~~] that the board lacks jurisdiction, [~~conclude~~] that a violation of the Act or this chapter has not been established, [~~order~~] that the investigation be closed for some other reason [~~,or refer the matter for further investigation~~].

(p) [~~(q)~~] The licensee or applicant may either accept or reject the settlement recommendations at the conference. If the recommendations are accepted, an agreed settlement order shall be prepared by the executive director, executive director's designee or the board's legal counsel and forwarded to the licensee or applicant. The order shall contain agreed findings of fact and conclusions of law. The licensee or applicant shall execute the order and return the signed order to the board office within ten days of his or her receipt of the order. If the licensee or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the settlement recommendations.

(q) [~~(r)~~] If the licensee or applicant rejects the proposed settlement, the matter shall be referred to the executive director for appropriate action.

(r) [~~(s)~~] If the licensee or applicant signs and accepts the recommendations, the agreed order shall be submitted to the entire board for its approval. Placement of the agreed order on the board agenda shall constitute only a recommendation for approval by the board.

(s) [~~(t) The identity of the licensee or applicant shall not be made available to the board until after the board has reviewed and accepted the agreed order unless the licensee or applicant chooses to attend the board meeting.~~] The licensee or applicant shall be notified of the date, time, and place of the board meeting at which the proposed agreed order will be considered. Attendance by the licensee or applicant is voluntary.

(t) [~~(u)~~] Upon an affirmative majority vote, the board shall enter an agreed order approving the accepted settlement recommendations. The board may not change the terms of a proposed order may only approve or disapprove an agreed order unless the licensee or applicant is present at the board meeting and agrees to other terms proposed by the board.

(u) [~~(v)~~] If the board does not approve a proposed agreed order, the licensee or applicant and the complainant shall be so informed. The matter shall be referred to the executive director for other appropriate action.

(v) [~~(w)~~] A proposed agreed order is not effective until the full board has approved the agreed order. The order shall then be effective in accordance with the APA, §2001.054(c).

(w) [~~(x)~~] A licensee's opportunity for an informal conference under this subchapter shall satisfy the requirement of the APA, §2001.054(c).

(1) If the executive director or ethics committee determines that an informal conference shall not be held, the executive director or executive director's designee shall give written notice to the licensee or applicant if it has not been previously provided. The notice will indicate [~~of the~~] facts or conduct alleged to warrant the intended disciplinary action and the licensee or applicant shall be given the opportunity to show, in writing and as described in the notice, compliance with all requirements of the Act and this chapter.

(2) The complainant shall be sent a copy of the written notice. The complainant shall be informed that he or she may also submit a written statement to the board office.

This 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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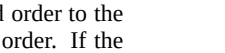

SUBCHAPTER O. FORMAL HEARINGS

22 TAC §§801.361, 801.362, 801.364, 801.365, 801.368, 801.369

The amendments are proposed under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

The amendments affect Texas Occupations Code, Chapter 502.

§801.361. Purpose.

The purpose of this subchapter is to set forth the formal hearing procedures and practices that will be used by the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] in handling denials, probations, revocations, and suspensions of licenses; reprimands

of licensees; and imposition of administrative penalties and in implementing the contested case provisions of the Administrative Procedure Act.

§801.362. General.

(a) The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] or the appropriate committee on its own motion or on request from a licensee or applicant may initiate a formal hearing. A formal hearing and all related proceedings shall be conducted in accordance with the provision of the Administrative Procedure Act (APA), applicable state statutes, and this chapter.

(b) (No change.)

(c) The broad schedule of sanctions by the board for violations of the Act [~~Licensed Marriage and Family Therapist Act (Act)~~] or this chapter is as follows:

(1)-(6) (No change.)

(d) (No change.)

§801.364. Parties to the Hearing.

(a) The parties to a hearing shall be the applicant or licensee and the ethics committee of the board. [~~Texas State Board of Examiners of Marriage and Family Therapists.~~]

(b)-(c) (No change.)

§801.365. Subpoenas.

(a) On the written request of any party to the hearing, the executive director of the board [~~Texas State Board of Examiners of Marriage and Family Therapists~~] shall issue a subpoena to require the attendance of witnesses or the production of documents. The administrative law judge may also issue any necessary subpoenas. A subpoena may be served by any person authorized to serve subpoenas under the Civil Practice and Remedies Code.

(b)-(e) (No change.)

§801.368. Hearing Procedures.

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

(e) Recording the hearing. The ALJ will keep either a stenographic or audio record of the hearing proceeding. In the event an independently contracted court reporter is utilized in the making of the record of the proceedings, the board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] shall bear the cost of the per diem or other appearance fee for such a reporter. Any party desiring a written transcript of the proceedings shall contract directly with such court reporter and be responsible for payment of same pursuant to the authority of the Administrative Procedure Act (APA). In those cases when a tape recording of the formal hearing is made, the board shall make such recording available to any party requesting permission to hear or, with appropriate protective measures, allow such recording to be duplicated. Upon appeal of any final order of the board necessitating the forwarding of the record to a court of law, the board may assess the cost of the transcript to the appealing party.

(f) (No change.)

§801.369. Action After the Hearing.

(a) Reopening of hearing for new evidence.

(1) The board [~~Texas State Board of Examiners of Marriage and Family Therapists (board)~~] may reopen a hearing where new evidence is offered which was unobtainable or unavailable at the time of hearing.

(2)-(3) (No change.)

(b)-(f) (No change.)

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

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 1. TEXAS BOARD OF HEALTH
SUBCHAPTER A. PROCEDURES AND POLICIES

25 TAC §1.6

The Texas Department of Health (department) proposes an amendment to §1.6 concerning procedures and policies of the Board of Health (board). Specifically, the section addresses actions requiring board approval. The amendment will require that certain employee appointments made by the Commissioner of Health (commissioner) be subject to the approval of the Texas Board of Health (board).

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the amended section is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the section as proposed.

Ms. Steeg has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing or administering the section will be Board of Health oversight of the hiring of executive management positions. There will be no effect on small businesses or micro-businesses because the sections only govern the board, the department and the commissioner. There are no economic costs to persons who are required to comply with the section as proposed. There will be no effect on local employment.

Comments on the proposal may be submitted to Susan K. Steeg, General Counsel, Texas Department of Health, 1100 West 49th Street, Austin Texas 78756, (512) 458-7236. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Health and Safety Code, §12.001 which provides the board with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects the Health and Safety Code, §12.001.

§1.6. Actions Requiring Board Approval.

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

(e) Of those appointments made by [~~or coordinated with~~] the commissioner, the following shall be subject to the approval of the board:

(1) the executive deputy commissioner [~~and deputy commissioners~~] of the department; and

(2) the deputy [~~associate~~] commissioners of the department[~~;~~]

[~~(3) the assistant commissioners of the department;~~]

[~~(4) the regional directors of the department;~~]

[~~(5) the director of the Texas Center for Infectious Disease; and~~]

[~~(6) the director of the South Texas Hospital~~].

(f)-(g) (No change.)

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

Filed with the Office of the Secretary of State, on November 17, 2000.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 14. COUNTY INDIGENT HEALTH CARE PROGRAM

The Texas Department of Health (department) proposes amendments to §§14.1, 14.2, 14.104, and 14.203 concerning the County Indigent Health Care Program.

The proposed amendment to §14.1 allows the department to prevent payments for services that were not paid by the county within 95 calendar days from the county's receipt of the bill, to withhold state assistance funds to counties if serious deficiencies that cannot be corrected are identified, and to routinely audit a county receiving state assistance funds. The appeals conducted by the Office of General Counsel for audit disputes are deleted so that the program and the deputyship can handle these disputes. The signature of the county judge and the additional wording on the State of Texas purchase voucher that the payee agrees to repay any funds paid in error are proposed for counties receiving state assistance funds.

The proposed amendments to §14.2 delete the appeals conducted by the Office of General Counsel on eligibility dispute resolutions to leave the responsibility for program policy within the deputyship.

Section 14.104 proposes amendments to increase the maximum income limit deduction for the sponsor's family to be consistent with the Temporary Assistance to Needy Families (TANF) program as required by the Health and Safety Code, Chapter 61.

Section 14.203 allows counties to choose how to pay inpatient hospital services at the beginning of the calendar year rather than the state fiscal year to simplify county administration.

Joe Moritz, Bureau Chief, Budget and Support Services, Health Care Financing, has determined that for each year of the first five-year period the sections are in effect, there will be no fiscal implications on state or local government as a result of enforcing or administering the sections as proposed. Mr. Moritz has also determined that for the first five years the sections are in effect, the public benefit anticipated will be simplified administration of the program and compliance with state law. There will be no impact on small businesses or micro-businesses to comply with this 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 rule as proposed. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There is no anticipated impact on local employment.

A public hearing on the proposed amendments will be held at 10:00 a.m. on December 15, 2000, in the Public Hearing Room, Texas Department of Health, 12555 Riata Vista Circle, Austin, Texas, to accept comments on the proposal.

Comments on the proposed amendments may be submitted to Kathy McCormick, Program Specialist, Indigent Health Care Division, Texas Department of Health, Mail Code Y-990,1100 West 49th Street, Austin, Texas 78756-6405, within 30 days of publication in the *Texas Register*.

SUBCHAPTER A. COUNTY PROGRAM ADMINISTRATION

25 TAC §14.1, §14.2

The amendments are proposed under Health and Safety Code Chapter 61 and Human Resources Code Chapters 22 and 32. The department has rule making authority for CIHCP under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991). Government Code §2001.039 passed by the 76th Legislature, 1999 is implemented by this proposal.

The amendments affect the Health and Safety Code, Chapter 61.

§14.1. County Program Administration.

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

(f) Eligiblity requirements for counties applying for state assistance.

(1) (No change.)

(2) Counties may not credit payments for the following towards eligibility for state assistance:

(A) - (D) (No change.)

(E) county program administrative expenses; [~~.~~]

(F) services that were not paid by the county within 95 calendar days from the county's receipt of the bill. For SSI applicants, the date of receipt is the day the applicant is determined CIHCP eligible because their SSI application has been denied by the Social Security Administration.

(3) (No change.)

(g) Determining county eligibility for state assistance.

(1) (No change.)

(2) If the eligibility systems review does not identify any [serious] deficiencies in the county's eligibility system, the county is eligible for state assistance when it reaches the 8.0% expenditure level. If deficiencies are identified, the county must correct the deficiencies within five workdays of written notice before claiming state assistance funds. If serious deficiencies that cannot be corrected are identified, the county is not eligible for state assistance funds. Serious deficiencies are consistent misapplication of policy as stated in these rules and the County Indigent Health Care Handbook.

(h) The department state-assistance-fund audits.

(1) The department may routinely audit a county that receives state assistance funds. [The audit may occur after the state assistance fund is depleted or at the end of the state fiscal year.]

(2) - (4) (No change.)

[(5) If the county disagrees with the policy section's decision on the audit report, the county may file a request to appeal the policy section's decision with the department's office of the general counsel. The county must send its written request appealing the policy section's decision, and all other relevant information, within 14 days from the date the county received the policy section's decision.]

[(6) The office of the general counsel conducts the appeal hearing according to the department's contract appeal rules]

(i) The department administration of state assistance funds. The following procedures are established to assist the department in its administration of state assistance funds and to assist counties in the management of their programs.

(1) (No change.)

(2) After a county reaches the 8.0% expenditure level, the county must contact the department by telephone to encumber available state assistance funds to match expenditures that the commissioners court will be asked to authorize.

(A) The department provides the county with an approval code number for the state-assistance-encumbered funds.

(B) The county must complete the State of Texas purchase voucher form, enter "For reimbursement from the state assistance fund provided under the County Indigent Health Care Program (the Health and Safety Code, Chapter 61). The payee agrees to repay any funds paid in error and acknowledges the state's authority to collect any funds paid in error," and the approval code number for the encumbered funds on the voucher, and submit the voucher to the department within 30 days after the commissioners court authorizes the expenditures. The county judge must sign and date the purchase voucher and enter his or her telephone number. If the county does not submit the purchase voucher within the 30-day period, the encumbered state assistance funds become unencumbered.

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

§14.2. Eligibility Disputes and Fraud.

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

[(e) If one or more of the involved entities are dissatisfied with the policy section's decision, the dissatisfied entity(ies) may then request an appeal, which shall be a fair hearing. The following procedures apply when the entity(ies) requests an appeal.]

[(1) The entity(ies) must file the request for appeal by submitting a new EDRR, with the policy section's decision and all other relevant information, to the department's Office of the General Counsel within 30 days from the date the involved entity(ies) received notice of the policy section's decision.]

[(2) The Office of the General Counsel conducts the appeal and issues a final decision within 45 days from the date the request for appeal is filed unless the parties agree to an extension.]

(e) [(f)] A governmental entity, hospital district, or provider of assistance may appeal the final order of the department under Chapter 2001, Government Code, using the substantial evidence rule on appeal.

(f) [(g)] If a county discovers that a household intentionally misrepresented information to receive benefits, the county may recover the funds through household restitution or court action. Counties may consult with the county attorney to develop a procedure for administering suspected fraud cases.

This 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. DETERMINING ELIGIBILITY

25 TAC §14.104

The amendment is proposed under Health and Safety Code Chapter 61 and Human Resources Code Chapters 22 and 32. The department has rule making authority for CIHCP under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991). Government Code §2001.039 passed by the 76th Legislature, 1999 is implemented by this proposal.

The amendment affects the Health and Safety Code, Chapter 61.

§14.104. Income.

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

(e) Budgeting.

(1) - (4) (No change.)

(5) How to budget the income of the alien's sponsor. Eligibility staff must consider as unearned income available to the alien's household all the sponsor's and sponsor's spouse's gross countable income(s) after subtracting the following deductions:

(A) (No change.)

(B) an amount equal to the maximum income limit for the sponsor's family size as corresponds to 100% of FPIL [the current AFDC recognizable needs amounts]. Include all members of the household whom the sponsor claims or could claim as tax dependents;

(C) - (D) (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.

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SUBCHAPTER C. PROVIDING SERVICES

25 TAC §14.203

The amendment is proposed under Health and Safety Code Chapter 61 and Human Resources Code Chapters 22 and 32. The department has rule making authority for CIHCP under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991). Government Code §2001.039 passed by the 76th Legislature, 1999 is implemented by this proposal.

The amendment affects the Health and Safety Code, Chapter 61.

§14.203. Payments for Basic and Department Approved Optional Services.

(a) - (b) (No change.)

(c) The payment standards for the individual basic and department approved optional services are as follows:

(1) Inpatient and outpatient hospital care.

(A) The county must choose one of the following two payment standards for inpatient hospital services, and use the one payment standard it selects for the duration of a calendar [~~state fiscal~~] year:

(i) - (ii) (No change.)

(B) (No change.)

(2) - (7) (No change.)

(d) (No change.)

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

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CHAPTER 73. LABORATORIES

25 TAC §§73.22, 73.24, 73.25

The Texas Department of Health (department) proposes amendments to §§73.22, 73.24, and new §73.25 concerning fees for laboratory services, the certification of drinking water, milk, and shellfish laboratories, and voluntary environmental laboratory accreditation.

An amendment to §73.22 proposes an increase in fees for laboratories. This increase in fees is needed to recover the costs to administer the laboratory certification program. An amendment to §73.24 proposes removal of drinking water certification from this section. Drinking water certification will be addressed in new §73.25. New §73.25 is proposed to implement added Chapter 421 (Senate Bill 1238, Chapter 447, 76th Legislature 1999, Subtitle E, Title 5, Health and Safety Code, "Accreditation of Environmental Laboratories".) This legislation requires the department to administer the program and the Board of Health (board) to adopt rules and set fees to defray the cost of administering the program. Adoption of the rules will allow the department to meet the requirements to become a National Environmental Laboratory Accreditation Program approved accrediting authority.

Mr. Max Phillips, Laboratory Evaluation Officer, has determined that for the first five-year period the sections are in effect, there will be fiscal implications as a result of administering the sections as proposed. It is estimated that revenue generated by the proposed fees will recover 96% of the cost to the department to administer the program. The effect on state government will be an estimated increase in revenue of approximately $204,265 per year as a result of proposed fees. There will be fiscal implication to local governments participating voluntarily with these sections. It is estimated that these rules will result in an increased cost of approximately $485 per year for microbiology laboratories and a decreased cost of approximately $1370 for chemistry laboratories operated by local governments participating voluntarily with these sections of this rule. The increased costs for microbiology laboratories is due to the proposed increase in fees and increasing the number of proficiency testing samples from one to two each year. The decreased costs for chemistry laboratories is due to the reduction in costs when the department conducts the on-site assessment as opposed to an approved third party. There will be no fiscal implications to local governments that choose not to participate.

Mr. Phillips has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the development and implementation of a voluntary accreditation program for environmental laboratories consistent with national standards. Participating laboratories will benefit from improvement in quality of testing by increased adherence to industry standards which will allow laboratories in Texas to compete with laboratories from other states for federal fund contracts. The cost to micro-businesses, small businesses, or persons participating voluntarily with these sections is approximately $885 per year for microbiology laboratories and $5170 per year for chemistry laboratories. These costs are based on the proposed fees and estimated costs for proficiency testing samples. There are no impacts to micro-businesses, small businesses, or persons not participating with these sections. There is no anticipated impact on local employment.

Comments on the proposal may be directed to Mrs. Sherry S. Clay, Director, Quality and Regulatory Affairs Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*. In addition, a public hearing on the proposed section will be held at 1:00 p.m., December 20, 2000, in the Texas Department

of Health, Lecture Hall, Room K-100, 1100 West 49th Street, Austin, Texas.

The amendments and new section are proposed under Health and Safety Code, §421.003, which provides the board the authority to set an accreditation fee in an amount sufficient to defray the cost of administering Chapter 421; and §421.005, which provides the board the authority to adopt rules to implement Chapter 421 and minimum performance and quality assurance standards for accreditation of an environmental testing laboratory, §§12.031 - .032 which allows the board to establish fees for public health services, and §12.001 which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments and new section affect the Health and Safety Code, Chapter 421.

§73.22. Fees

(a) - (b) (No change.)

(c) Fees.

(1) The annual fees for certification of milk, shellfish, and environmental [~~drinking water and shellfish~~] laboratories and proficiency testing for milk laboratories are as follows:

(A) antibiotic milk laboratories--$250;

[~~(B) water bacteriology laboratories--$250;~~]

(B) [~~(C)~~] milk industry laboratories--$400;

(C) [~~(D)~~] full service milk laboratories--$500;

(D) [~~(E)~~] milk proficiency testing (non-Texas certified laboratories)--$250;

[~~(F) water chemistry laboratories--$250; and~~]

(E) [~~(G)~~] shellfish laboratory--$500; [~~,~~]

(F) environmental laboratory administrative fee -- $460;

(G) environmental laboratory microbiology category fee -- $115;

(H) environmental laboratory radiochemistry category fee -- $430;

(I) environmental laboratory chemistry category fee for a single category $430;

(J) environmental laboratory chemistry category fee for two categories $860;

(K) environmental laboratory chemistry category fee for three categories-- $1290 and/or;

(L) environmental laboratory chemistry category fee for four or more categories -- $1720;

(2) - (5) (No change.)

(d) (No change.)

§73.24. Certification of [~~Drinking Water,~~] Milk[~~,~~] and Shellfish Laboratories

(a) Purpose. This section establishes the procedures for [~~drinking water,~~] milk[~~,~~] and shellfish laboratories to become certified laboratories under federal or state law.

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

(1) (No change.)

(2) Certification--An official and legal approval granted by the department to a laboratory, permitting analysis of [~~drinking water,~~] milk [~~,~~] or shellfish samples in accordance with applicable federal and state laws and rules based on the process outlined in this section. Certification means that a certified laboratory has been judged capable of performing the analyses for which it is certified correctly. Certification does not imply or mean that the department certifies the results produced by the certified laboratory.

(c) Certification application.

(1) An applicant laboratory must submit an application for certification directly to the department on a form specified by the department. [~~For drinking water laboratories, the application must be accompanied by evidence of assessment by a department-approved assessor in the category for which certification is requested or assessment by the department if the department performs assessments.~~]

(2) - (3) (No change.)

(4) A laboratory may apply for certification in a single category or any combination of categories from among the following: [~~chemistry-routine inorganics, chemistry-nitrate and nitrite, chemistry-metals, chemistry-lead and copper, chemistry-trihalomethanes, chemistry-volatile organics, chemistry-insecticides and herbicides, chemistry-carbamate insecticides, chemistry-ethylene dibromide (EDB) and dibromochloropropane (DBCP), chemistry-synthetic organics, chemistry-endothal, chemistry-glyphosate, chemistry-diquat, chemistry-radiochemicals, chemistry-asbestos, chemistry-dioxin, drinking water microbiology,~~] milk analysis-antibiotics, milk analysis-raw, milk analysis-full service, or shellfish analysis-full service.

(5) - (6) (No change.)

(d) - (f) (No change.)

§73.25. Voluntary Environmental Laboratory Accreditation

(a) Purpose. This section establishes the procedures for certification or accreditation of environmental laboratories. For a laboratory to be approved by the Texas Department of Health, the laboratory must meet the requirements of this rule. A laboratory may apply for National Environmental Laboratory Accreditation Program (NELAP) accreditation if it chooses to meet the National Environmental Laboratory Accreditation Conference (NELAC) standards and become eligible for recognition by other states and agencies that require or accept NELAP accreditation.

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

(1) Accreditation - The recognition of a laboratory that is certified by the department as meeting the NELAC Standards to conduct environmental analysis in those fields of testing listed in subsection (f) of this section.

(2) Certification - The recognition of a laboratory that is certified by the department as meeting the standards outlined in the Environmental Protection Agency's (EPA) Manual for the Certification of Laboratories Analyzing Drinking Water, EPA 815-B-97-001, March 1997, to conduct environmental analysis in those specified fields of testing listed in subsection (f)(3) of this section.

(3) CWA - The Clean Water Act also know as the Federal Water Pollution Control Act.

(4) Deficiency - A noncompliance with one or more of the requirements of this section.

(5) Environmental laboratory - A scientific laboratory that:

(A) performs analyses to determine the chemical, molecular, or pathogenic compounds of drinking water, wastewater, hazardous wastes, soil, or air for regulatory compliance purposes; and

(B) is either a commercial laboratory or environmental laboratory that is required to be accredited under federal law.

(6) EPA - The United States Environmental Protection Agency.

(7) Federal Water Pollution Control Act (Clean Water Act) - The enabling legislation under 33 United States Code §§1251 et seq., Public Law 92-50086, Stat. 816, that empowers EPA to set discharge limitations, write discharge permits, monitor, and bring enforcement action for non-compliance.

(8) Interim accreditation - The temporary accreditation status, not to exceed six months, for a laboratory that has met all accreditation criteria except for a pending on-site assessment, which has been delayed for reasons beyond the control of the laboratory.

(9) Interim certification - The temporary certification status, not to exceed six months, for a laboratory that has met all certification criteria except for a pending on-site assessment, which has been delayed for reasons beyond the control of the laboratory.

(10) NELAC - The National Environmental Laboratory Accreditation Conference.

(11) NELAC Standards - Standards that include procedures for consistently evaluating and documenting the ability of laboratories performing environmental measurements to meet nationally defined standards established by the National Environmental Laboratory Accreditation Conference.

(12) NELAP - The National Environmental Laboratory Accreditation Program.

(13) NELAP approved accrediting authority - An accrediting authority that has received recognition from NELAP.

(14) NELAP primary accrediting authority - The agency or department designated at the Territory, State or Federal level as the recognized authority with the responsibility and accountability for granting NELAC accreditation for a specified field of testing.

(15) NELAP secondary accrediting authority - The territorial, state of federal agency that grants NELAC accreditation to laboratories, based upon their accreditation by a NELAP-recognized Primary Accrediting Authority.

(16) Proficiency testing program - The aggregate of providing rigorously controlled and standardized environmental samples to a laboratory for analysis, reporting of results, statistical evaluation of the results and the collective demographics and results summary of all participating laboratories.

(17) Proficiency testing study provider - Any person, private party, or government entity that meets stringent criteria to produce and distribute NELAC proficiency testing samples, evaluate study results against published performance criteria and report the results.

(18) Revoke - To remove a laboratory's certification or accreditation or the approval for a certified or accredited laboratory to perform one or more specified methods.

(19) Safe Drinking Water Act (SDWA) - The enabling legislation, 42 United States Code §§300f et seq. (1974), (Public Law 93-523), that requires the EPA to protect the quality of drinking water in the United States by setting maximum allowable contaminant levels, monitoring, and enforcing violations.

(20) SDWA - The Safe Drinking Water Act.

(21) Suspend - The temporary removal of a laboratory's accreditation or certification for a defined period of time to allow the laboratory time to correct deficiencies or area of non-compliance with this rule.

(22) TNRCC - The Texas Natural Resources Conservation Commission.

(c) Administration by department. The department shall administer the voluntary environmental laboratory accreditation program established by the Health and Safety Code Chapter 421 and this section.

(d) Implementation. Laboratories currently certified by the department have two years from promulgation to comply with all requirements of this rule.

(e) Standards.

(1) A laboratory certified by the department pursuant to this rule shall comply with the standards outlined in the EPA's Manual for the Certification of Laboratories Analyzing Drinking Water, EPA 815-B-97-001, March 1997, and is adopted by reference into this rule. This document is available for review during normal business hours at the department's Bureau of Laboratories, 1100 West 49th Street, Austin Texas.

(2) A laboratory accredited by the department pursuant to this rule shall comply with the consensus standards adopted at the National Environmental Laboratory Accreditation Conference (NELAC). The NELAC Constitution, Bylaws, and Standards, EPA 600/R-99/068, revised as of June 29, 2000, are adopted by reference into this rule. These specifications are available for review during normal business hours at the department's Bureau of Laboratories, 1100 West 49th Street, Austin Texas.

(3) A laboratory certified or accredited by the EPA is approved by the department.

(f) Certification and accreditation requirements. To become certified or accredited, to renew certification or accreditation, or to become recertified or reaccredited under this rule, a laboratory must:

(1) submit a completed application to the department, on forms provided by the department that shall include:

(A) the legal name of the laboratory;

(B) the name of the laboratory owner;

(C) the laboratory mailing address;

(D) the full address of location of the laboratory;

(E) the laboratory hours of operation;

(F) a description of qualifications of key personnel and technical employees;

(G) the name and daytime phone number of the laboratory director;

(H) the name and daytime phone number of the laboratory quality assurance officer;

(I) the name and daytime phone number of the laboratory contact person;

(J) an indication of class of laboratory for which the laboratory is applying for certification or accreditation under this rule; and

(K) the laboratory's quality assurance plan and documentation of the laboratory's implementation and adherence to the quality assurance plan.

(2) be enrolled in a proficiency testing program and meet all requirements of subsection (i) of this section;

(3) apply for approval to analyze at least one analyte or interdependent analyte group by a method the department may approve under this rule from the following categories:

(A) Safe Drinking Water Act (SDWA) - microbiology certification.

(B) SDWA - microbiology, routine inorganic chemistry, metals inorganic chemistry, volatile organic chemistry, synthetic organic chemistry group I, synthetic organic chemistry group II, synthetic organic chemistry group III, chemistry disinfectant byproducts, limited chemistry analysis, and radiochemistry accreditation.

(C) Clean Water Act (CWA) - microbiology, routine inorganic chemistry, metals inorganic chemistry, volatile organic chemistry, synthetic organic chemistry group I, synthetic organic chemistry group II, synthetic organic chemistry group III, chemistry disinfectant byproducts, limited chemistry analysis, and radiochemistry accreditation.

(4) pay all fees under §73.22 of this title prior to the issuance of certification or accreditation;

(A) out-of-state laboratories that meet requirements through reciprocity are exempt from category fees;

(B) laboratories that meet on-site assessment requirements through approved third-party assessors are exempt from category fees.

(5) pass an on-site assessment by meeting all requirements of subsection (j) and (k) of this section, and

(6) submit a statement of compliance signed and dated by the laboratory owner, director, or quality assurance officer that shall include:

(A) an acknowledgment that the applicant understands that, once certified or accredited, the laboratory must continually comply with this rule and shall be subject to the penalties provided in this rule for failure to maintain compliance;

(B) an acknowledgment that the department may make unannounced assessments and that a refusal to allow entry by the department's representatives is grounds for denial or revocation of certification or accreditation;

(C) a statement that the applicant laboratory will perform all proficiency testing studies according to the accepted method and in accordance with the department requirements; and

(D) a statement that there is no misrepresentation in the information provided in the application.

(g) Certification and accreditation of laboratories outside the State of Texas.

(1) The department shall certify an out-of-state laboratory to perform environmental sample analysis provided:

(A) the laboratory is accredited by an accrediting authority for those fields of testing in which the laboratory is requesting certification pursuant to this rule;

(B) the laboratory submits to the department a completed application, copies of the laboratory's three most recent proficiency test results, and its written quality assurance manual;

(C) the laboratory submits to the department a copy of its most recent (less than two years old) on-site assessment report from the accrediting authority or from the accrediting authority's delegated assessor body, together with a current copy of the laboratory's certification and listing the categories, analytes, and methods accredited; and

(D) the department determines that the out-of-state certification program is equivalent to the requirements of this rule.

(2) An out-of-state laboratory shall be eligible for reciprocal accreditation to perform environmental sample analyses provided:

(A) the laboratory is accredited by an agency recognized as a NELAP approved accrediting authority for those fields of testing in which the laboratory is requesting accreditation pursuant to this rule;

(B) the laboratory submits to the department a completed application, copies of the laboratory's three most recent proficiency test results, and its written quality assurance manual; and/or

(C) the laboratory submits to the department a copy of its most recent (less than two years old) on-site assessment report from the accrediting authority or from the accrediting authority's delegated assessor body, together with a current copy of the laboratory's accreditation and listing the categories, analytes, and methods accredited.

(3) If upon review of the required documents, the department determines that the out-of-state certificate is equivalent to the requirements of this rule, the department will not require an on-site assessment by its assessors and certification or accreditation shall be granted after the assessed fees are paid.

(4) If upon review of the required documents, the department determines that the out-of-state certificate is not equivalent or cannot determine if the out-of-state certificate is equivalent to the requirements of this rule, the department will notify, in writing, the applicable accrediting authority and the laboratory. However, the laboratory is to be notified only in situations where no administrative or judicial prosecution is contemplated.

(5) If the laboratory has its certification or accreditation downgraded in total or in part by the laboratory's primary accrediting authority, the laboratory shall notify the department within 30 days of notification of the intent to downgrade by the primary accrediting authority.

(h) Proficiency testing requirements. For a certified or accredited laboratory to become approved or to maintain approval for an analyte or an interdependent analyte group by a specific method, the laboratory shall, at its own expense meet the proficiency testing requirements of this subsection.

(1) The laboratory shall enroll and participate in a proficiency testing program for each analyte or interdependent analyte group. For each analyte or interdependent analyte group for which proficiency testing is not available, the laboratory shall establish, maintain, and document the accuracy and reliability of its procedures through a system of internal quality management.

(2) The laboratory shall participate in more than one proficiency testing program if necessary to be evaluated to obtain or maintain approval to analyze an analyte or interdependent analyte group.

(3) The laboratory shall, prior to obtaining approval, notify the department of the authorized proficiency testing program or programs in which it has enrolled for each analyte or interdependent analyte group.

(4) The laboratory shall follow the proficiency testing provider's instructions for preparing the proficiency testing sample and shall analyze the proficiency testing sample as if it were a client sample.

(5) The laboratory shall notify the department before the laboratory changes enrollment in an authorized proficiency testing program.

(6) The laboratory shall direct the proficiency testing provider to send, either in hard copy or electronically, a copy of each evaluation of the laboratory's proficiency testing study results to the department. The laboratory shall allow the proficiency testing provider to release all information necessary for the department to assess the laboratory's compliance with this rule. Out-of-state laboratories may submit a copy of the original report results.

(7) Proficiency testing providers shall evaluate results from all proficiency testing studies using NELAC-mandated acceptance criteria described in Chapter 2, Appendix A, of the NELAC standards.

(8) In each calendar year, the laboratory shall complete at least two separate proficiency testing studies for each analyte or interdependent analyte group. The department may determine the months of participation in the proficiency testing program.

(9) The laboratory shall be successful in at least two of the most recent three proficiency testing studies for each field of testing, subgroup, or analytes for which it is accredited.

(10) The laboratory shall be successful in at least one of the most recent two proficiency testing studies for each field of testing, subgroup, or analytes for which it is certified.

(11) The laboratory shall be successful in at least one proficiency testing study annually for each SDWA method for which it is certified or accredited.

(12) The certified or accredited laboratory shall not:

(A) discuss the results of a proficiency testing study with any other laboratory until after the deadline for receipt of results by the proficiency testing provider;

(B) if the laboratory has multiple testing sites or separate location, discuss the results of a proficiency testing study across sites or locations until after the deadline for receipt of results by the proficiency testing provider;

(C) send proficiency testing samples or portions of samples to another laboratory to be tested; or

(D) knowingly receive a proficiency testing samples from another laboratory for analysis and fail to notify the department of the receipt of the other laboratory's sample within five business days of discovery.

(13) The following are strictly prohibited:

(A) performing multiple analyses (replicates, duplicates) which are not normally performed in the course of analysis of routine samples;

(B) averaging the results of multiple analyses for reporting when not specifically required by the method; or

(C) permitting anyone other than bona fide laboratory employees who perform the analyses on a day-to-day basis for the laboratory to participate in the generation of data or reporting of results.

(14) The laboratory shall maintain a copy of all proficiency testing records, including analytical worksheets and proficiency testing provider report of results.

(i) On-site assessments.

(1) The laboratory shall ensure that its documented Quality System, analytical methods, quality control data, proficiency test data, laboratory standard operating procedures, and other records needed to verify compliance with this rule are available for review during the on-site laboratory assessment. The laboratory shall allow the department's authorized personnel to examine records; observe the laboratory's procedures, facilities, and equipment; and interview staff as necessary to determine such compliance.

(2) An assessment report shall be issued to the laboratory documenting any deficiencies found by the assessor. An assessment report shall be submitted to the laboratory within 30 calendar days of the on-site assessment.

(3) The department is authorized to conduct on-site assessments of the laboratory at any time during normal business hours.

(4) An on-site assessment shall be conducted prior to the issuance of certification or accreditation. Thereafter, an on-site assessment shall be conducted every two years. If the laboratory completes all of the requirements for continued accreditation or certification except that of an on-site assessment because the department is unable to schedule the assessment, the department may issue interim certification or accreditation for a period not to exceed six months.

(5) The department shall adopt procedures specifying the application criteria for acceptance and approval of approved third-party laboratory accreditation organizations.

(j) Corrective action reports in response to on-site assessment

(1) A corrective action report must be submitted by the laboratory to the primary accrediting authority in response to any assessment report received by the laboratory after an on-site assessment. The corrective action report shall include the action that the laboratory shall implement to correct each deficiency and the time period required to accomplish the corrective action.

(2) After being notified of deficiencies, the laboratory shall have 30 calendar days from the date of receipt of the assessment report to provide a corrective action report.

(3) The primary accrediting authority shall respond to the action noted in the corrective action report within 30 calendar days of receipt.

(4) If the corrective action report (or a portion) is deemed unacceptable to remediate a deficiency, the laboratory shall have an additional 30 calendar days to submit a revised corrective action report.

(5) If the corrective action report is not acceptable to the primary accrediting authority after the second submittal, the laboratory shall have accreditation revoked for all or any portion of its scope of accreditation for any or all of a field of testing, method, or analyte within a field of testing.

(6) All information included and documented in an assessment report and the corrective action report are considered to be public information and are to be released.

(7) If the laboratory fails to implement the corrective actions as stated in their corrective action report, accreditation for fields

of testing, specific methods, or analytes within those fields of testing shall be revoked.

(8) Proprietary data, confidential business information and classified national security information will be excluded from all public records.

(k) Method Approval.

(1) An applicant laboratory must request approval to analyze for an analyte or interdependent analyte group as part of its application for certification or accreditation or renewal of certification or accreditation. The laboratory must specify the method by which the analysis shall be performed. Approval to analyze for an analyte or interdependent analyte group by the specific method upon application for certification or accreditation or renewal of certification or accreditation shall be granted only after an on-site assessment. The applicant laboratory shall:

(A) provide documentation that it has the necessary equipment and trained technical employees to perform the test;

(B) provide documentation that the laboratory has passed two proficiency testing studies for analyte(s) or interdependent analyte group(s) in question;

(C) provide its standard operating procedure for the method used for the analyte(s) in question;

(D) provide documentation of its initial demonstration of analytical capability; and

(E) provide documentation establishing the laboratory's method detection limit for the analyte.

(2) At any time a laboratory may request approval to analyze for additional analyte or interdependent analyte groups or to analyze by additional methods by submitting a written request together with the documentation required in subsection (l) of this section. The department may require an on-site assessment prior to the granting of approval.

(3) The department shall approve the analyte or interdependent analyte group by the specific method that meets the requirement of this rule.

(4) SDWA methods of analysis shall be as specified in 40 Code of Federal Regulations Chapter 141 of the National Primary Drinking Water Regulation, or by any alternative analytical technique as specified by the department and approved by the Administrator of the EPA under 40 Code of Federal Regulations §141.27.

(5) CWA methods of analysis shall be as specified in 40 Code of Federal Regulations Chapter 136, Guidelines Establishing Test Procedures for the Analysis of Pollutants, or by any alternative analytical technique as specified by the department and approved by the Administrator of the EPA under 40 Code of Federal Regulations §136.3.

(6) The department adopts by reference the federal regulations referred to in paragraph (4) and (5) of this subsection. These documents are available for review during normal business hours at the department's Bureau of Laboratories, 1100 West 49th Street, Austin Texas.

(l) Period of accreditation.

(1) The period of accreditation shall be 12 months from the date of issuance.

(2) To renew accreditation, a laboratory shall reapply to the department and meet all requirements for accreditation prior to the termination of their accreditation.

(m) Period of certification.

(1) The period of certification shall be 24 months from the date of issuance.

(2) To renew certification, a laboratory shall reapply to the department and meet all requirements for certification prior to the termination of their certification.

(n) Display of certificate. A current certificate or accreditation document shall be displayed at all time in a prominent place in each certified or accredited laboratory where it may be viewed by the public.

(o) Contracts, records, and reports. The Texas Natural Resource Conservation Commission (TNRCC) is the state agency that has primary responsibility for implementing the safe drinking water program. Contracts for compliance testing must be made with the TNRCC prior to analysis. Subcontracting of compliance samples shall be made only with the approval of the TNRCC. Reports of results must be made in the form, style, manner, and frequency specified by the TNRCC. Laboratories are required to maintain records of compliance samples as follows:

(1) chemical analyses for ten years;

(2) lead and copper analyses for 12 years;

(3) microbiological analyses for five years; and

(4) radionuclide analyses for ten years.

(p) Denial and revocations.

(1) The department is authorized to deny, suspend, limit, or revoke the accreditation of any laboratory that does not comply with the requirements in the NELAC Standards and this rule.

(2) The department is authorized to deny, suspend, limit, or revoke the certification of any laboratory that does not comply with the requirements in the EPA's Manual for the Certification of Laboratories Analyzing Drinking Water, EPA 815-B-97-001, March 1997, and this rule.

(3) In determining the denial, revocation, suspension, or limitation, the department shall consider such factors as the gravity of the offense, the danger to the public of the offense, the intent of the violation, the extent of the violation, and the proposed correction of the problem.

(4) The department is authorized to immediately suspend the certification or accreditation of a laboratory when the department determines that any condition in the laboratory presents a clear and present danger to public health and safety.

(5) Any laboratory, which has its certification or accreditation, revoked, denied, suspended, or limited shall be allowed to apply for a fair hearing conducted by the department if requested in writing within 30 days of receipt of the notice. The hearing will be conducted using the department's fair hearing procedures in Chapter 1, Subchapter C of this title (relating to Fair Hearing Procedures).

(q) Changes of name or ownership. A certified or accredited laboratory that changes its name, business organizational status, or ownership must report the change in writing to the department within 30 days of the change.

(r) Technical Committee.

(1) The department shall establish one or more technical committees for the assistance in interpretation of requirements and for advising the department on the technical matters relating to the operation if its environmental laboratory accreditation program.

(2) Appointments to the committee shall be made from lists of nominees solicited by the department, and shall provide adequate representation of interested parties and environmental laboratories subject to this rule.

(3) The department shall determine the terms of office of appointees. All committee members shall serve without compensation and shall pay their own expenses incurred as a result of attending meetings or engaging in any other activity pursuant to 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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TRD-200008098
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 458-7236

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CHAPTER 229. FOOD AND DRUG SUBCHAPTER G. MANUFACTURE, STORAGE, AND DISTRIBUTION OF ICE SOLD FOR HUMAN CONSUMPTION INCLUDING ICE PRODUCED AT POINT OF USE

The Texas Department of Health (department) proposes the repeal of existing §§229.111 - 229.120, and the adoption of new §§229.111 - 229.115, concerning the manufacture, storage, and distribution of ice sold for human consumption, including ice produced at point of use. New §§229.111 - 229.115 covers general provisions; definitions; source water; labeling of packaged ice; and ice equipment.

Sections 229.111 - 229.120 are being proposed for repeal because the rules have not been updated since 1976 and many of the sections contain outdated references or are covered under more recent rules such as 25 Texas Administrative Code (TAC), Chapter 229, Food and Drug, Subchapter N, Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing or Holding Human Food. The new sections reorganize and rewrite the requirements resulting in content that reflects current practices in the industry.

Pursuant to the Government Code, §2001.39, each state agency is required to review and consider for readoption each rule adopted by that agency. The current rules have been reviewed and the department has determined that reasons for adopting the sections continue to exist. However, because many of the sections contain outdated references or are covered under more recent rules such as 25 TAC, Chapter 229, Food and Drug, Subchapter N, Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing or Holding Human Food, the current rules are being repealed and new rules are being proposed.

The department published a Notice of Intention to Review for §§229.111 - 229.120 as required by Government Code, §2001.039 in the *Texas Register* on April 7, 2000 (25 TexReg 3062). No comments were received as a result of the publication of the notice.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implication to the state or local government as a result of enforcing or administering the sections as proposed.

Mr. Sowards also has determined that for each year of the first five years the sections are in effect, the public health benefits anticipated as a result of enforcing or administering the sections will be the improved identification of the manufacturer and improved confidence in the safety of the source water. There are anticipated economic costs to small businesses, micro businesses and persons who are required to conduct source water sampling of $145 per year and an additional $248 every three years. There will be no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

25 TAC §§229.111-229.120

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

The repeals are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed repeals affect the Health and Safety Code, Chapter 431, Chapter 12; and the Government Code §2001.039, as passed by the 76th Legislature.

§229.111. Quality of Water.
§229.112. Water Systems.
§229.113. Ice Plant Equipment.
§229.114. Equipment Contamination.
§229.115. Air.
§229.116. Ice Storage Vaults.
§229.117. Delivery of Ice.
§229.118. Crushed Ice.
§229.119. Steam Sterilization.
§229.120. Toilet Facilities.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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25 TAC §§229.111-229.115

The new sections are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed new sections affect the Health and Safety Code, Chapter 431, Chapter 12; and the Government Code §2001.039, as passed by the 76th Legislature.

§229.111. General Provisions.

The sections will supplement §§229.181 - 229.184 of this title (relating to Licensure of Food Manufacturers and Food Wholesalers - Including Good Manufacturing Practices and Good Warehousing Practices in Manufacturing, Packing and Holding Human Food), and §§229.211 - 229.222 of this title (relating to Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food).

§229.112. Definitions.

The following words and terms, when used in these sections, shall pertain to ice production and shall have the following meanings unless the context clearly indicates otherwise.

(1) Approved laboratory - An approved laboratory is one which is acceptable to the department, certified by the U.S. Environmental Protection Agency (EPA), or certified by the primacy enforcement authority in any state which has been granted primacy by EPA or certified by a third party organization acceptable to a primacy state.

(2) Approved source (when used in reference to a plants product water or operations water) - A source of water and the water there from, whether it be from a spring, artesian well, drilled well, municipal water supply, or any source, that has been inspected and the water sampled, analyzed, and found to be safe and sanitary quality according to applicable laws and regulations of State and local government agencies having jurisdiction. The presence in the plant of current certificates or notifications of approval from the government agency or agencies having jurisdiction constitutes approval of the source and the water supply.

(3) Department - The Texas Department of Health.

§229.113. Source Water.

(a) Requirements for approved source. Sources in Texas shall comply with the following requirements:

(1) Public water systems. Sources in Texas which are public water systems shall comply with the Texas Health and Safety Code, Chapter 341, Subchapter C, concerning drinking water standards and rules adopted thereunder by the Texas Natural Resource Conservation Commission, 30 Texas Administrative Code (TAC), §§290.101 - 290.122 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems), and 30 TAC, §§290.38 - 290.47 (relating to Rules and Regulations for Public Water Systems);

(2) Other sources. Any other sources in Texas shall comply with 30 TAC, §§290.101 - 290.122 concerning drinking water standards and 30 TAC, §§290.38 - 290.43 and §290.46 concerning rules and regulations for public water systems.

(3) Compliance with these sections is required as if the source were a public water system.

(b) Sampling requirements.

(1) Approved community public water systems as defined by 30 TAC §290.38(8) and (41) (relating to Definitions). No additional source water sampling is required.

(2) Source water obtained from other than a public water system. Source water obtained from other than a community public water system shall be sampled in accordance with 30 TAC, §§290.101 - 290.122 for transient non-community water systems.

§229.114. Labeling of Packaged Ice.

(a) Packaged ice shall be labeled according to Health and Safety Code, Chapter 431, and Title 21, Code of Federal Regulations, Part 101, Food Labeling.

(b) Label information shall include:

(1) the common name of the food;

(2) an accurate declaration of the net weight; and

(3) the name and place of business of the manufacturer, packer, or distributor.

(c) The label should bear a code representing the package date and location for positive lot identification in the event of product recalls or customer notifications. If packaged ice is distributed without such coding, all ice products may be included within the scope of any recall or notification.

§229.115. Ice Equipment.

(a) Ice equipment. Equipment used in ice plants or as part of the facilities producing ice at point of use including, but not limited to, portable can fillers, core sucking devices, drop tubes, tank lids, ice cans, ice manufacturing, and ice dispensers shall be handled and maintained in such a manner as to prevent contamination. Equipment shall be located away from areas that could cause contamination such as toilets, vestibules, and openings to the outside. If at any time equipment is suspected as having been contaminated by improper handling, this equipment shall be sanitized.

(b) Block ice equipment. In order to minimize the possibility of contamination of ice during freezing, the operator employed on the tank floor shall use footwear which is limited to use only on the tank room floor. This footwear cannot be worn when leaving the tank room floor for any purpose. Only authorized persons are to be permitted on the tank room floor or within the ice storage rooms. Signs shall be posted stating that only authorized persons are allowed on the tank room floor and in ice storage vaults.

(c) Ice storage vaults. Ice storage vaults must be kept under sanitary conditions and shall be maintained in such a condition as to prevent possible flooding of rooms with waste material. All vaults shall be provided with suitable drains. To prevent possible contamination of ice, all accumulations of rust, fungus growth, mold, or slime shall be controlled.

This 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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Susan K. Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER I. SANITATION IN PECAN SHELLING PLANTS

25 TAC §§229.131-229.134

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

The Texas Department of Health (department) proposes the repeal of §§229.131 - 229.134, concerning sanitation in pecan shelling plants. These rules are being repealed because the existing rules contain obsolete language. Also, language in the proposed repeal of §229.134(b) and (c) is being added as an amendment to Subchapter N, Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food, Chapter 229, Food and Drug, §229.219.

Pursuant to the Government Code, §2001.039, each state agency is required to review and consider for readoption each rule adopted by that agency. The sections have been reviewed and the department has determined that reasons for adopting the sections no longer exist.

The department published a Notice of Intention to Review for §§229.131 - 229.134 as required by Government Code, §2001.039 in the *Texas Register* on April 7, 2000, (25 TexReg 3062).

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five-year period the sections are no longer in effect there will be no fiscal implications to state government or local government as a result of the repeal.

Mr. Sowards also has determined that for each year of the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections is that the department will be consistent with federal regulations. Since there are no new regulations being imposed, there will be no effect on small businesses or micro-businesses. There are no anticipated economic costs to persons who are required to comply with the sections as repealed. There is no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeals are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 431; Chapter 12; and the Government Code, §2001.039 as passed by the 76th Legislature.

§229.131. General Provisions.
§229.132. Building.
§229.133. Equipment.
§229.134. Operations.

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

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Susan K. Steeg
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SUBCHAPTER N. CURRENT GOOD MANUFACTURING PRACTICE AND GOOD WAREHOUSING PRACTICE IN MANUFACTURING, PACKING, OR HOLDING HUMAN FOOD

25 TAC §§229.211, 229.217, 229.219

The Texas Department of Health (department) proposes amendments to §§229.211, 229.217, and 229.219, concerning the current good manufacturing practice and good warehousing practice in manufacturing, packing, or holding human food. Specifically, the sections cover definitions; sanitary facilities and controls; and production and process controls.

In §229.211, a definition for approved source of food was added and the definition for sanitization was clarified. Section 229.217 clarifies the requirements for water sources to include specific information on approved sources of water and sampling requirements. Language from the Sanitation in Pecan Shelling Plants, which is being proposed for repeal, was added to §229.219.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implication to the state or local government as a result of enforcing or administering the sections as proposed.

Mr. Sowards has also determined that for each year of the first five years the sections are in effect, the public health benefits anticipated as a result of enforcing or administering the amended rules will be improved confidence in the safety of the sources and water and food used to manufacture other food products. There are anticipated economic costs to a limited number of small businesses, micro businesses, and persons who are required to conduct source water sampling of $145 per year and an additional $248 every three years. There will be no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas

78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of heath.

The proposed amendments affect the Health and Safety Code, Chapters 12 and 431.

§229.211. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Those definitions and interpretations of terms of the Federal Food, Drug, and Cosmetic Act (the Act), §201, are also applicable when used in this subchapter.

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

(4) Approved source - A supplier of food that complies with applicable state and federal laws and is licensed, if required, and inspected by the regulatory authority having jurisdiction over the processing and distribution of food.

(5) [~~(4)~~] Batter - A semifluid substance, usually composed of flour and other ingredients, into which principal components of food are dipped or with which they are coated, or which may be used directly to form bakery foods.

(6) [~~(5)~~] Blanching (except for tree nuts and peanuts) - A prepackaging heat treatment of foodstuffs for a sufficient time and at a sufficient temperature to partially or completely inactivate the naturally occurring enzymes and to effect other physical or biochemical changes in the food.

(7) [~~(6)~~] Control point - Any point, step, or procedure at which biological, physical, or chemical factors can be controlled.

(8) [~~(7)~~] Food - Articles used for food or drink for human consumption; chewing gum; and articles used for components of any such article.

(9) [~~(8)~~] Food-contact surfaces - Those surfaces that contact human food and those surfaces from which drainage onto the food or onto surfaces that contact the food ordinarily occurs during the normal course of operations." Food-contact surfaces" includes utensils and food-contact surfaces of equipment.

(10) [~~(9)~~] Lot - Food produced during a period of time indicated by a specific code.

(11) [~~(10)~~] Microorganisms - Yeasts, molds, bacteria, and viruses which include, but are not limited to, species having public health significance. The term "undesirable microorganisms" includes those microorganisms that are of public health significance; that subject food to decomposition; that indicate that food is contaminated with filth; or that otherwise may cause food to be adulterated within the meaning of the Act. Occasionally in these regulations, the adjective "microbial" is used instead of using an adjectival phrase containing the word microorganism.

(12) [~~(11)~~] Pests - Any objectionable animal or insect including, but not limited to, birds, rodents, flies, and larvae.

(13) [~~(12)~~] Plant - The building or facility, or parts thereof, used for or in connection with the manufacturing, packaging, labeling, or holding of human food.

(14) [~~(13)~~] Potentially hazardous food - A food that is natural or synthetic and requires temperature control because it is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms; the growth and toxin production of *Clostridium botulinum*; or in raw shell eggs, the growth of *Salmonella enteritidis*.

(A) The term includes a food of animal origin that is raw or heat-treated; a food of plant origin that is heat-treated or consists of raw seed sprouts; cut melons; and garlic and oil mixtures that are not acidified or otherwise modified at a food processing plant in a way that results in mixtures that do not support growth as specified in this definition.

(B) The term does not include an air-cooled hard-boiled egg with shell intact; a food with a water activity (a_w) [~~(aw)~~] value of 0.85 or less; a food with a pH level of 4.6 or below when measured at 24 degrees Celsius (75 degrees Fahrenheit); and a food, in an unopened hermetically sealed container, that is commercially processed to achieve and maintain commercial sterility under conditions of nonrefrigerated storage and distribution. The term also does not include a food for which laboratory evidence demonstrates that the rapid and progressive growth of infectious or toxigenic microorganisms or the growth of *S. enteritidis* in eggs or *C. botulinum* cannot occur, such as a food that has an aw and a pH that are above the levels specified above and that may contain a preservative, other barrier to the growth of microorganisms, or a combination of barriers that inhibit the growth of microorganisms. The term also does not include a food that may contain an infectious or toxigenic microorganism or chemical or physical contaminant at a level sufficient to cause illness, but that does not support the growth of microorganisms as specified in the definition of a potentially hazardous food.

(15) [~~(14)~~] Quality control operation - A planned and systematic procedure for taking all actions necessary to prevent food from being adulterated within the meaning of the Act.

(16) [~~(15)~~] Raw agricultural commodity - Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing.

(17) [~~(16)~~] Rework - Clean, unadulterated food that has been removed from processing for reasons other than insanitary conditions or that has been successfully reconditioned by reprocessing and that is suitable for use as food.

(18) [~~(17)~~] Safe-moisture level - A level of moisture low enough to prevent the growth of undesirable microorganisms in the finished product under the intended conditions of manufacturing, storage, and distribution. The maximum safe moisture level for a food is based on its water activity (a_w) [~~(aw)~~]. An (a_w) [~~(aw)~~] will be considered safe for a food if adequate data are available that demonstrate that the food at or below the given (a_w) [~~(aw)~~] will not support the growth of undesirable microorganisms.

(19) Sanitization - The application of cumulative heat or chemicals on cleaned food-contact surfaces that, when evaluated for efficacy, yield a reduction of 5 logs, which is equal to a 99.999% reduction of representative disease microorganisms of public health importance.

~~[(18) Sanitize - Adequately treating food-contact surfaces by a process that is effective in destroying vegetative cells of microorganisms of public health significance, and in substantially reducing numbers of other undesirable microorganisms, but without adversely affecting the product or its safety for the consumer.]~~

(20) [~~(19)~~] Shall - Term to state mandatory requirements.

(21) [~~(20)~~] Should - Term to state recommended or advisory procedures or identify recommended equipment.

(22) [~~(21)~~] Water activity (a_w) [~~(aw)~~] - A measure of the free moisture in a food. The quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature.

§229.217. Sanitary Facilities and Controls.

Each plant shall be equipped with adequate sanitary facilities and accommodations including, but not limited to:

(1) Water supply. The water supply shall be sufficient for the operations intended and shall be derived from an approved [~~adequate~~] source.

(A) Requirements for approved source. Sources in Texas shall comply with the following requirements.

(i) Public water systems. Sources in Texas which are public water systems shall comply with the Texas Health and Safety Code, Chapter 341, Subchapter C, concerning drinking water standards and rules adopted thereunder by the Texas Natural Resource Conservation Commission, 30 Texas Administrative Code (TAC), §§290.101 - 290.122 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems), and §§290.38 - 290.47 (relating to Rules and Regulations for Public Water Systems).

(ii) Other sources. Any other sources in Texas shall comply with 30 TAC, §§290.101 - 290.122 concerning drinking water standards and 30 TAC, §§290.38 - 290.43 and §290.46 concerning rules and regulations for public water systems.

(iii) Compliance with these sections is required as if the source were a public water system.

(B) Sampling requirements.

(i) Approved community public water systems as defined by 30 TAC, §290.38(8) and (41) (relating to Definitions). No additional source water sampling is required.

(ii) Source water obtained from other than a community public water system shall be sampled in accordance with 30 TAC, §§290.101 - 290.122 for transient noncommunity water systems.

(C) Any water that contacts food or food-contact surfaces shall be safe and of sanitary quality for its intended use. Running water at a suitable temperature, and under pressure as needed, shall be provided in all areas where required for the processing of food, for the cleaning of equipment, utensils, and food-packaging materials, or for employee sanitary facilities.

(2) Plumbing. Plumbing shall be of adequate size and design and adequately installed and maintained to:

(A)-(E) (No change.)

(3) Sewage disposal. Sewage disposal shall be made into an approved sewerage system in accordance with applicable state regulations and local ordinances [~~or disposed of through other adequate means~~].

(4)-(6) (No change.)

§229.219. Production and Process Controls.

All operations in the receiving, inspecting, transporting, segregating, preparing, manufacturing, packaging, and storing of food shall be conducted in accordance with good public health and sanitation principles. Appropriate quality control operations shall be employed to ensure that food is suitable for human consumption and that food-packaging materials are safe and suitable. Overall sanitation of the plant shall be under the supervision of one or more competent individuals assigned responsibility for this function. All reasonable precautions shall be taken to ensure that production procedures do not contribute contamination from any source. Testing procedures shall be used where necessary to identify sanitation failures or possible food contamination by chemicals, microbes, or extraneous materials. All food that has become contaminated to the extent that it is adulterated within the meaning of the Act shall be rejected, or if permissible, treated or processed to eliminate the contamination.

(1) Raw materials and other ingredients.

(A)-(G) (No change.)

(2) Manufacturing operations.

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

(J) Mechanical manufacturing steps such as washing, peeling, trimming, cutting, sorting and inspecting, mashing, dewatering, cooling, shredding, extruding, drying, whipping, defatting, soaking, tempering, and forming shall be performed so as to protect food against contamination. Compliance with this requirement may be accomplished by providing adequate physical protection of food from contaminants that may drip, drain, or be drawn into the food. Protection may be provided by cleaning and sanitizing all food-contact surfaces, and by using time and temperature controls at and between each manufacturing step.

(K)-(O) (No change.)

(P) Unshelled pecans shall be thoroughly cleaned to remove foreign matter before cracking. After cleaning, unshelled pecans shall be sanitized.

(Q) [~~(P)~~] When ice is used in contact with food, it shall be made from water that is safe and of adequate sanitary quality, and shall be used only if it has been manufactured in accordance with current good manufacturing practice as outlined in this part.

(R) [~~(Q)~~] Food-manufacturing areas and equipment used for manufacturing human food should not be used to manufacture nonhuman food-grade animal feed or inedible products, unless there is no reasonable possibility for the contamination of the human food.

This 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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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 229. FOOD AND DRUG

The Texas Department of Health (department) proposes the repeal of existing §§229.301 - 229.304 and proposal of new §§229.301 - 229.306 concerning the issuance of certificates of free sale and sanitation and/or certificates of origin. Specifically,

the sections cover the purpose, definitions, minimum requirements, application for certificate, time frames and fees.

The Health and Safety Code, §431.241, allows the Board of Health (board) to adopt rules and to set fees for certificates of free sale and sanitation and another certification in an amount sufficient to recover the cost to the department of issuing the particular certificate. Certificates are issued to manufacturers and distributors for the purpose of importing products from the United States into other countries. These rules set forth the process for obtaining a certificate and clarify the products that the department can certify.

Government Code §2001.039 requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 229.301 - 229.304 have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that rules are needed on this subject; however, the rules need revision as described in this preamble.

The department published a Notice of Intention to Review these sections in the December 31, 1999, issue of the *Texas Register* (24 TexReg 12082). No comments were received by the department as a result of the publication of the notice.

Ms. Susan Tennyson, Bureau Chief, Bureau of Food and Drug Safety, has determined that for each year of the first five year period the sections are in effect, there will be fiscal implications as a result of enforcing or administering the sections as proposed. The proposed increase in certificate and inspection fees is estimated to generate additional revenues of $80,000 each year of the first five years for state government. The new certificate fees will offset current costs associated with administering these sections. There will be no effect on local government.

Ms. Tennyson has also determined that for the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be a clear understanding of requirements and non-refundable fees applicable to obtaining certificates of free sale and sanitation and/or certificates of origin.

A micro-business or small business, which is not required to be licensed by the department, will have an increased inspection fee from $250 to $328, in order to certify sanitation and the products being shipped to another country.

There is no anticipated economic cost to persons who are required to comply with the amendments as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ms. Susan Tennyson, Chief of the Bureau of Food and Drug Safety, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0222. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

SUBCHAPTER R. ISSUANCE OF CERTIFICATES OF FREE SALE AND CERTIFICATES OF ORIGIN

25 TAC §§229.301 - 229.304

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

The repeals are proposed under Health and Safety Code, Chapter 431 (Food, Drug, Service and Cosmetic Act); and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for its procedures and performance of each duty imposed by law on the board, the department and the commissioner of health.

The repeals affect the Health and Safety Code, Chapters 12 and 431; and Government Code §2001.039.

§229.301. Purpose.
§229.302. Definitions.
§229.303. Certificate Fees and Procedures.
§229.304. Minimum Requirements To Receive a Certificate.

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

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER R. ISSUANCE OF CERTIFICATES OF FREE SALE AND SANITATION AND/OR CERTIFICATES OF ORIGIN

25 TAC §§229.301 - 229.306

The new rules are proposed under Health and Safety Code, Chapter 431 (Food, Drug, Service and Cosmetic Act); and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for its procedures and performance of each duty imposed by law on the board, the department and the commissioner of health.

The new rules affect the Health and Safety Code, Chapters 12 and 431; and Government Code §2001.039.

§229.301. Purpose.

These sections set out the requirements for the Texas Department of Health (department) to issue a certificate of free sale and sanitation and/or a certificate of origin. Certificates are issued to manufacturers and distributors for the purpose of importing products from the United States into other countries. Certificates for meat and poultry products, which have been inspected by the United States Department of Agriculture (USDA), can only be issued to distributors of those products.

§229.302. Definitions.

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

(1) Certificate of free sale and sanitation--A certificate issued by the department, which certifies that the manufacturer and/or distributor of the food, drugs, cosmetics, medical device products, dietary supplements, milk and dairy products, or molluscan shellfish products listed in the document is duly authorized to manufacture or distribute the products and that the products can be sold freely to the public in the United States of America, and that the manufacturer or

distributor is in substantial compliance with Health and Safety Code, Chapters 431, 435, 436, or 440, depending on the product (the Acts), and with Title 25, Texas Administrative Code, Chapters 217, 221, 229, or 241 (the Rules), as determined by the department.

(2) Certificate of origin--A certificate issued by the department, which certifies that the product(s) listed in the document originate from, are manufactured in, produced in or grown in the State of Texas.

(3) Current inspection--An official inspection of an establishment conducted within the time specified in §229.303(b) of this title (relating to Minimum Requirements), or immediately preceding a request for certificate of free sale and sanitation and/or a certificate of origin.

(4) Currently licensed--Establishments regulated by the department under the Health and Safety Code (Texas Food, Drug, and Cosmetic Act, Texas Meat and Poultry Inspection Act, Texas Dairy Products Act, and Texas Aquatic Life Act,) which possess a current, valid license.

(5) Department--The Texas Department of Health.

§229.303. Minimum Requirements.

(a) Current license. All establishments, except those exempt from licensing by law, shall be currently licensed by the department and shall be in substantial compliance with the Acts and the Rules as they apply to each specific type of operation.

(b) Current compliant inspection. All establishments shall have a current compliant inspection as follows:

(1) manufacturers, distributors, or wholesalers of foods, dietary supplements, or drug products, within 12 months of application;

(2) manufacturers, distributors, or wholesalers of cosmetic products, within 12 months of application;

(3) manufacturers of medical devices, within 24 months of application;

(4) distributors of medical devices, within 12 months of application;

(5) producers, processors, and distributors of milk or dairy products, within 3 months of application; and

(6) producers or distributors of molluscan shellfish, within 3 months of application.

(c) Violation. A certificate of free sale and sanitation and/or certificate of origin shall not be issued if substantive violations of the Acts or the Rules exist as determined by the department.

§229.304. Application for Certificate.

(a) Application form. Application forms may be obtained from the Bureau of Food and Drug Safety, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3182, or at the website, www.tdh.state.tx.us/bfds/bfds-hom.htm.

(b) Application information. The application shall be signed, shall be made on an application form furnished by the department, and shall contain the following information:

(1) the name under which the business is conducted;

(2) the address where the business is conducted;

(3) the type of operation conducted by the requesting establishment;

(4) the type of certificate required; and

(5) the product(s) specified on the application to include the name of the product, the name of the manufacturer and the size of the product.

(c) Complete application. Applications must be completely filled out and shall be accompanied by the appropriate fee.

(d) Supplemental information. The labeling information, promotional information, website information, master formulas, marketing clearance letters, and advertising affixed to, accompanying, or relating to the products may be required to be submitted for each product upon request by the department.

(e) Information listed. The certificate will list the product name, manufacturer's name, and the product size, if applicable. If the applicant requests additional information be included on the certificate, an additional fee will be charged.

§229.305. Time Frames.

The time frames for issuing a certificate shall be as follows.

(1) Within 10 business days of receipt of a completed application, the department shall issue a certificate, deny a certificate, schedule an inspection, and/or request supplemental information.

(2) Within 30 business days of receipt of a completed application, the department shall inspect an establishment needing a current compliant inspection, and shall issue the certificate if there is no substantive violation of the Acts or the Rules.

(3) Within 30 business days of receipt of requested supplemental information, the department shall review the supplemental information for compliance with state and federal regulations. If the supplemental information meets the requirements of the state and federal law, if the establishment has a current compliant inspection, and if the fees for review of the supplemental information have been received, the department shall issue the certificate.

§229.306. Fees.

(a) Original certificate. All applicants for certificates shall pay a nonrefundable fee of $50 for the certificate and $.10 per product to be listed on the certificate. Certificates shall not be reproduced or transferred from one person to another or from one establishment to another.

(b) Cosmetic products. For cosmetic establishments not required to be licensed by the department, and who do not have a current compliant inspection, a nonrefundable fee of $50 for the certificate, $.10 per product to be listed on the certificate, and $328 for an inspection conducted by department staff will be required.

(c) Supplemental information review. For supplemental information review, a separate invoice shall be mailed or sent via facsimile to the applicant. Nonrefundable fees of $33 per hour of review time will be charged. This fee must be paid prior to the certificate being issued. Failure to pay the review fee will result in denial of the certificate.

(d) Additional certificates. Each additional identical original certificate is $1.00 per page.

This 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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Susan K. Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER X. LICENSURE OF DEVICE DISTRIBUTORS AND MANUFACTURERS

25 TAC §§229.432 - 229.436, 229.439, 229.441, 229.443

The Texas Department of Health (department) proposes amendments to §§229.432 - 229.436, 229.439, 229.441, and 229.443, concerning the licensure of device distributors and manufacturers. Specifically, the sections cover applicable laws and regulations; definitions; exemptions; licensure requirements; licensure procedures; licensure fees; minimum standards for licensure; and enforcement and penalties. Amended §229.432 will eliminate references to the U.S. Food and Drug Administration's (FDA) medical device distributor reporting regulation and to the FDA's requirements for cigarettes and smokeless tobacco, based upon the repeal of those provisions by the FDA. Amended §229.433 will add new definitions for "flea market", "practitioner", and "prescription device" to provide clarification of statutory intent. Amended §229.434 will clarify licensure exemptions with respect to Health and Safety Code, Chapter 483. Amended §229.435 will clarify requirements for amending a license and for licensing distributors and manufacturers of combination products. The new language concerning combination products will reflect certain provisions added as a result of Senate Bill 1236, passed by the 76th Texas Legislature. Amended §229.436 revises references for licensure contacts and updates licensing procedures. Amended §229.439 updates referenced citations for licensure fee exemptions. Amended §229.441 will clarify existing requirements for prescription devices and the sale of contact lenses at flea markets. The new language concerning the sale of contact contact lenses at flea markets will reference provisions added by House Bill 749, passed by the 76th Texas Legislature. Amended §229.443 will clarify requirements dealing with access to and retention of records and will update the enforcement provisions related to adulterated and misbranded devices.

Cynthia T. Culmo, R.Ph., Director, Drugs and Medical Devices Division, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed because the licensing requirements are not being substantially changed.

Ms. Culmo has also determined that for each year of the first five years the sections as proposed are in effect, the public benefit will be clarification of minimum standards for licensure of device distributors and manufacturers. There will be no adverse economic effect on micro-businesses and/or small businesses and persons who may be required to comply with these sections as proposed. The finding of no adverse economic effect on micro-businesses and/or small businesses is based on the intent of the proposed sections to clarify existing licensing requirements and the determination that no changes to existing licensure fee schedules will occur. There will be no impact on local employment.

Comments on the proposed amendments may be submitted to Thomas E. Brinck, Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0237. Comments will be accepted for 30 days from the date of publication of this proposal in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments affect Health and Safety Code, Chapter 431.

§229.432. Applicable Laws and Regulations.

(a) The Texas Department of Health (department) adopts by reference the following laws and regulations:

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

~~[(4) 21 CFR, Part 804, Medical Device Distributor Reporting, as amended;]~~

(4) [~~(5)~~] 21 CFR, Part 807, Establishment Registration and Device Listing for Manufacturers and Initial Importers [~~Distributors~~] of Devices, as amended;

(5) [~~(6)~~] 21 CFR, Part 814, Premarket Approval of Medical Devices, as amended;

(6) [~~(7)~~] 21 CFR, Part 820, Quality System Regulation, as amended;

[~~(8) 21 CFR, Part 897, Cigarettes and Smokeless Tobacco, as amended;~~] and

(7) [~~(9)~~] 21 CFR, Subchapter J - Radiological Health, as amended.

(b) - (c) (No change.)

§229.433. Definitions.

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

(1) - (11) (No change.)

(12) Flea market--A location at which booths or similar spaces are rented or otherwise made available temporarily to two or more persons and at which the persons offer tangible personal property for sale.

(13) [~~(12)~~] Health authority--A physician designated to administer state and local laws relating to public health.

(14) [~~(13)~~] Importer--Any person who initially distributes a device imported into the United States.

(15) [~~(14)~~] Ionizing radiation--Any electromagnetic or particulate radiation capable of producing ions, directly or indirectly, in its passage through matter. Ionizing radiation includes gamma rays and x-rays, alpha and beta particles, high speed electrons, neutrons, and other nuclear particles.

(16) [~~(15)~~] Labeling--All labels and other written, printed, or graphic matter:

(A) upon any article or any of its containers or wrappers; or

(B) accompanying such article.

(17) [~~(16)~~] Manufacture--The making by chemical, physical, biological, or other procedures of any article that meets the definition of device. The term includes the following activities:

(A) repackaging or otherwise changing the container, wrapper, or labeling of any device package in furtherance of the distribution of the device from the original place of manufacture to the person who makes final delivery or sale to the ultimate consumer; or

(B) initiation of specifications for devices that are manufactured by a second party for subsequent commercial distribution by the person initiating specifications.

(18) [~~(17)~~] Manufacturer--A person who manufactures, fabricates, assembles, or processes a finished device. The term includes a person who repackages or relabels a finished device. The term does not include a person who only distributes a finished device.

(19) [~~(18)~~] Misbranded Device--Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.112.

(20) [~~(19)~~] Person--Includes individual, partnership, corporation, and association.

(21) [~~(20)~~] Place of business--Each location at which a device is manufactured or held for distribution.

(22) Practitioner--Means a person licensed by the Texas State Board of Medical Examiners, State Board of Dental Examiners, Texas State Board of Podiatric Medical Examiners, Texas Optometry Board, or State Board of Veterinary Medical Examiners to prescribe and administer prescription devices.

(23) Prescription device--A restricted device which, because of any potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use is not safe except under the supervision of a practitioner licensed by law to direct the use of such device, and hence for which §§adequate directions for use cannot be prepared.

(24) [~~(21)~~] Radiation machine--Any device capable of producing ionizing radiation except those devices with radioactive material as the only source of radiation.

(25) [~~(22)~~] Radioactive material--Any material (solid, liquid, or gas) that emits radiation spontaneously.

(26) [~~(23)~~] Reconditioning--Any appropriate process or procedure by which distressed merchandise can be brought into compliance with departmental standards as specified in the Texas Food, Drug, Device, and Cosmetic Salvage Act, Health and Safety Code, Chapter 432, §432.003, as interpreted in the rules of the board in §229.192 of this title (relating to Definitions).

(27) [~~(24)~~] Restricted device--A device subject to certain controls related to sale, distribution, or use as specified in the Federal Food, Drug, and Cosmetic Act, as amended, §520(e)(1).

§229.434. Exemptions.

(a) (No change.)

(b) An exemption from the licensing requirements under these sections does not constitute an exemption from other applicable provisions of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431; the Texas Dangerous Drug Act, Health and Safety Code, Chapter 483; [~~(Act)~~] or the rules adopted [~~by the Texas Board of Health~~] to administer and enforce the Acts [~~Act~~].

§229.435. Licensure Requirements.

(a) - (i) (No change.)

(j) Amendment of license. A license that is amended, including a change of name, ownership, or a notification of a change in the location of a licensed place of business will require submission of an application as outlined in §229.436 of this title (relating to Licensing Procedures) and submission of fees as outlined in §229.439 of this title (relating to Licensure Fees).

(k) (No change.)

(l) Combination products. If the United States Food and Drug Administration determines, with respect to a product that is a combination of a drug and a device, that the primary mode of action of the product is as a device, a distributor or manufacturer of the product is subject to licensure as described in this section.

§229.436. Licensing Procedures.

(a) License application forms. License application forms may be obtained from the Texas Department of Health, Licensing and Enforcement [~~Drugs and Medical Devices~~] Division, 1100 West 49th Street, Austin, Texas, 78756 or from the Bureau of Food and Drug Safety website at http://www.tdh.state.tx.us/bfds/lic/apps.html.

(b) Initial license [~~License~~] application. The initial application for licensure as a device distributor or manufacturer [~~license application~~] shall be signed and verified, shall be made on a license application form furnished by the Texas Department of Health (department), and shall contain the following information:

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

(3) if a proprietorship, the name and residence address of the proprietor; if a partnership, the names and residence addresses of all partners; if a corporation, the date and place of incorporation and name and address of its registered agent in the state and corporation charter number [~~a copy of the Articles of Incorporation~~]; or if any other type of association, then the names of the principals of such association;

(4) - (7) (No change.)

(c) Renewal license application. The renewal application for licensure as a device distributor or manufacturer shall be made on a license application form furnished by the department.

§229.439. Licensure Fees.

(a) (No change.)

(b) Exemption from licensure fees. A person is exempt from the licensure fees required by this section if the person is:

(1) licensed under §289.252 of this title (relating to Licensing of Radioactive Material) or registered under §289.226 [~~§289.122~~] of this title (relating to Registration of Radiation Machine Use and Services) and engages only in the following types of device distribution or manufacturing:

(A) - (B) (No change.)

(2) (No change.)

(c) (No change.)

§229.441. Minimum Standards for Licensure.

(a) (No change.)

(b) Federal establishment registration and device listing. All persons who operate as device distributors or manufacturers in Texas shall meet the applicable requirements in 21 Code of Federal Regulations (CFR), Part 807, titled "Establishment Registration and Device Listing for Manufacturers and Initial Importers [~~Distributors~~] of Devices." Devices distributed by device distributors or manufacturers shall have met, if applicable, the premarket notification requirements

of 21 CFR, Part 807 or the premarket approval provisions of 21 CFR, Part 814, titled "Premarket Approval of Medical Devices."

(c) - (h) (No change.)

(i) Medical device reporting. Device distributors or manufacturers shall meet the applicable medical device reporting requirements of 21 CFR, Part 803, titled "Medical Device Reporting" [~~or 21 CFR, Part 804, titled "Medical Device Distributor Reporting"~~].

(j) (No change.)

(k) Distribution of prescription devices.

(1) A prescription device in the possession of a device distributor or manufacturer licensed under these sections of this subchapter is exempt from Health and Safety Code, §431.112(f)(1), relating to labeling bearing adequate directions for use, providing it meets the requirements of 21 CFR, §§801.109, titled "Prescription devices" and 801.110, titled "Retail exemption for prescription devices".

(2) Each device distributor or manufacturer who distributes prescription devices shall maintain a record for every prescription device, showing the identity and quantity received or manufactured and the disposition of each device.

(3) Each device distributor or manufacturer who delivers a prescription device to the ultimate user shall maintain a record of any prescription or other order lawfully issued by a practitioner in connection with the device.

(l) Sale of contact lenses at flea markets. Contact lenses may not be sold by persons at flea markets unless:

(1) the person selling the contact lenses has complied with the requirements of Business and Commerce Code, §35.55; and

(2) the person selling the contact lenses has complied with the requirements of the Texas Contact Lens Prescription Act, Texas Civil Statutes, Article 4552-A.

§229.443. Enforcement and Penalties.

(a) - (b) (No change.)

(c) Access to records.

(1) A person who is required to maintain records referenced in these sections or under the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act) or §519 or §520(g) of the Federal Food, Drug, and Cosmetic Act or a person who is in charge or custody of those records shall, at the request of an authorized agent or health authority, permit the authorized agent or health authority at all reasonable times access to and to copy and verify the records.

(2) A person who is subject to licensure under these sections of this subchapter shall, at the request of an authorized agent or health authority, permit the authorized agent or health authority at all reasonable times access to and to copy and verify all records showing:

(A) the movement in commerce of any device;

(B) the holding of any device after movement in commerce; and

(C) the quantity, shipper, and consignee of any device.

(d) Retention of records. Records required by these sections of this subchapter shall be maintained at the place of business or other location that is reasonably accessible for a period of at least 2 years following disposition of the device unless a greater period of time is required by laws and regulations adopted in §229.432 of this title (relating to Applicable Laws and Regulations).

(e) [~~(d)~~] Adulterated and misbranded device. If the Texas Department of Health (department) identifies an adulterated or misbranded device, the department may impose [~~enforce~~] the applicable provisions of Subchapter C of the Act including, but not limited to: detention, emergency order, recall, condemnation, destruction, injunction, civil penalties, criminal penalties [~~enforcement~~], and/or administrative penalties.[~~,~~] Administrative and civil penalties will be assessed using the Severity Levels contained [~~set out~~] in §229.261 of this title (relating to Assessment of Administrative or Civil Penalties).

This 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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Susan K. Steeg
General Counsel
Texas Department of Health
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 5. SYSTEM CAP TRADING

30 TAC §§101.380, 101.382, 101.383, 101.385

The Texas Natural Resource Conservation Commission (commission) proposes new §101.380, Definitions; §101.382, Applicability; §101.383, General Provisions; and §101.385, Recordkeeping and Reporting. The proposed new sections are to be grouped into Subchapter H, Emissions Banking and Trading; new Division 5, System Cap Trading. The sections will also be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed rules would simplify emission trading for electric generating facilities (EGFs) operating under a system emission cap in the Dallas/Fort Worth (DFW) ozone nonattainment area and in the attainment counties of east and central Texas. The rules represent a continuing commitment by the commission to incorporate maximum flexibility for the electric industry in achieving the nitrogen oxides (NO_x) emissions reductions necessary to achieve the goal of ozone attainment in the DFW area while maintaining reliability of service. The proposed procedure may be applied to other facilities subject to a system cap under Chapter 117 in subsequent rulemaking.

Emission reduction credit (ERC) trading among companies is allowed under the April 19, 2000 adoption of the DFW ozone attainment demonstration rules for EGFs, which were published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 4140). In order to complete a trade under these existing rules, one source owner must bank an emission credit with the commission and another source owner must receive the executive director's approval to use the credit. This procedure works well for trades which are made relatively infrequently, such as tend to occur when emissions are limited annually. In contrast, the ozone attainment demonstration rules for EGFs in DFW establish daily NO_x limits because the EGFs in DFW mostly operate on days conducive to exceedences of the ozone standard. This proposed rulemaking would add a trading alternative which would facilitate daily emission trading by reducing the steps necessary to trade allowable emissions among different owners. Under this rule proposal, the source owners would be simply required to report trades and the commission would have the opportunity to review, on a quarterly basis, the daily emissions, 30-day rolling average emissions, and any emission trades which occurred during the preceding calendar quarter.

Currently, individual sources under common ownership or control may be voluntarily grouped together in a system with a system cap on total emissions from the sources in the system. Emission allowables may be transferred from source to source within the system, provided the cap is not exceeded. This proposal would allow the increase of system caps, provided that surplus emission allowables are obtained from another source owner participating in a system cap. The system cap may be increased daily using a daily surplus or on a 30-day rolling average using 30-day rolling average surpluses for the same period.

The rules adopted on April 19, 2000 also established an annual system cap for EGFs in the attainment counties of east and central Texas (25 TexReg 4101). This proposal would allow the exceedence of that system cap provided surplus emission allowable is obtained from another EGFs participating in the system cap. The EGFs affected by Chapter 117 are in the following counties: Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton.

The transfer of emission allowable remains restricted to the area, nonattainment or attainment, in which it originates.

SECTION BY SECTION DISCUSSION

The proposed new §101.380 contains definitions for use in this division. Surplus emission allowable is defined as an amount, greater than zero, by which a source's allowable source cap emissions exceed actual emissions for a single day or a 30-day average or tons per year for a calendar year for a source subject to Chapter 117, Subchapter B, Division 2, Utility Electric Generation in East and Central Texas.

The proposed new §101.382 would apply the trading provisions of this division to sources located within a single nonattainment area or other area with unique emission limits as defined in Chapter 117.

The proposed new §101.383 would allow the increase of system cap limits provided surplus allowances are obtained from another owner or operator participating in the system cap. Emissions caps may be increased daily or on a 30-day rolling average, provided allowances are obtained that match the period when the increase occurs. System cap limits for EGFs as regulated under Chapter 117, Subchapter B, Division 2, may be exceeded with surplus emission allowable obtained for that calendar year from another source owner or operator participating in the system cap.

The proposed new §101.385 would require owners or operators of sources in an ozone nonattainment area participating in this trading program to submit quarterly reports based on a calendar year within 30 days of the end of the reporting period. The reports would contain daily NO_x emissions from each source and supporting calculations, rolling 30-day average for each source with supporting calculations, and all emission trades during the reporting period including trade date or period, quantity traded, and trading participants. Similarly, EGFs complying with Chapter 117, Subchapter B, Division 2, would submit reports dated on annual period beginning January 1 of each year and submitted within 30 days following the end of the annual period. The report would detail annual emissions with supporting calculations and all emission trades during the report period including trade date, quantity traded, and trade participants. This section would also require owners or operators to report to the commission, within 48 hours, any exceedences of a system cap when there were not allowances available to compensate for that exceedence.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined for each year of the first five-year period the proposed rules are in effect, there may be positive fiscal implications, which are not anticipated to be significant, for owners of boilers and turbines in the four- county DFW nonattainment area and the 95-county central and east Texas attainment area as a result of administration or enforcement of the proposed rules. There are 23 investor-owned boilers and 13 boilers owned by municipalities in the DFW area that could be affected by the proposed rules. In addition, there are approximately 65 investor-owned boilers and turbines and 36 boilers and turbines owned by municipalities, cooperatives, or river authorities in the east and central Texas attainment areas that could be affected by the proposed rules. There will be no fiscal implications for units of state and local government that do not own or operate boilers or turbines at EGFs in the affected areas. The proposed rules are intended to simplify and expand the trading of emissions for regulated NO_x sources in the affected areas.

This proposal is intended to provide increased flexibility for regulated NO_x sources by adding another emission trading alternative to meet required emission levels. Regulated NO_x sources in the affected areas that are operating under a system cap are eligible to participate in the system cap trading program. This proposal would allow the trading of emissions between different entities as long as participating sources are operating under a system cap. A NO_x source would only be allowed to exceed the system cap by obtaining surplus emissions from other sources.

The system cap trading program differs from the emission credit banking and trading program, because there is no banking of emissions with the agency. All trading is done between entities with overall trading reports and emission levels provided to the commission on a quarterly or annual basis. The proposed system cap trading program is intended to enhance daily trading of emissions by allowing direct trades between entities without prior agency approval and to implement annual trading in the east and central Texas attainment area. The commission does

not anticipate significant fiscal impacts to units of state and local government due to the quarterly reporting requirement.

Examples of NO_x sources at facilities that could be affected by the proposed rules include electric utility boilers and stationary gas turbines. Currently, only EGFs are eligible under Chapter 117 rules to participate in the system cap trading program.

There are approximately 23 investor-owned boilers and 13 boilers owned by municipalities in the DFW area that could be affected by the proposed rules if the owners of these boilers decide to participate in the system cap trading program. In addition, there are approximately 65 investor-owned boiler and turbine EGFs and 36 boiler and turbine EGFs owned by river authorities, cooperatives, or municipalities in the east and central Texas attainment area which could be affected by the proposed rules if the owners of these boilers and turbines decide to participate in the system cap trading program. The counties in the affected attainment areas are: Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton. The transfer of emission allowable remains restricted to the area, nonattainment or attainment, in which it originates. Although the exact cost per ton for an emission credit traded in the system cap trading program is unknown, the commission estimates that the cost will be similar to ERCs currently traded in the DFW and Houston/Galveston (HGA) areas. The current cost for ERCs in HGA is approximately $3,600 per ton per year. Actual costs will be dependent on availability and demand. Total costs to state and local government sites that elect to participate in the system cap trading program will depend on the amount of emissions purchased. Emission trading under this program is intended to provide flexibility for regulated NO_x sources and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of surplus emissions from other NO_x sources to meet emission reduction requirements. Additionally, facilities that remain within their emission caps may receive additional revenue from selling surplus emissions to other emission sources.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result on implementing the rules will be the reduction of emissions of NO_x in the DFW and east and central Texas areas and increased flexibility for regulated facilities to meet emission reduction requirements.

This proposal is intended to provide increased flexibility for regulated NO_x sources by adding another emission trading alternative to meet required emission levels. Regulated NO_x sources in the affected areas that are operating under a system cap are eligible to participate in the system cap trading program, which allows the trading of emissions between different entities as long as participating sources are operating under a system cap. A NO_x source would only be allowed to exceed the system cap by obtaining surplus emissions from other sources.

It is anticipated that the majority of owners and operators of the approximately 23 investor-owned and operated boilers located at EGFs in the DFW area would be affected by the proposed rulemaking by electing to participate in the system cap trading program. Although the exact cost per ton for an emission credit traded in the system cap trading program is unknown, the commission estimates the cost will be similar to ERCs currently traded in the DFW and HGA areas. The current cost for ERCs in HGA is approximately $3,600 per ton per year. Actual costs will be dependent on availability and demand. Total costs to individuals and businesses that elect to participate in the system cap trading program will depend on the amount of emissions purchased. Emission trading under this program is intended to provide flexibility for regulated NO_x sources and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other NO_x source's surplus emissions to meet emission reduction requirements. Additionally, facilities that remain within their emission caps may receive additional revenue from selling surplus emissions to other emission sources.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of administration or enforcement of the proposed rules. The proposed rules would allow EGFs in the DFW and east and central Texas areas to participate in the system cap trading program. There are no known small or micro-businesses that own or operate affected EGFs in the affected areas; therefore, the commission anticipates there will be no fiscal impact for small or micro-businesses as a result of the proposed rules.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that these proposed new sections do not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225. "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 commission is proposing these new sections to allow greater flexibility for sources in the affected areas to meet NO_x emission limitations and for NO_x emissions trading. The proposed new sections do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state; therefore, this proposal does not constitute a major environmental rule. In addition, 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 is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rules do not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements were developed in order to meet the ozone national ambient air quality standard (NAAQS) set by the EPA under the Federal Clean Air Act (FCAA), §109 (42 United States Code (USC), §7409), and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement"

of the primary NAAQS in each air quality control region of the state. While §7410 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 Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC 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 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) 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 agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill 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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The commission bases these actions on the presumption that the legislature understands this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA 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. Because it is a rule of statutory interpretation that 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 RIA for rules that are extraordinary in nature. While the SIP rules will 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 proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017 as well as under 42 USC, §7410(a)(2)(A).

The commission invites public comment on the draft RIA.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rules. The following is a summary of that assessment. The sections are proposed as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the DFW nonattainment area to attain the NAAQS for ozone and to maintain air quality in the east and central Texas area. Promulgation and enforcement of the rules will not burden private real property. The proposed new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the NO_x emissions under the system cap that are the subject of these rules are not property rights. Consequently, the proposed sections do not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the proposed sections do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the USC, §7410. Specifically, the emission limitations and control requirements that are the subject of this proposal were developed in order to meet the ozone NAAQS set by the EPA under the USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a NO_x strategy which is necessary for the DFW area to meet the air quality standards established under federal law and to maintain air quality in east and central Texas. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Plan (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, 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 regulations of the Coastal Coordination Council and determined the proposed rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires the commission protect air quality in coastal areas. The proposed new sections would allow greater flexibility in meeting system cap requirements by trading NO_x emissions between sources in the DFW and east and central Texas areas. These proposed rules do not authorize any new NO_x air emissions. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The proposed new sections, if adopted, would become part of the state's ozone attainment strategy; therefore, these revisions would be submitted as part of the SIP. As a result, the proposed sections would become applicable requirements under the federal operating permit program and sources would be required to amend their permits.

ANNOUNCEMENT OF HEARING

The commission will hold public hearings on this proposal in Irving on January 3, 2001 at 6:00 p.m. at the City of Irving Public Library Auditorium, located at 801 West Irving Boulevard and in Austin on January 4, 2001, at 2:00 p.m., at the Texas Natural Resource Conservation Commission, Building B, Room 201A, located at 12100 Park 35 Circle. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearings, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-046-101-AI. Comments must be received by 5:00 p.m., January 5, 2001. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

§101.380. Definitions.

The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise: Surplus emission allowable--The amount, greater than zero, that a source owner or operator's allowable emissions in a system cap emission limit specified in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) is greater than the actual emissions in that system, in:

(1) pounds per day for a:

(A) single day; or

(B) rolling 30-day average period; or

(2) tons per year for a calendar year period for a source subject to Chapter 117, Subchapter B, Division 2 of this title (relating to Utility Electric Generation in East and Central Texas).

§101.382. Applicability.

Trades of emission allowables are limited to sources located within a single nonattainment area or within another single area with unique emission limits identified in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds).

§101.383. General Provisions.

(a) System cap limits may be exceeded with surplus emission allowable obtained for that day from another source owner or operator participating in a system cap. The owner or operator may exceed the:

(1) maximum daily cap with a one-day surplus emission allowable generated on the same day; and

(2) rolling 30-day average daily system cap emission limitation with a surplus emission allowable generated over the same period.

(b) System cap limits for utility electric generating units as regulated under Chapter 117, Subchapter B, Division 2 of this title (relating to Utility Electric Generation in East and Central Texas) may be exceeded with surplus emission allowable obtained for that calendar year from another source owner or operator participating in a system cap.

(c) The cap requirements of Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) continue to apply, except as modified in subsection (a) of this section.

§101.385. Recordkeeping and Reporting.

(a) The owner or operator of a source in an ozone nonattainment area participating with this division shall submit to the executive director a quarterly report.

(1) Each quarterly report will be based on a three-calendar month period beginning on January 1 of each year.

(2) The report shall be submitted within 30 days following the end of the quarterly period.

(3) The report shall detail the following:

(A) the daily nitrogen oxides (NO_x) emissions from each source along with supporting calculations for the maximum daily cap and the rolling 30-day average system cap emission limitation;

(B) all emission trades during the reported time period including the trade date or period, quantity traded, and trading participants.

(b) The owner or operator of a source participating in a system cap limit for sources subject to Chapter 117, Subchapter B, Division 2 of this title (relating to Utility Electric Generation in East and Central Texas) shall submit to the executive director an annual report.

(1) Each annual report will be based on a 12-month calendar period beginning on January 1 of each year.

(2) The report shall be submitted within 30 days following the end of the annual period.

(3) The report shall detail the following:

(A) the annual NO_x emissions from each source along with supporting calculations; and

(B) all emissions trades during the reported time period including trade date, quantity traded, and trade participants.

(c) The owner or operator of any system participating in this division shall report within 48 hours to the executive director any time that the system exceeded its daily or rolling 30-day average system cap emission limitation, or within 30 days any time that the system exceeded its annual system cap, and did not obtain surplus emission allowable for that time period. This report shall include:

(1) cause of the exceedence with data to demonstrate the amount of emissions in excess of the applicable limit;

(2) date or period of exceedence;

(3) amount of exceedence; and

(4) number of surplus emissions allowables traded on the date of or during the period of the exceedence.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008044
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 239-0348

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CHAPTER 117. CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS SUBCHAPTER B. COMBUSTION AT MAJOR SOURCES

The Texas Natural Resource Conservation Commission (commission) proposes new §117.109, System Cap Flexibility; §117.110, Change of Ownership - System Cap; and §117.139, System Cap Flexibility. The new sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

On April 19, 2000 the commission adopted rules, which were published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 4101 and TexReg 4140), that required electric generating facilities (EGFs) in the Dallas/Fort Worth (DFW) ozone nonattainment area and east and central Texas to meet specific nitrogen oxides (NO_x) emission limits. The counties of Dallas, Tarrant, Collin, and Denton are included in the DFW area. The counties affected in the attainment area are: Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton.

Under the adopted rules, owners or operators of EGFs were given the option of participating in a system cap to meet the emission requirements in Chapter 117. Under a system cap owners or operators of EGFs would have the option of averaging emissions among as long as the facilities were under common ownership or control and an overall cap on the system is not exceeded. The purpose of this proposal is give the owners and operators of EGFs in the affected areas additional flexibility in meeting their system caps either through the use of emission reduction credits (ERCs), discrete emission reduction credits (DERCs), or through the transfer of emissions between EGFs participating in a system cap that are in the same nonattainment or attainment area.

SECTION BY SECTION DISCUSSION

The proposed new §117.109 would allow owners or operators of NO_x sources in the DFW ozone nonattainment area who are participating in a system cap under proposed §117.108 to trade emissions with other participating owners or operators of NO_x sources in the DFW ozone nonattainment area under the requirements in amendments to Chapter 101, Subchapter H, Division 1, 4, or 5, relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading. The new Chapter 101, Subchapter H, Division 5 is proposed in a concurrent rulemaking and appears in this edition of the *Texas Register*.

The new §117.110 states that in the event that a unit of electric power generation is sold or transferred, the unit shall become subject to the transferee's emission cap. The value Ri in §117.108(c), System Cap is based on a unit's status as of January 1, 2000 and does not change as a result of the sale or transfer of a unit regardless of the size of the transferee's system.

The proposed new §117.139 states that an owner or operator of a source of NO_x in an east or central Texas attainment area who is participating in the system cap under §117.138, System Cap may exceed their system cap provided the owner or operator is complying with Chapter 101, Subchapter H, Division 1, 4, or 5, relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading. The new Chapter 101, Subchapter H, Division 5 is proposed in a concurrent rulemaking and appears in this edition of the *Texas Register*.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined for each year of the first five-year period the proposed rules are in effect, there may be positive fiscal implications, which are not anticipated to be significant, for owners of boilers and turbines in the four- county DFW nonattainment area and the 95-county central and east Texas attainment area as a result of administration or enforcement of the proposed rules. There are 23 investor-owned boilers and 13 boilers

owned by municipalities in the DFW area that could be affected by the proposed rules. In addition, there are approximately 65 investor-owned boilers and turbines and 36 boilers and turbines owned by municipalities, cooperatives, or river authorities in the east and central Texas attainment area that could be affected by the proposed rules. The transfer of emission allowable remains restricted to the area, nonattainment or attainment, in which it originates. There will be no fiscal implications for units of state and local government that do not own or operate boilers at EGFs.

The system cap trading program is intended to provide another emission trading alternative for regulated EGFs in the DFW area, which consists of Collin, Dallas, Denton, and Tarrant Counties and in the attainment counties of east and central Texas. The EGFs affected by Chapter 117 are in the following counties: Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton. This program is intended to provide increased flexibility for regulated NO_x sources by adding another emission trading alternative to meet required emission levels. Regulated NO_x sources in the affected areas that are operating under a system cap are eligible to participate in the system cap trading program. This program would allow the trading of emissions between different entities as long as participating sources are operating under a system cap. A NO_x source would only be allowed to exceed the system cap by obtaining surplus emissions from other sources.

The system cap trading program differs from the emission credit banking and trading program because there is no banking of emissions with the commission. All trading is done between entities with overall trading reports and emission levels provided for the agency on a quarterly basis. The proposed system cap trading program is intended to enhance daily trading of emissions by allowing direct trades between entities without prior commission approval. The commission does not anticipate significant fiscal impacts to units of state and local government owned and operated sources due to the quarterly reporting requirement.

Since the proposed rules do not add additional regulatory requirements that have not already been proposed, the commission estimates there will be no additional costs to units of state and local government as a result of implementing the proposed rules other than the cost to purchase and trade emissions, which was estimated to be approximately $3,600 per ton per year for ERCs. There are 23 investor-owned boilers and 13 boilers owned by municipalities in the DFW area that could be affected by the proposed rules if the owners of these boilers decide to participate in the system cap trading program. In addition, there are approximately 65 investor-owned boiler and turbine EGFs and 36 boiler and turbine EGFs owned by river authorities, cooperatives, or municipalities in the east and central Texas attainment area which could be affected by the proposed rules if the owners of these boilers and turbines decide to participate in the system cap trading program. Actual costs for purchased and traded emissions will be dependent on availability and demand. Total costs to state and local government sites that elect to participate in the system cap trading program will depend on the amount of emissions purchased. Emission trading under this program is intended to provide flexibility for regulated NO_x sources and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other sources' surplus emissions to meet emission reduction requirements. Additionally, facilities that remain within their emission caps may receive additional revenue from selling surplus emissions to other emission sources.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result of implementing the proposed rule will be a reduction in NO_x emissions in the affected areas and increased flexibility for EGFs to meet emission reduction requirements. The proposed rules would allow EGFs in the affected areas that are operating under a system cap to participate in the system cap trading program.

This program is intended to provide increased flexibility for regulated NO_x sources by adding another emission trading alternative to meet required emission levels. Regulated NO_x sources in the affected areas that are operating under a system cap would be eligible to participate in the system cap trading program, which would allow the trading of emissions between different entities as long as participating sources are operating under a system cap. A NO_x source would only be allowed to exceed the system cap by obtaining surplus emissions from other sources, unless it was in compliance with §117.570 of this title (relating to Use of Emissions Credits for Compliance).

Since the proposed rules do not add additional regulatory requirements that have not already been proposed, the commission estimates there will be no additional costs to individuals and businesses as a result of implementing the proposed rules other than the cost to purchase and trade emissions, which was estimated to be approximately $3,600 per ton per year for ERCs. It is anticipated that the majority of owners and operators of the investor-owned and operated power boilers located at EGFs in the DFW and the east and central Texas areas would be affected by the proposed rulemaking by electing to participate in the system cap trading program. Emission trading under this program is intended to provide flexibility for regulated NO_x sources and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other NO_x sources' surplus emissions to meet emission reduction requirements. Additionally, facilities that remain within their emission caps may receive additional revenue from selling surplus emissions to other emission sources.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of administration or enforcement of the proposed rules. The proposed rules would allow EGFs in the affected areas to participate in the system cap trading program. There are no known small or micro- businesses that own or operate affected EGFs in the affected areas; therefore, the commission anticipates there will be no fiscal impact for small or micro-businesses as a result of the proposed rules.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that these proposed new sections do not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225. "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 commission is proposing these new sections to allow greater flexibility for EGFs in the affected areas to meet NO_x emission limitations and for NO_x emissions trading. The proposed new sections do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state; therefore, these proposed sections does not constitute a major environmental rule. In addition, 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 is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rules does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements were developed in order to meet the ozone national ambient air quality standard (NAAQS) set by the EPA under the Federal Clean Air Act (FCAA), §109 (42 United States Code (USC), §7409), and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 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 Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC 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 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) 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 agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill 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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The commission bases these actions on the presumption that the legislature understands this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA 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. Because it is a rule of statutory interpretation that 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 RIA for rules that are extraordinary in nature. While the SIP rules will 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 proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invites public comment on the draft RIA.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rules. The following is a summary of that assessment. The sections are proposed as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the DFW nonattainment area to attain the NAAQS for ozone and to maintain air quality in east and central Texas. Promulgation and enforcement of the rules will not burden private real property. The proposed new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the NO_x emissions under the system cap that are the subject of these rules are not property rights. Consequently, the proposed sections do not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the proposed sections do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the USC, §7410. Specifically,

the emission limitations and control requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a NO_x strategy which is necessary for the DFW area to meet the air quality standards established under federal law and to maintain air quality in east and central Texas. Consequently, the exemption which applies to this proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Plan (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, 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 regulations of the Coastal Coordination Council and determined the proposed rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires the commission protect air quality in coastal areas. The proposed new sections would allow greater flexibility in meeting system cap requirements by trading NO_x emissions between EGFs in the affected areas. The proposed sections do not authorize any new NO_x air emissions. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The proposed new sections, if adopted, would become part of the state's ozone attainment strategy; therefore, these revisions would be submitted as part of the SIP. As a result, the proposed sections would become an applicable requirement under the federal operating permit program and source would be required to amend their permits.

ANNOUNCEMENT OF HEARING

The commission will hold public hearings on this proposal in Irving on January 3, 2001 at 6:00 p.m. at the City of Irving Public Library Auditorium, located at 801 West Irving Boulevard and in Austin on January 4, 2001, at 2:00 p.m., at the Texas Natural Resource Conservation Commission, Building B, Room 201A, located at 12100 Park 35 Circle. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearings, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-046-101-AI. Comments must be received by 5:00 p.m., January 5, 2001. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

DIVISION 1. UTILITY ELECTRIC GENERATION IN OZONE NONATTAINMENT AREAS

30 TAC §117.109, §117.110

STATUTORY AUTHORITY

These new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

§117.109. System Cap Flexibility.

An owner or operator of a source of nitrogen oxides (NO_x) in the Dallas/Fort Worth ozone nonattainment area who is participating in the system cap under §117.108 of this title (relating to System Cap) may exceed their system cap provided that the owner or operator is complying with the requirements of §117.570 of this title (relating to Use of Emissions Credits for Compliance) or Chapter 101, Subchapter H, Division 1, 4, or 5 of this title (relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading).

§117.110. Change of Ownership - System Cap.

In the event that a unit within an electric power generating system is sold or transferred, the unit shall become subject to the transferee's system cap. The value Ri in §117.108(c) of this title (relating to System Cap) is based on the unit's status as part of a large or small system as of January 1, 2000, and does not change as a result of sale or transfer of the unit, regardless of the size of the transferee's system.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008042

Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 239-0348

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DIVISION 2. UTILITY ELECTRIC GENERATION IN EAST AND CENTRAL TEXAS

30 TAC §117.139

STATUTORY AUTHORITY

This new section is proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new section implements TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

§117.139. System Cap Flexibility.

An owner or operator of a source of nitrogen oxides (NO_x) in east and central Texas attainment area who is participating in the system cap under §117.138 of this title (relating to System Cap) may exceed their system cap provided that the owner or operator is complying with the requirements of Chapter 101, Subchapter H, Division 1, 4, or 5 of this title (relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading).

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

Filed with the Office of the Secretary of State, on November 17, 2000.

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Margaret Hoffman
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Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-0348

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CHAPTER 328. WASTE MINIMIZATION AND RECYCLING
SUBCHAPTER F. MANAGEMENT OF USED OR SCRAP TIRES

30 TAC §328.71

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §328.71, Closure Cost Estimate for Financial Assurance. The commission proposes these revisions to Chapter 328, Waste Minimization and Recycling; Subchapter F, Closure Cost Estimate for Financial Assurance, in order to complete cross-references regarding financial assurance requirements for scrap tire sites.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The cross-references in Chapter 328 to §37.3001 and §37.3011 need to be replaced by a reference to Chapter 37, Subchapter M, Financial Assurance Requirements for Scrap Tire Sites.

On February 24, 2000, the Chapter 37 financial assurance rule consolidation package was adopted. This package attempted to correct a cross-reference concerning financial assurance requirements for waste tire sites in Chapter 330. However, the Chapter 330 waste tire subchapters were being repealed and placed into Chapter 328 during the time that Chapter 37 was processed. Changes to Chapter 328 were not made because the Chapter 37 project team did not conceptualize opening Chapter 328. The cross-reference correction is needed to direct entities that manage used or scrap tires to the location of the financial assurance requirements.

SECTION BY SECTION DISCUSSION

The rule will amend cross-references in §328.71(g) by deleting the specific previous cross- references to §37.3001 and §37.3011 and adding the appropriate cross-reference to Chapter 37, Subchapter M, Financial Assurance Requirements for Scrap Tire Sites, to specify all sections. These sections include: §37.3001, Applicability; §37.3003, Definitions; §37.3011, Financial Assurance Requirements; §37.3021, Financial Assurance Mechanisms; and §37.3031, Submission of Documents.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendment is in effect there will be no significant fiscal impacts for units of state and local government as a result of administration or enforcement of the proposed amendment. The proposed amendment does not impose any new requirements on owners and operators of scrap tire sites and is administrative in nature by updating references to financial assurance requirements within the scrap tire site rules. There are no known units of state or local government that are affected by the proposed amendment because no units of state or local government are owners or operators of scrap tire sites.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be that owners and operators of scrap tire sites will know where to find updated information and rules concerning financial assurance requirements.

The proposed amendment is intended to provide owners and operators of scrap tire sites with the updated location for rules covering financial assurance for scrap tire sites. Financial assurance is a key component of the scrap tire site registration process. During registration, an owner or operator seeking approval to operate a scrap tire site must prepare a written estimate detailing the total costs for closing the site(s). Site closure consists of cleaning and securing the site, and dismantling the tire shredding equipment. Prior to the approval of the application,

the owner or operator must provide financial assurance to fund the closure of the facility if necessary.

The proposed amendment does not add additional regulatory requirements; thus, the commission estimates there will be no additional costs to individuals and businesses as a result of implementing the proposed amendment. There are approximately 15 scrap tire storage sites in Texas that are owned by small or micro-businesses.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-business as a result of the proposed amendment. This amendment to the commission's rules are administrative in nature and will have no fiscal impact on small or micro-businesses.

The proposed amendment does not add additional regulatory requirements; thus, the commission estimates there will be no additional costs to the approximately 15 scrap tire sites in Texas that are owned and operated by small or micro-businesses. The proposed amendment updates references to the location of rules relating to financial assurance for scrap tire sites. During registration, an owner or operator seeking approval to operate a scrap tire storage site must prepare a written estimate detailing the total costs for closing the site(s). Site closure consists of cleaning and securing the site, and dismantling the tire shredding equipment. Prior to the approval of the application, the owner or operator must provide financial assurance to fund the closure of the facility if necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. Although the intent of the proposed amendment is to protect the environment or reduce risks to human health from environmental exposure, the rulemaking will not have an adverse material impact because the proposed amendment corrects a cross-reference and does not change regulatory requirements, and therefore does not meet the definition of a "major environmental rule." Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed a preliminary assessment of whether the proposed amendment constitutes a takings under Texas Government Code, Chapter 2007. The following is a summary of that evaluation and preliminary assessment. The specific purpose of the proposed amendment is to clarify the location of rules relating to financial assurance for scrap tire facilities. Entities that manage used scrap tires will benefit from knowing the appropriate location for information relating to the financial assurance requirements.

Adoption and enforcement of the proposed amendment would neither be a statutory nor a constitutional taking of private real property. Specifically, the subject proposed 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 otherwise exist in the absence of the regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation rules, 31 TAC §505.11. Therefore, the proposed amendment is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be mailed to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-083-328-WS. Comments must be received by 5:00 p.m., December 18, 2000. For further information, please contact David T. Williams, Policy and Regulations Division, (512) 239-0339.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. The amendment is also proposed under the Texas Health and Safety Code (THSC), §361.011, which provides the commission with the authority to adopt rules and to establish standards of operation for the management of solid waste; and THSC, §361.085, which provides the commission with the authority to require financial demonstrations for permitted solid waste and hazardous waste facilities. In addition, THSC, §361.112, provides the commission with the authority to adopt by rule application forms and procedures for the registration and permitting process (of which financial assurance is a part) for the storage, transportation, and disposal of used or scrap tires. The commission may not register or issue a permit to a facility required to provide evidence of financial responsibility unless the facility has complied with this financial assurance requirement.

The proposed amendment implements THSC, §361.011, Commissions Jurisdiction: Municipal Solid Waste; and §361.112, Storage, Transportation, and Disposal of Used or Scrap Tires.

§328.71. Closure Cost Estimate for Financial Assurance.

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

(g) Financial assurance required under this section shall be provided in accordance with Chapter 37, Subchapter M of this title (relating to Financial Assurance Requirements for Scrap Tire Sites) [~~§37.3001 of this title (relating to Applicability) and §37.3011 of this title (relating to Financial Assurance Requirements for Scrap Tire Sites)~~].

(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 November 17, 2000.

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §335.1

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes an amendment to §335.1, Definitions.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The primary purpose of the proposed amendment is to revise the state rule to expand the number of exemptions from the definition of a solid waste currently allowed under Chapter 335. The proposed amendment and the following discussion focus on the recycling of certain nonhazardous materials. A conforming change is also proposed, which would add an exclusion from the definition of solid waste for certain condensates, promulgated by the United States Environmental Protection Agency (EPA) on April 15, 1998. The proposed amendment also includes a change to conform to 40 Code of Federal Regulations (CFR) §261.2(a)(2)(iv) concerning military munitions and corrections to cross- references.

Historically, the primary means of dealing with industrial and hazardous wastes have been to dispose of them (e.g., in landfills, down a deep well, through incineration etc.). The result has been that the commission has focused its efforts to protect human health and the environment primarily on the regulation of the disposal of such wastes (as well as on their storage, processing, and treatment prior to disposal).

However, in recent years both the commission and the regulated community have begun to look at alternatives to disposal as a means of dealing with such wastes. The result has been an increasing emphasis on both source reduction and recycling. The increase in recycling activities has highlighted the fact that revisions need to be made to the definition of "solid waste" in §335.1(124).

In discussions with industry groups during a review of requests for exemptions, the executive director and his staff have identified common concerns among these groups. Chief among these concerns are that the materials bear a stigma if they are designated as solid waste and the perceived notion that deed recordation is required for all land applied wastes under §335.5.

The commission notes that, interpreted strictly, §335.1(124)(D)(i) regulates as solid waste materials that are recycled by being applied to the land, placed on the land, or which are contained in products that are applied to or placed on the land. However, beginning in April 1995, the executive director has granted case-by-case exemptions from the definition of a solid waste for several nonhazardous materials that are recycled by being applied to the land or used in products which are applied to the land. To be granted such an exemption, all of the materials had to meet two conditions. First, the generator(s) of the materials had to demonstrate that the materials posed no significant threat to human health or the environment. This demonstration was made based upon both process knowledge and analytical test results. Second, the materials had to meet criteria that demonstrated that they were "co-products." The criteria referred to here are similar to those now listed in TNRCC Regulatory Guidance document RG 240, "Helpful Recycling Facts For Materials that Could Be Considered Industrial and/or Hazardous Wastes." Examples of materials which have been granted exemptions from being a solid waste by the executive director are certain types of foundry sand used as an ingredient in cement, concrete, brick, asphalt, pipe, geo-technical support, road base and asphalt roads; ash, bottom ash and desulfurization (FGD) materials used as ingredients in concrete and concrete products, cement/fly ash blends, lightweight and concrete aggregate, soil cement, road construction materials, blasting grit, roofing material, insulation material, wall board/sheet rock, mineral filler, masonry, and waste stabilization and solidification; and steel slag generated by Texas steel mills used as an ingredient in cement, concrete, stabilizing material in road banks and shoulders, road base and paving material, as paving material in uncovered driveways, surface roads and walkways, as railroad ballast, as a fluxing agent, as a trench aggregate in drain fields and as a fill material.

The proposed rule is designed to be protective of human health and the environment, while at the same time introducing greater flexibility and "common sense" into the commission's rules by adding a self-implementing exemption from the definition of "solid waste" for certain recycling activities involving application of nonhazardous materials to the land or involving their use in materials which are applied to the land. In addition, the self-implementing aspect of the proposed rule will alleviate the need for case-by-case determinations.

This proposal would not authorize materials to be applied to the land that would otherwise be prohibited from land application. The proposed rule would only exempt recycled materials that meet all of the specified criteria from requirements such as manifesting and notification to the executive director.

This proposal would apply only to materials that are legitimately and beneficially recycled, and not to materials being land disposed. Nor would it apply to materials which are themselves applied to the land (e.g., as fertilizers or soil amendments) where the beneficial components would be applied at more than their maximum beneficial rates, nor would it apply to materials which, if applied to the land, would be subject to the Texas Commercial Fertilizer Act.

SECTION BY SECTION DISCUSSION

The definition of "solid waste" in §335.1(124)(A)(iv) is proposed for amendment to include the exclusion from the definition of solid waste found at 40 CFR §261.4(a)(15), promulgated by EPA in the April 15, 1998 *Federal Register* in 63 FedReg 18504. This proposed amendment would exclude condensates derived from the overhead gases from kraft mill steam strippers that are used to comply with 40 CFR §63.446(e), relating to the National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry.

Section 335.1(124)(B) is proposed to be amended by adding clause (iv), which adds military munition identified as a solid

waste under 40 CFR §266.202 to the list of materials which are considered to be discarded material. This proposed amendment is a change to conform to the federal regulations promulgated by EPA on February 12, 1997 in 62 FedReg 6621.

Section 335.1(124)(D)(iii), the footnote 2 of Table 1 in (iv), and (F)(iii), is proposed to be amended to correct the reference 40 CFR §261.4(a)(16) by changing it to 40 CFR §261.4(a)(17). The purpose of this change is to correct the reference to the conditions for exclusion of certain secondary materials generated within the primary mineral processing industry found in 40 CFR §261.4(a)(17). This amendment conforms with renumbering of these paragraphs promulgated by EPA on May 11, 1999 in 64 FedReg 25408.

Table 1 in §335.1(124)(D)(iv) is proposed to be corrected to delete the superfluous underlined space in the heading entitled "Reclamation," and delete the superfluous superscript "2" in the heading entitled "Speculative Accumulation."

Section 335.1(124)(D) and (G) is proposed to be amended to include the language, "Except for materials described in subparagraph (H) of this paragraph, materials...." This would account for the addition of the exemption from the definition of a solid waste found in §335.1(124)(H). The exemption is proposed in subparagraph (H) rather than subparagraph (F) in order to avoid extending the exemption to hazardous waste because subparagraph (F) applies to both nonhazardous industrial and hazardous waste.

Section 335.1(124)(H) is proposed to be amended, beginning with the insertion of the following language: "With the exception of contaminated soils which are being relocated for use under 30 TAC §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that would otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being used or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:." Contaminated soils and other contaminated media are excluded from the scope of the proposed rule in order to avoid potential conflict with the Texas Risk Reduction Program rules found in Chapter 350. The purpose of this language is to specifically allow materials that are applied to the land or products produced from such materials to be excluded from being a "solid waste" if they meet criteria (i) - (viii). This will create an exception to §335.1(124)(D)(i)(I) and (II).

In addition, §335.1(124)(H) is proposed to be amended to include the following criteria: (i) a legitimate market exists for the recycling material as well as its products; (ii) the recycling material is managed and protected from loss as would be raw materials or ingredients or products; (iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material; (iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation; (v) the recycling material is not burned for energy recovery, used to produce a fuel or contained in a fuel; (vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation; (vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land. Generators can demonstrate that materials do not present an increased risk to human health, the environment, and waters in the state by showing that each constituent found in the recycling material is a constituent normally found in the raw material that it is replacing in approximately the same concentrations. Alternatively, generators can show that the material meets the waste classification standard found in §335.507 of this title (relating to Class 3 Waste Determination) as a Class 3 industrial waste; and

(viii) no more than 25% (by weight or volume) of the annual production of the recycling material as it is generated may accumulate at the site of generation or at a subsequent site for a total of 365 days from the time of generation. If the recycling material is placed in protective storage, such as a silo or other protective enclosure, the material may be accumulated for up to a total of two years from the time of generation.

All of the aforementioned case-by-case exemptions granted by the executive director to date have been based upon criteria that are the same as or similar to the proposed criteria. The basis for all eight proposed criteria can be found in one or more of the following sources: (a) the January 4, 1985 issue of the *Federal Register*; (b) a memorandum on recycling dated April 26, 1989, from Ms. Sylvia Lowrance of EPA; or (c) the TNRCC Regulatory Guidance document RG 240, "Helpful Recycling Facts For Materials that Could Be Considered Industrial and/or Hazardous Wastes."

The eight proposed criteria are designed to act together to achieve the goals of protecting human health and the environment and establishing a rational basis for evaluating the legitimacy of recycling activities involving nonhazardous industrial materials. While some of the criteria serve both goals, clauses (ii), (v), (vii), and (viii) are focused primarily on ensuring the protection of human health and the environment while the primary focus of clauses (i), (iii), (iv), and (vi) is to ensure the legitimacy of activities in which nonhazardous industrial wastes are recycled by being applied to the land or used in products which are applied to the land.

In order to insert a new subparagraph (H) in §335.1(124), the language currently found in (H) is proposed to be moved to subparagraph (I). The current language of subparagraph (I) is proposed to be moved to subparagraph (J). Section 335.1(124)(K) is proposed to be added to accommodate the language of what is currently subparagraph (J).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Grymkoski, Strategic Planning and Appropriations, has determined for the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for state government or units of local governments as a result of administration or enforcement of the proposed amendment. The purpose of the proposed rule is to expand the number of exemptions from the definition of a solid waste currently allowed under Chapter 335 and to make the rule consistent with current practice and guidance. A minor reduction in workload is anticipated for the commission by reducing the number of waste codes to audit and include in the Notice to Registration. There is no anticipated impact on state agencies regarding their waste generation, because state agencies are not industrial waste generators and are not regulated by Chapter 335. It is anticipated that there could be minor positive fiscal implications for the Texas Department of Transportation (TxDOT) and units of local government.

The proposed change expands the number of exemptions from the definition of nonhazardous solid waste currently allowed in Chapter 335. This action will exempt certain nonhazardous materials from the definition of solid waste. This proposed change could make it easier for the TxDOT and county governments to accept this exempt material for use as ingredients in road base construction instead of more costly construction material. It is also anticipated that there could be a minor positive impact on small business as well. Reductions in costs to individuals including small businesses are addressed in the Small Business and Micro-Business Assessment section of this preamble.

PUBLIC BENEFIT AND COSTS

Mr. Grymkoski also determined for each of the first five years that the proposed rule is in effect, the anticipated public benefit as a result of administration of and compliance with the proposed amendment will be clarification of exemptions to the definition of solid waste; consistency with current practice; enhanced ease of compliance with solid waste regulations; minor reductions in costs of regulation; and reductions in cost for disposal of the exempt material.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Compliance with the proposed exception is optional on the part of individual waste generators. Businesses that choose to use the exemption are only required to document that nonhazardous industrial waste has met the exemption criteria; keep the documentation available for inspection; comply with the general prohibitions in Chapter 335; and comply with the prohibitions on unauthorized discharges contained in Texas Water Code (TWC), Chapter 26.

It is anticipated that disposal costs associated with industrial waste could be reduced because the proposed change may exempt certain materials from regulation and will make disposal of these materials easier. In addition, there may be an opportunity for waste generators to sell some of the exempt waste material for use in road construction or other fill operations. It is anticipated that there will be minor reductions in costs for businesses due to reduced reporting on the exempt material. It is recognized that larger businesses normally produce the larger amounts of waste. The greater the amount of waste that meets the exemption criteria, the greater the potential savings, but any business that meets the exemption criteria can benefit from the proposed change.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment will provide an exemption from the definition of a solid waste for certain nonhazardous materials that are recycled in a manner involving land application. This rule does not authorize materials to be applied to the land that would otherwise be prohibited from land application. The rule only exempts certain recycled materials from being labeled a "solid waste," thereby exempting recycled materials that meet all of the rule's criteria from requirements such as manifesting and notification to the commission. Additionally, the amendment will provide the ability to make required changes to permits to allow facilities to store hazardous munitions waste in additional types of units. Therefore, the proposal would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Texas Government Code, §2001.0225, requires a state agency to prepare a regulatory analysis of a major environmental rule in certain circumstances. The regulatory analysis must be prepared where the result of the adoption of the rule is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that the regulatory analysis requirement does not apply to this rulemaking because this proposal does not exceed a standard set by federal law, nor does it exceed an express requirement of state law. In addition, this rule does not exceed a requirement of a delegation agreement or contract between the state and the federal government, nor is this rule adopted solely under the general powers of the agency.

With this background in mind, the commission next demonstrates how each of the four circumstances under which a regulatory analysis is required does not apply to this rulemaking:

Exceedance of a standard set by federal law

The requirements of this rule which seek to provide an exemption from the definition of solid waste for land application of recycled nonhazardous materials, are not subject to federal regulation. Accordingly, there are no applicable standards set by federal law that could be exceeded by this portion of the rule.

The requirements of this rule which relate to federal military munitions are being implemented to maintain equivalency with federal law (federal military munitions rule, 62 FedReg 6622 et seq.) and do not exceed any federal law standards.

Exceedance of an express requirement of state law

The requirements of this rule (relating to both recycled nonhazardous materials and military munitions) seek to carry out the commission's statutory responsibility under Texas Health and Safety Code (THSC), §361.017 (relating to the commission's jurisdiction over industrial solid waste and hazardous municipal waste) and THSC, §361.024 (relating to rules and standards). The rule seeks to comply with the relevant specific state law and not to exceed it.

Exceedance of a requirement of a delegation agreement

The commission is not a party to a delegation agreement with the federal government concerning a state and federal program that would be applicable to requirements set forth in the rule. Accordingly, there are no delegation agreement requirements that could be exceeded by this rule.

Adoption of a rule solely under the agency's general powers

The commission is adopting this rule under the specific statutory authority of THSC, §361.017 (relating to the commission's

jurisdiction over industrial solid waste and hazardous municipal waste) and THSC, §361.024 (relating to rules and standards), in addition to the general powers of TWC, §5.103 (relating to rules) and TWC, §5.105 (relating to general policy). Accordingly, this rule is not being adopted solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposed rule pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rule is to update the commission's rule to establish environmentally protective uniform and specific criteria by which materials which would otherwise be regulated as nonhazardous industrial wastes can be exempt from being regulated as such, including when such materials are recycled by being applied to the land or used as ingredients in materials which are applied to the land. The proposed rule would substantially advance this stated purpose by providing a set of environmentally protective criteria to be applied in the determination of whether a material meets the exemption. Promulgation and enforcement of this proposed rule would not affect private real property which is the subject of the rule because the proposed rule creates an exemption which allows greater flexibility in the recycling of certain materials which are currently regulated as nonhazardous industrial wastes. The proposed rule does not affect a landowner's right to property that would otherwise exist in the absence of the rule. In other words, because the rule allows certain nonhazardous industrial materials to be recycled and not have to be regulated as "solid waste," it does not restrict the owner's right to property. Therefore, the rule will not constitute a takings under the Texas Government Code, §2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed this rulemaking and found that the proposal is a rulemaking subject to the Texas Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for this proposed rule pursuant to 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code (USC), §§6901 et seq. Promulgation and enforcement of this proposed rule would be consistent with the applicable CMP goals and policies because the rule amendment would update the commission's rule to establish environmentally protective uniform and specific criteria by which materials which are currently regulated as nonhazardous industrial solid wastes (especially when applied to the land or used as ingredients in materials which are applied to the land) can be exempted from being regulated as such without a case-by-case review by commission staff, thereby serving to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also thereby serving to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 et seq. In addition, the proposed rule does not violate any applicable provisions of the CMP's stated goals and policies. The commission invites public comment on the consistency of the proposed rule.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808. All comments should reference Rule Log Number 1997-174-335-WS. Comments must be received by 5:00 p.m., January 2, 2001. For further information, please contact Ray Henry Austin at (512) 239-6814.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rule necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rule consistent with the general intent and purposes of the Act.

The proposed amendment implements THSC, Chapter 361.

§335.1. Definitions.

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

(1) - (123) (No change.)

(124) Solid Waste -

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

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

(iv) a material excluded by 40 Code of Federal Regulations (CFR) §261.4(a)(1) - (19) as amended May 11, 1999 in 64 FedReg 25408 [~~(14), as amended through August 6, 1998, at 63 FedReg 42110, by 40 CFR §261.4(a)(16), as amended June 19, 1998 at 63 FedReg 33782~~], subject to the changes in this clause, [~~by 40 CFR §261.4(a)(17), as amended May 11, 1999 at 64 FedReg 25408, by 40 CFR §261.4(a)(18) - (19), as amended through August 6, 1998, at 63 FedReg 42110,~~] or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the purposes of the exclusion under 40 CFR §261.4(a)(16), as amended June 19, 1998 at 63 FedReg 33782, 40 CFR §261.38 is revised as follows, with "30 TAC §335.1(123)(A)(iv)" meaning "§335.1(123)(A)(iv) of this title (relating to Definitions)":

(I) - (VIII) (No change.)

(B) A discarded material is any material which is:

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

(iv) a military munition identified as a solid waste in 40 CFR §266.202.

(C) (No change.)

(D) Except for materials described in subparagraph (H) of this paragraph, materials [~~Materials~~] are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) - (ii) (No change.)

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17) [~~(16)~~]). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17) [~~(16)~~]).

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.
Figure 1: 30 TAC §335.1(124)(D)(iv)

(E) (No change.)

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i) - (ii) (No change.)

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) [~~(16)~~] apply rather than this provision.

(iv) (No change.)

(G) Except for materials described in subparagraph (H) of this paragraph, the [~~The~~] following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) - (iv) (No change.)

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that would otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as would be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land. Generators can demonstrate that materials do not present an increased risk to human health, the environment, and waters in the state by showing that each constituent found in the recycling material is a constituent normally found in the raw material that it is replacing in approximately the same concentrations. Alternatively, generators can show that the material meets the waste classification standard found in §335.507 of this title (relating to Class 3 Waste Determination) as a Class 3 industrial waste; and

(viii) no more than 25% (by weight or volume) of the annual production of the recycling material as it is generated may accumulate at the site of generation, or at a subsequent site, for a total of 365 days from the time of generation. If the recycling material is placed in protective storage, a silo, or other protective enclosure, the material may be accumulated for up to a total of two years from the time of generation.

(I) [~~(H)~~] Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) [~~I~~] Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) [~~J~~] Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Materials).

(125) - (154) (No change.)

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008028
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: January 2, 2001
For further information, please call: (512) 239-4712

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SUBCHAPTER C. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

30 TAC §335.69

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §335.69, Accumulation Time.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The primary purpose of the proposed amendment is to revise the commission's rules to conform to changes under Title 40 Code of Federal Regulations (CFR) §262.34, Accumulation Time, promulgated by the United States Environmental Protection Agency (EPA) on January 21, 1999 at 64 FedReg 3382 and March 8, 2000 at 65 FedReg 12378. The January 21, 1999 changes correct rule language concerning requirements to comply with certain air emission standards in order to qualify under the accumulation time exemption. The March 8, 2000 changes allow large quantity generators of certain sludges from the treatment of electroplating wastewaters (i.e., EPA hazardous waste number F006) up to 180 days (or 270 days, as applicable) to accumulate F006 waste without a hazardous waste permit or interim status, provided that these generators recycle the F006 waste through metals recovery and meet certain other conditions.

The commission proposes this accumulation time rule primarily to address existing economic barriers to the recycling of F006 waste through metals recovery and to provide large quantity generators of F006 waste with an incentive to choose metals recovery instead of treatment and land disposal. By this proposal, the revisions would further the public policy concerning hazardous waste under Texas Health and Safety Code (THSC), §261.023 by encouraging recycling, which is a method of hazardous waste management preferred over land disposal. Also, the proposed amendment includes conforming changes that are needed to establish equivalency with the federal regulations, which will enable the State of Texas to increase its level of authorization to implement hazardous waste regulations in lieu of the EPA. Finally, in addition to the aforementioned rule language corrections concerning air emission standards, the proposed amendment includes administrative and formatting changes, and cross-reference corrections.

Currently, under §335.69(a) generators may accumulate hazardous waste on-site for up to 90 days without a permit or interim status, if certain conditions are met. Certain of these conditions are related to air emission standards, which were mistakenly removed in EPA's November 25, 1996 issue of the *Federal Register*, at 61 FedReg 59950. The conditional requirements were put back into the federal regulations in EPA's January 21, 1999 issue of the *Federal Register*, at 64 FedReg 3382, with references to 40 CFR Part 265, Subparts AA, BB, and CC.

The March 8, 2000 issue of the *Federal Register*, at 65 FedReg 12378 provided changes to allow large quantity generators of certain sludges from the treatment of electroplating wastewaters (i.e., EPA hazardous waste number F006) longer periods of time to accumulate F006 waste without a hazardous waste storage permit or interim status, provided that these generators recycle the F006 waste through metals recovery and meet certain conditions. The EPA found, through research associated with the Common Sense Initiative for the Metal Finishing Industry, that the 90-day accumulation limit does not allow accumulation of a large enough volume of F006 sludge to make recycling economically feasible when compared to treatment and land disposal. This disincentive to recycling is principally due to the relatively high cost of transporting partial truckloads of the hazardous sludge from a generator's establishment to a recycling or smelting facility. Because there are more landfills than metals recovery facilities that handle F006 wastes, the distances from generators' sites to metals recovery facilities are generally greater than to landfills. Generators minimize shipping costs by finding the nearest authorized hazardous waste treatment, storage, or disposal facility, which is most often a landfill.

The requirements of this proposal are designed to minimize releases of hazardous waste to the environment. Furthermore, the commission believes that having larger amounts of F006 waste on-site under the accumulation time exemption will not result in increased risks of release of F006 waste into the environment. EPA's research indicates that most generators dewater F006 waste into a cake-like material to remove free liquids and to decrease the costs of accumulation, shipping, recycling and/or disposal. In the event of a spill of dewatered F006 sludge, the potential risk of harm to human health and the environment would be low compared to a spill of a free liquid or dust. Due to the cake-like consistency of dewatered F006 waste, a spill of this waste could be contained relatively easily. Spilled dewatered F006 sludge is not likely to run off as a free liquid or disperse in the wind like a dust. In addition, with this proposal, workers will be required to handle the F006 waste less often (because transfers will occur less often), thereby decreasing their potential exposure to the F006 waste. With these conditions in place, the commission concurs with EPA that allowing large quantity generators of F006 waste to accumulate this waste for 180 days (or 270 days as applicable) does not pose any significantly increased potential harm to human health or the environment.

SECTION BY SECTION DISCUSSION

Section 335.69(a) is proposed to be amended to correct the cross-reference to "subsections (f) - (h)" by changing this cross-reference to "subsections (f) - (k)," to account for the proposed addition of exceptions to the 90-day accumulation time limit under new subsections (j) and (k).

Section 335.69(a)(1)(A) and (B) are proposed to be amended to reinstate the references to 40 CFR Part 265, Subparts AA, BB, and CC, as discussed earlier in this preamble. Section 335.69(a)(1)(B) is proposed to be amended to replace "Code of Federal Regulations" with "CFR." Because §335.69(a) contains the phrase "Code of Federal Regulations (CFR)," each subsequent occurrence of this phrase within this section is proposed to be replaced with "CFR," for the purpose of improved readability. Such revisions are also proposed under §§335.69(a)(4), 335.69(d), 335.69(d)(1), 335.69(e), and 335.69(f)(2) - (4). Section 335.69(a)(1)(A) - (C) is proposed to be amended by the addition of "and/" just prior to the word "or" ending each subparagraph to make it clear that any combination of the

options under subparagraphs (A) - (D) are allowable under the accumulation time exemption. Section 335.69(a)(1)(D) is proposed to be amended to delete the superfluous comma between "CFR" and "Part 265," and to reformat the reference to 40 CFR Part 265, Subpart DD, for consistency with the rest of the section. Similar reformatting amendments are also proposed under §§335.69(a)(4)(i) and (ii), 335.69(d)(1), and 335.69(f)(2) - (4).

Section 335.69(a)(4) is also proposed to be amended to split the list of referenced requirements into clauses (i) - (iii) for readability and to replace the word "incorporated" with "adopted" in clause (i) for consistency. Proposed clause (ii) contains a correction of the cross-reference to "§268.7(a)(4)" by changing it to "§268.7(a)(5)." This proposed correction reflects the corresponding correction made in the aforementioned EPA regulation promulgated March 8, 2000 at 64 FedReg 12397. Section 335.69(f)(4) is also proposed to be amended to correct this cross-reference.

Section 335.69(b) is proposed to be amended to add the reference to 30 TAC Chapter 305, relating to Consolidated Permits, to conform to the corresponding federal regulation at 40 CFR §262.34(b), which references the permit requirements of 40 CFR Part 270. Section 335.69(b) is also proposed to be amended to change "commission" to "executive director," to appropriately state that the executive director, rather than the commission, grants any accumulation time storage extensions under this subsection.

Section 335.69(c) is proposed to be amended to correct the designations of "I" in "Class I" to "1."

Section 335.69(f)(5)(A) is proposed to be amended to correct the reference to subsection (f)(3)(D), changing it to a reference to subsection (f)(5)(D) with the phrase "subparagraph (D) of this paragraph."

Section 335.69(h) is proposed to be amended by replacing the reference to "Texas Water Commission" with "executive director." Thus, the sentence is proposed to read "Such extension may be granted by the executive director if hazardous wastes must remain on-site for longer than 180 days (or 270 days, if applicable) due to unforeseen, temporary, and uncontrollable circumstances." The commission considers the proposed amendment to be a correction to appropriately state that the executive director grants any accumulation time storage extensions under this subsection, as well as to remove the out-of-date reference to the Texas Water Commission.

New §§335.69(j) - (l) is proposed to reflect the aforementioned EPA regulation promulgated March 8, 2000 at 64 FedReg 12397. The commission proposes to allow large quantity generators of F006 electroplating sludge to accumulate F006 waste on-site for up to 180 days (or 270 days, if the generator must transport this waste) in tanks, containers, or containment buildings without a permit or interim status, if certain conditions are met. Under proposed §335.69(j)(1), the generator must have implemented pollution prevention practices that reduce the amount of any hazardous substances, pollutants or contaminants entering the F006 waste or otherwise released to the environment prior to its recycling. Under proposed §335.69(j)(2), the F006 waste must be legitimately recycled through metals recovery. Under proposed §335.69(j)(3), no more than 20,000 kilograms of F006 waste can be accumulated on-site at any one time. In addition to the aforementioned conditions, under proposed §335.69(j)(4), the F006 waste must be placed in containers, tanks, or containment buildings and the generator must comply with a specified set of hazardous waste rules relating to these types of units, including unit specific standards and any applicable air emission standards, and the generator must comply with certain standards for marking and labeling, preparedness and prevention, contingency plan and emergency procedures, personnel training, and land disposal restrictions.

Proposed new §335.69(k) extends the accumulation time to 270 days, if the generator must transport the waste, or offer the waste for transportation, over a distance of 200 miles or more for offsite metals recovery. In such a case, the generator must also comply with the requirements under proposed §335.69(j)(1) - (4) discussed earlier in this preamble.

Proposed new §335.69(l) states that a generator accumulating F006 waste in accordance with §335.69(j) or (k), but who exceeds the 180- or 270-day limit limitation, or who exceeds the 20,000 kilogram limit, is a hazardous waste storage facility subject to the requirements of Chapter 335, relating to Industrial Solid Waste and Municipal Hazardous Waste and 30 TAC Chapter 305, relating to Consolidated Permits, applicable to such owners and operators, unless the generator has been granted an extension to the time limit or exception to the weight limitation by the executive director. Proposed §335.69(l) allows the executive director to grant such extensions and exceptions if F006 waste must remain on-site for longer than 180 or 270 days or if more than 20,000 kilograms of F006 waste must remain on-site due to unforeseen, temporary, and uncontrollable circumstances. Finally, proposed §335.69(l) states that an extension of up to 30 days or an exception to the accumulation limit may be granted at the discretion of the executive director on a case-by-case basis.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendment is in effect, there will be no fiscal impacts to units of state or local government as a result of implementation of the proposed amendment because there are no large quantity generators of wastewater sludge that are owned or operated by units of state or local government. The proposed amendment would increase the number of days affected large quantity generators can store wastewater sludge without requiring a hazardous waste storage permit. Current regulations allow large quantity generators to store wastewater sludge onsite for 90 days while the proposed amendment will allow them to store wastewater sludge onsite for 180 days, and up to 270 days under certain circumstances, without requiring a hazardous waste storage permit.

Affected large quantity generators are facilities that produce over 13 tons of F006 wastewater sludge annually. F006 sludge, which will be referred to as the affected waste in this fiscal note, is the wastewater by-product of electroplating. Electroplating includes a wide range of production processes, including common and precious metal electroplating, anodizing, chemical conversion coating, electroless plating, chemical etching and milling, and printed circuit board manufacturing. Electroplating is the application of a metal surface coating which is intended to increase wear or erosion resistance, or simply provide decoration.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposal is in effect, the public benefit anticipated from

enforcement of and compliance with the proposed revisions will be the potential increased recycling of affected waste associated with primary metal extraction and conservation of land through decreased landfill use.

The proposed amendment is intended to comply with changes to federal regulations, implemented by the EPA on March 8, 2000, regarding affected waste accumulation periods for large quantity generators (facilities that generate more than 13 tons of affected waste annually). The proposed amendment contains voluntary provisions which will allow large quantity generators to accumulate up to 20,000 kg (22 tons) of affected waste onsite for up to 180 days (up to 270 days in certain situations) without requiring a hazardous waste storage permit. This extension period only applies to facilities that intend to recycle their accumulated affected waste.

Current regulations allow large quantity generators to store the affected waste onsite for 90 days without a hazardous waste storage permit. In order to store the affected waste for the extended period, a facility must meet the following qualifications: 1) must have implemented pollution prevention practices that reduce the amount of any hazardous substance, pollutant or contaminant entering the affected waste or otherwise released into the environment prior to its recycling; 2) recycle the affected waste by metals recovery; 3) accumulate no more than 20,000 kg of the affected waste on site at any one time; and 4) comply with the applicable management standards, such as accumulation in tanks, containers, or containment buildings, labeling and marking accumulation units, preparedness and prevention, contingency plan and emergency procedures, personnel training, and waste analysis and record keeping. The proposed amendment would also allow large quantity generators to accumulate the sludge up to 270 days without a hazardous waste storage permit, provided that the generator complies with the conditions stated above, and if they must ship their affected waste off site to a metals recovery facility that is located more than 200 miles away.

There are an estimated 124 facilities in Texas that would be affected by the proposed amendment. The commission estimates that large quantity generators that generate less than 80 tons of the affected waste annually will benefit the most due to implementation of the proposed amendments. By extending the accumulation period to 180 days, generators can send larger shipments of the affected waste offsite less often, which is anticipated to reduce overall transportation costs since only two instead of four shipments are required annually. The anticipated cost savings does decrease; however, as the distance to recyclers increases. The commission anticipates that larger generators (60 tons of affected waste annually) will probably continue to landfill if the nearest recycler is 1,000 or more miles from the generator.

Potential cost savings due to implementation of the proposed amendment is provided in Figure: 30 TAC Chapter 335 - Preamble 1 and Figure: 30 TAC Chapter 335 - Preamble 2, which are based on data provided by the EPA contained in the January 14, 2000 *"Regulatory Impact Analysis of the Final Rule for a 180-Day Accumulation Time for F006 Wastewater Treatment Sludges." T*able 1 compares the cost between recycling the affected waste based on the 90 and 180 day accumulation periods. Table 2 compares the cost between landfilling and recycling based on distance from landfills and recyclers. Based on the EPA data, a large quantity generator that currently recycles 50 tons of affected waste annually, would save approximately $2,225 annually if it continued to recycle and the accumulation period is extended to 180 days. A similar generator that landfills the affected waste would save approximately $2,311 annually if it chose to recycle instead of landfilling under the proposed amendments.

Figure: 30 TAC Chapter 335 - Preamble 1

Figure: 30 TAC Chapter 335 - Preamble 2

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed amendment. The proposed amendment would increase the number of days affected large quantity generators can store the affected waste without requiring a hazardous waste storage permit, which could result in positive fiscal impacts for affected facilities. Current regulations allow large quantity generators to store affected waste onsite for 90 days while the proposed amendment will allow them to store affected waste onsite for 180 days (up to 270 days under certain circumstances), without requiring a hazardous waste storage permit. There are 124 sites affected by the proposed amendment, some of which the commission estimates will be small or micro-businesses. Although the number of employees per affected business in Texas is undetermined, data provided by the EPA in the January 14, 2000 *Regulatory Impact Analysis of the Final Rule for a 180-Day Accumulation Time for F006 Wastewater Treatment Sludges* indicates that many of the 124 affected generators may be small or micro-businesses. The EPA study determined that approximately 98% of the 3,296 affected waste generators in business in 1992 nationwide were businesses that employed 100 or fewer employees.

The EPA's study showed that a large quantity generator that currently recycles 20 tons of the affected waste annually, would save approximately $3,345 annually if the accumulation period is extended to 180 days. A similar generator that landfills the waste would save approximately $4,971 annually if it chose to recycle instead of landfilling under the proposed amendment.

REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a). The proposed rule does not exceed a standard set by federal law because the purpose of this proposal is to adopt state rules which are accordant with the corresponding federal regulations. Any requirements in this rule are in accord with the corresponding federal regulations, and they do not exceed an express requirement of state law because there is no express requirement in state law concerning F006 wastes. This proposal does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The state is proposing the rule to maintain EPA authorization of its RCRA program and accordingly is conforming its rules to fit the framework of the corresponding federal regulations. See 40 CFR §271.21, relating to procedures for revision of state programs and 40 CFR §262.34, relating to accumulation time. Finally, the proposal would adopt a rule under specific state law (i.e., THSC, Solid Waste Disposal Act, §361.017 and §361.024).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for the proposed rule pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rule is to facilitate recycling by providing regulatory flexibility for large quantity generators of certain sludges. The proposed rule would substantially advance this stated purpose by adopting an extension to the current accumulation time limit up to 180 days (or 270 days, as applicable) to accumulate these sludges (i.e., F006 waste that is destined for legitimate recycling through metal recovery). This additional time would allow the accumulation and shipment of a full truckload of F006 waste, enabling a reduction in transportation costs per unit over a partial truckload. Promulgation and enforcement of the proposed rule would not affect private real property which is the subject of the rules because the proposed rule language provides regulatory flexibility to large quantity generators of F006 waste who choose metals recovery in lieu of other more stringent hazardous waste regulations (e.g., the 90-day accumulation time limit). The proposed standards are not considered to be more stringent than existing standards. In addition, this reduction of regulatory requirements may be taken only at the initiative of certain persons managing F006 waste. For these reasons, this action is not considered a burden to private real property and does not constitute a taking under Texas Government Code, Chapter 2007. The subject proposed regulations do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed this rulemaking for consistency with Coastal Management Program (CMP) goals and policies in accordance with the rules of the Coastal Coordination Council. The commission has found that the proposal is a rulemaking which relates to an action or actions subject to the CMP, in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code §33.201 et seq.), and the commission's rules at 30 TAC Chapter 281, Subchapter B, relating to Consistency with the Texas CMP. Therefore, as required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2) relating to actions and rules subject to the CMP, this proposal must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for this proposed rule pursuant to 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. Promulgation and enforcement of this proposed rule would be consistent with the applicable CMP goals and policies because the proposed rule would facilitate the environmentally sound recycling of F006 waste and reduce the quantity of these wastes going to hazardous waste landfills. Thus, the proposed rule would serve to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also serve to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. The commission has determined that the specific actions detailed in this section and earlier in this preamble under the sections concerning background and summary of the factual basis for the proposed rules, public benefit and costs, small business and micro-business assessment, regulatory impact analysis determination, and takings impact assessment will comply with the goals and policies of the CMP. In addition, the proposed rule does not violate any applicable provisions of the CMP's stated goals and policies. The commission invites public comment on the consistency of the proposal with the CMP.

SUBMITTAL OF COMMENTS

Written comments may be submitted by mail to Patricia Duron, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by 5:00 p.m. on January 2, 2001, and should reference Rule Log No. 2000-045-335-WS. Comments received by the deadline will be considered by the commission prior to any final action on the proposal. For further information, please contact Ray Henry Austin at (512) 239-6814.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

The proposed amendment implements THSC, Chapter 361.

§335.69. Accumulation Time.

(a) Generators that comply with the requirements of paragraph (1) of this subsection are exempt from all requirements adopted by reference in §335.112(a)(6) and (7) of this title (relating to Standards), except 40 Code of Federal Regulations (CFR) §265.111 and §265.114. Except as provided in subsections (f) - (k) [~~(f) - (h)~~] of this section, a generator may accumulate hazardous waste on-site for 90 days without a permit or interim status provided that:

(1) the waste is placed:

(A) in containers and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts I, AA, and BB, as adopted by reference under §335.112(a) of this title (relating to Standards), and 40 CFR Part 265, Subpart CC [~~provisions adopted by reference in §335.112(a)(8) of this title (relating to Standards)~~]; and/or

(B) in tanks and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts J, AA, BB, as adopted by reference under §335.112(a) of this title (relating to Standards), and 40 CFR Part 265, Subpart CC [~~requirements adopted by reference in §335.112(a)(9) of this title (relating to Standards)~~], except 40 CFR [~~Code of Federal Regulations~~] §265.197(c) and §265.200; and/or

(C) on drip pads and the generator complies with §335.112(a)(18) of this title (relating to drip pads) and maintains the following records at the facility: a description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and

documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal, and/or

(D) the waste is placed in containment buildings and the generator complies with [~~Subpart DD of~~] 40 CFR[~~,~~] Part 265, Subpart DD, as adopted by reference under §335.112(a) of this title (relating to Standards) and has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR §265.1101 in the facility's operating record prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

(i)-(ii) (No change.)

(2)-(3) (No change.)

(4) the generator complies with the following:

(A) the requirements for owners or operators [~~contained~~] in 40 CFR [~~Code of Federal Regulations~~], Part 265, Subparts C and D and with 40 CFR §265.16, as adopted [~~incorporated~~] by reference in §335.112(a) [~~§335.112~~] of this title (relating to Standards)[~~, with 40 Code of Federal Regulations §265.16, with~~];

(B) 40 CFR [~~Code of Federal Regulations,~~] §268.7(a)(5) [~~§268.7(a)(4)~~], as adopted by reference under §335.431(c) of this title (relating to Purpose, Scope, and Applicability); and

(C) §335.113 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(b) A generator who accumulates hazardous waste for more than 90 days is an operator of a hazardous waste storage facility and is subject to the requirements of this chapter and Chapter 305 of this title (relating to Consolidated Permits) applicable to such owners and operators, unless he has been granted an extension to the 90-day period. Such extension may be granted by the executive director [~~commission~~] if hazardous wastes must remain on-site for longer than 90 days due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the executive director on a case-by-case basis.

(c) Persons exempted under this provision, who generate hazardous waste, are still subject to the requirements in Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste Management in General) applicable to generators of Class 1 [~~I~~] waste.

(d) A generator, other than a conditionally exempt small quantity generator regulated under §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators), may accumulate as much as 55 gallons of hazardous waste or one quart of acutely hazardous waste listed in 40 CFR [~~Code of Federal Regulations~~] §261.33(e) in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, without a permit or interim status and without complying with subsection (a) of this section provided he:

(1) complies with 40 CFR [~~Code of Federal Regulations~~] §§265.171, 265.172 and 265.173(a), as adopted by reference under §335.112(a) of this title (relating to Standards); and

(2) (No change.)

(e) A generator who accumulates either hazardous waste or acutely hazardous waste listed in 40 CFR [~~Code of Federal Regulations~~] §261.33(e) in excess of the amounts listed in subsection (d) of this section at or near any point of generation must, with respect to that amount of excess waste, comply within three days with subsection (a) of this section or other applicable provisions of this chapter. During the three-day period, the generator must continue to comply with subsection (d) of this section. The generator must mark the container holding the excess accumulation of hazardous waste with the date the excess amount began accumulating.

(f) A generator who generates greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status provided that:

(1) the quantity of waste accumulated on-site never exceeds 6,000 kilograms;

(2) the generator complies with the requirements of [~~Subpart I of~~] 40 CFR [~~Code of Federal Regulations~~] Part 265, Subpart I, as adopted by reference under §335.112(a) of this title (relating to Standards), except 40 CFR [~~Code of Federal Regulations~~] §265.176;

(3) the generator complies with the requirements of 40 CFR [~~Code of Federal Regulations~~] §265.201, as adopted by reference under §335.112(a) of this title (relating to Standards) [~~in Subpart J of 40 Code of Federal Regulations Part 265~~];

(4) the generator complies with the requirements of:

(A) subsections (a)(2) and (3) of this section; [~~and the requirements of~~]

(B) 40 CFR [~~Code of Federal Regulations,~~] Part 265, Subpart C, as adopted by reference under §335.112(a) of this title (relating to Standards); and [~~the requirements of~~]

(C) 40 CFR [~~Code of Federal Regulations,~~] 40 CFR §268.7(a)(5), as adopted by reference under §335.431(c) of this title (relating to Purpose, Scope, and Applicability) [~~§268.7(a)(4)~~]; and

(5) the generator complies with the following requirements:

(A) at all times there must be at least one employee either on the premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures specified in subparagraph (D) of this paragraph. This employee is the emergency coordinator.

(B)-(D) (No change.)

(g) (No change.)

(h) A generator who generates greater than 100 kilograms but less than 1000 kilograms of hazardous waste in a calendar month and who accumulates hazardous waste in quantities exceeding 6000 kg or accumulates hazardous waste for more than 180 days (or for more than 270 days if he must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more) is an operator of a storage facility and is subject to the requirements of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste), and Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and the permit requirements of Chapter 305 of this title (relating to Consolidated Permits), unless he has been granted an extension to the 180-day (or 270-day, if applicable) period. Such extension may be granted by the executive director [~~Texas Water Commission~~] if hazardous wastes must remain on-site for longer than 180 days (or 270 days, if applicable) due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the executive director on a case-by-case basis.

(i) (No change.)

(j) A generator of 1,000 kilograms or greater of hazardous waste per calendar month who also generates wastewater treatment sludges from electroplating operations that meet the listing description for EPA hazardous waste number F006, may accumulate F006 waste on-site for more than 90 days, but not more than 180 days without a permit or without having interim status provided that:

(1) the generator has implemented pollution prevention practices that reduce the amount of any hazardous substances, pollutants or contaminants entering the F006 waste or otherwise released to the environment prior to its recycling;

(2) the F006 waste is legitimately recycled through metals recovery;

(3) no more than 20,000 kilograms of F006 waste is accumulated on-site at any one time; and

(4) the F006 waste is managed in accordance with the following:

(A) the F006 waste is placed:

(i) in containers and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts I, AA, and BB, as adopted by reference under §335.112(a) of this title (relating to Standards), and 40 CFR Part 265, Subpart CC; and/or

(ii) in tanks and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts J, AA, BB, as adopted by reference under §335.112(a) of this title (relating to Standards), and 40 CFR Part 265, Subpart CC, except 40 CFR §265.197(c) and §265.200; and/or

(iii) in containment buildings and the generator complies with 40 CFR Part 265, Subpart DD, as adopted by reference under §335.112(a) of this title (relating to Standards), and has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR §265.1101 in the facility's operating record prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

(I) a written description of procedures to ensure that the F006 waste remains in the unit for no more than 180 days, a written description of the waste generation and management practices for the facility showing that they are consistent with the 180-day limit, and documentation that the generator is complying with the procedures; or

(II) documentation that the unit is emptied at least once every 180 days;

(B) the generator complies with 40 CFR §265.111 and §265.114, as adopted by reference under §335.112(a)(6) of this title (relating to Standards);

(C) the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(D) while being accumulated on-site, each container and tank is labeled or marked clearly with the words "Hazardous Waste"; and

(E) the generator complies with the following:

(i) the requirements for owners or operators in 40 CFR Part 265, Subparts C and D, and 40 CFR §265.16, as adopted by reference under §335.112(a) of this title (relating to Standards);

(ii) 40 CFR §268.7(a)(5), as adopted by reference under §335.431(c) of this title (relating to Purpose, Scope, and Applicability); and

(iii) §335.113 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(k) A generator of 1,000 kilograms or greater of hazardous waste per calendar month who also generates wastewater treatment sludges from electroplating operations that meet the listing description for EPA hazardous waste number F006, and who must transport this waste, or offer this waste for transportation, over a distance of 200 miles or more for off-site metals recovery, may accumulate F006 waste on-site for more than 90 days, but not more than 270 days without a permit or without having interim status if the generator complies with the requirements of subsection (j)(1) - (4) of this section.

(l) A generator accumulating F006 waste in accordance with subjection (j) or (k) of this section who accumulates F006 waste on-site for more than 180 days (or for more than 270 days if the generator must transport this waste, or offer this waste for transportation, over a distance of 200 miles or more), or who accumulates more than 20,000 kilograms of F006 waste on-site is an operator of a hazardous waste storage facility and is subject to the requirements of this chapter and Chapter 305 of this title (relating to Consolidated Permits) applicable to such owners and operators, unless the generator has been granted an extension to the 180-day (or 270-day if applicable) period or an exception to the 20,000 kilogram accumulation limit. Such extensions and exceptions may be granted by the executive director if F006 waste must remain on-site for longer than 180 days (or 270 days if applicable) or if more than 20,000 kilograms of F006 waste must remain on-site due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days or an exception to the accumulation limit may be granted at the discretion of the executive director on a case-by-case 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 November 17, 2000.

TRD-200008069
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 239-0348

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE

SUBCHAPTER H. HISTORICALLY UNDERUTILIZED BUSINESSES

31 TAC §51.171

The Texas Parks and Wildlife Department proposes new §51.171, concerning the Historically Underutilized Business

Program. The new section is necessary to comply with the provisions of Government Code, §2161.003, which requires state agencies to adopt General Service Commission rules governing historically underutilized businesses (HUBs). The new section will function by adopting by reference the rules of the General Services Commission (GSC) contained in 1 TAC §111.11-111.28.

Debra L. Pendley, HUB Coordinator, has determined that for each of the first five years that the proposed new section is in effect, there will be no negative financial impact to state and local governments as a result of enforcing or administering the proposed section.

Ms. Pendley has also determined that for each of the first five years that the proposed new section is in effect, the public benefit anticipated is the good faith effort to increase purchases and contracts awarded to HUBs.

There will be no effect on small businesses, microbusinesses, or persons required to comply with the rule as proposed.

Comments on the proposed rules may be submitted to Judith Doran, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4329; judy.doran@tpwd.state.tx.us.

The new section is proposed under Government Code, §2161.003, which requires the commission to adopt the rules promulgated by the General Services Commission under Government Code, §2161.002.

The new section affects Government Code, Chapter 2161.

§51.171. Historically Underutilized Business Program.

The Texas Parks and Wildlife Commission adopts by reference the provisions of 1 TAC §§111.11-111.28.

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

Filed with the Office of the Secretary of State, on November 16, 2000.

TRD-200008016
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 389-4775

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CHAPTER 69. RESOURCE PROTECTION
SUBCHAPTER A. ENDANGERED, THREATENED, AND PROTECTED NATIVE PLANTS

31 TAC §69.8

The Texas Parks and Wildlife Department proposes an amendment to §69.8, concerning Threatened and Endangered Plants. The amendment: adds the Zapata bladderpod to the list of endangered plants and deletes the Lloyd's hedgehog cactus from the same list, and adds the Pecos sunflower to the list of threatened plants while deleting the McKittrick pennyroyal from that list. The amendment is necessary to comply with the provisions of Parks and Wildlife Code, Chapter 88, which requires the department to adopt regulations to administer the provisions of that chapter, including publication and distribution of lists of threatened, endangered, or protected plants. The amendment would function by affording statutory protection to the Zapata bladderpod and by removing the Lloyd's hedgehog cactus from the list of endangered plants.

Robert McDonald, regulations coordinator, has determined that for each of the first five years that the amendment as proposed is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the amendment.

Mr. McDonald also has determined that for each of the first five years the amendment as proposed is in effect, the public benefit anticipated as a result of enforcing the rule as proposed will be the protection of the state's botanical resources.

There will be no effect on small businesses, microbusinesses, or persons required to comply with the rule as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by Government Code, §2001.022, as this agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed amendment.

Comments on the proposed rule may be submitted to John Herron, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 912-4771 or 1-800-792-1112.

The amendment is proposed under Parks and Wildlife Code, Chapter 88, which requires the commission to adopt regulations to administer the provisions of Chapter 88.

The amendment affects Parks and Wildlife Code, Chapter 88.

§69.8. Endangered and Threatened Plants.

(a) The following plants are endangered:

Figure 1: 31 TAC §69.8(a)

(b) The following plants are threatened:

Figure 2: 31 TAC §69.8(b)

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

Filed with the Office of the Secretary of State, on November 16, 2000.

TRD-200008017
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 389-4775

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PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 365. INVESTMENT RULES

The Texas Water Development Board (the board) proposes amendments to 31 TAC §365.1 and §365.21, concerning Investment Rules. The amendments are proposed for clarification and compliance with the Public Funds Investment Act (PFIA), Government Code, Chapter 2256.

Section 365.1 is proposed for amendment to delete the reference to the Board's Statement of Investments Owned in describing the scope of the Board's investment portfolio. The statement is no longer included in the Board's Annual Financial Report.

Section 365.21 is proposed for amendment to delete the reference to accrued interest. Accrued interest is not a required element under the PFIA in the Board's investment reports, and should therefore not be included in the Board's Investment Rules.

Ms. Pam Gulley, Director of Fiscal Services, has determined that for the first five-year period the sections are in effect there will not be fiscal implications for state and local government as a result of enforcement and administration of the sections.

Ms. Gulley has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the section will be clarity in the definition of the Board's investment portfolio and simplification in the preparation of investment reports. Ms. Gulley has determined there will not be economic costs to small businesses or individuals required to comply with the section as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Gail L. Allan, Director, Administration and Northern Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to gail.allan@twdb.state.tx.us or by fax at (512) 463-5580.

SUBCHAPTER A. GENERAL PROVISIONS

31 TAC §365.1

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257 which requires each State agency to adopt rules regarding the investment of its funds.

There are no statutory provisions affected by the proposed amendments.

§365.1. Scope of Chapter.

(a) This chapter shall govern all funds managed by the board and by the board on behalf of the authority, as authorized by the Sales and Servicing Agreement executed between the board and authority. The funds are accounted for [~~individually in a Statement of Investments Owned as reported~~] in the board's Annual Financial Report and [~~as a grand total by fund in~~] the State of Texas' Comprehensive Annual Financial Report.

(b) The funds to which this chapter applies are categorized as enterprise funds, special revenue funds, and debt service funds.

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

Filed with the Office of the Secretary of State, on November 15, 2000.

TRD-200007997
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 17, 2001
For further information, please call: (512) 463-7981

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SUBCHAPTER C. INVESTMENT PROCEDURES

31 TAC §365.21

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257 which requires each State agency to adopt rules regarding the investment of its funds.

There are no statutory provisions affected by the proposed amendments.

§365.21. Reporting.

The investment officer will prepare and present to the board not less than quarterly, a report of investment transactions for all funds. The report, at a minimum, will contain all the requirements specified in Texas Government Code, Chapter 2256, §2256.023 of the Public Funds Investment Act. The report will include a summary for each fund which shows the strategy for each fund and which shows book value, market value, maturity date, yield, [~~accrued interest,~~] and purchase cost of each security. Market values will be obtained from a nationally recognized financial information service. The investment officer shall prepare a report on the Texas Government Code, Chapter 2256, Subchapter A and deliver the report to the board not later than the 180th day after the last day of each regular session of the legislature.

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION AND PLACEMENT
SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.39, §85.41

The Texas Youth Commission (TYC) proposes amendments to §85.39, concerning Temporary Admission Awaiting Permanent Placement and §85.41, concerning Temporary Admission Awaiting Transportation. The amendments to both sections will change references to the term temporary admission to distinguish between temporary admission and institution detention. The agency is publishing changes in several sections to implement different procedures for segregating TYC youth in a unit within an institution. These two rules are amended to use the language of the new segregation system, but are not substantively changed.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Graham also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be greater protection to staff and youth on TYC institution campuses and to the general public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendment is proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to order the child's confinement under conditions it believes best designed for the child's welfare and the interests of the public;

The proposed rule affects the Human Resource Code, §61.034, which provides the Texas Youth Commission with the authority to adopt rules to accomplish its function.

§85.39. Temporary Admission Awaiting Permanent Placement

(a) Purpose. The purpose of this rule is to provide for temporary placement for a youth whose assigned placement is no longer a valid placement but a new placement has not been secured.

(b) Applicability. This rule does not apply to placement as detention in a TYC high restriction facility. See (GAP) §97.43 of this title (relating to Institution Detention Program). [~~Temporary admission for the purpose of detention is not addressed in this policy. See (GAP) §97.41 of this title (relating to Detention).~~]

(c) Staff may place a youth temporarily at the Marlin Orientation and Assessment Unit while waiting for assignment to a permanent placement if no disciplinary hearing is involved and if no alternative temporary placement within the youth's placement region can be found.

(d) A youth may remain at the unit as a temporary admission for up to 14 days. Extensions may be granted.

(e) The youth will be assigned a caseworker and will participate in regular activities at the unit.

§85.41. Temporary Admission Awaiting Transportation

(a) Purpose. The purpose of this rule is to provide for temporary admissions into an institution detention program in [~~security units of~~] TYC institutional facilities for youths awaiting transportation.

(b) Applicability. This policy does not apply to the use of the same or adjacent space when used specifically as detention in a TYC institution for other purposes. See (GAP) §97.43 of this title (relating to Institution Detention Program).

(c) [~~(b)~~] Overnight stays in an institution detention program [~~institutional security units~~] shall be allowed when a youth's destination cannot be reached in a single day, including transportation:

(1) following a level I/II hearing that results in transportation to another facility; or

(2) between facilities not resulting from disciplinary actions.

(d) [~~(c)~~] The following procedures shall be utilized.

(1) A youth may be detained in a training school for up to 48 hours pending transportation.

(2) Each request for an institution detention program [~~security~~] admission pending transportation must be initiated by the transportation coordinator.

(3) Approval for the admission must be obtained from the institutional superintendent or designee.

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

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Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 424-6301

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CHAPTER 87. TREATMENT

SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

37 TAC §87.67

The Texas Youth Commission (TYC) proposes an amendment to §87.67, concerning the Corsicana Stabilization Unit. The amendment to §87.67 clarifies the admission process to make all referrals directly to the stabilization unit admissions panel rather than involve the Centralized Placement Unit in the process. Youth not admitted will return to the placement of origin. New criteria for when due process hearings are conducted was added, as well as additions to release and transition options. Criteria for releases must be consistent with admission criteria and institutional youth will be transitioned to a residential treatment program unless decided otherwise by the treatment team.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Graham also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be increased services to disturbed TYC youth. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendment is proposed under the Human Resources Code, §61.076, which provides the Texas Youth Commission with the authority to provide specialized treatment for emotionally disturbed youth in providing specialized psychiatric care.

The proposed rule affects the Human Resource Code, §61.034.

§87.67. Corsicana Stabilization Unit

(a) Purpose. The purpose of this rule is to establish, for psychiatrically disturbed TYC youth, criteria and procedure for admission and evaluation for specialized treatment services in the Corsicana Stabilization Unit (CSU) [and subsequent treatment at different sites].

(b) Applicability.

(1) The mental health status review due process procedures are found in (GAP) §95.71 of this title (relating to Mental Health Status Review Hearing Procedure).

(2) See (GAP) §95.55 of this title, (relating to Level II Hearing Procedure).

(3) See (GAP) §95.51 of this title (relating to Level I Hearing Procedure).

(4) For emergency mental health placements, see (GAP) §87.71 of this title (relating to Emergency Mental Health Admission).

(c) Admissions.

(1) Admission Criteria. Youth who may be admitted to the Corsicana Stabilization Unit at the Corsicana Residential Treatment Center are those who meet the following criteria.

(A) Youth demonstrates serious dysfunction in behavior, judgment, thinking, or mood; and

(B) The dysfunction is the result of a current neurological deficit and/or emotional disturbance and/or psychiatric disorder, e.g. psychosis, major affective disorder, organic disorder, or anxiety disorder; and the dysfunction is not the result of a primary conduct disorder or antisocial personality disorder; and

(C) The dysfunction presents a risk of serious harm to the youth or others; and

(D) The [A] stabilization unit is the least-restrictive intervention alternative that is appropriate and available to safely meet the treatment needs and to control the dysfunction.

(2) Admission Process.

(A) Referrals. Complete current psychiatric and psychological evaluations by a licensed psychiatrist and a psychologist must be included in order to be considered. Referral information should be sent directly to the stabilization unit admissions panel.

[(i) For youth referred from the Corsicana main campus program, referrals must be sent directly to the stabilization unit admissions panel.]

[(ii) For youth referred from other locations, referrals must be sent by TYC staff to the centralized placement unit (CPU) for screening.]

(B) Emergency Referrals. If an emergency exists, procedures in (GAP) §87.71 of this title (relating to Emergency Mental Health Admission) must be followed. Consistent with emergency criteria, staff may request of the superintendent immediate placement of the youth in the Corsicana Stabilization Unit. On admission, requirements in this policy are effective for all emergency admissions.

(3) 96 Hour Admission Review Process. A mental health status review hearing shall be held for all youth within 96 hours of arrival at the unit. If the 96 hour period ends on a Saturday, Sunday or Legal Holiday, the hearing must be held on the next regular working day. The hearing is held to determine whether criteria for unit admission have been met.

(A) If the youth is deemed not to be appropriate for admission, he/she is not retained in the program. Youth who are not admitted are returned to the referring program/location. [referred from the main campus program are returned to that program. Youth from all other locations are referred to CPU for appropriate placement.]

(B) If the youth is deemed appropriate for admission, he/she is retained and treated in the program.

(d) Program requirements.

(1) The program focus will be on stabilization of the psychiatric dysfunction.

(2) Services are provided in a self-contained unit at the TYC Corsicana Residential Treatment Center.

(3) An individualized treatment program reflecting treatment goals and objectives shall be developed for and with each youth.

(4) The treatment team shall review the youth's progress weekly.

(5) By the end of 90 days from the date of the admission due process hearing, a youth shall be returned to the referring source or referred to CPU for appropriate placement unless an extension becomes effective at that time.

(e) Extension of Time Beyond 90 Days to Treat the Psychiatric Dysfunction.

(1) Extension Criteria. Extension may occur if criteria are met.

(A) Youth continues to meet admission criteria; and

(B) The youth's treatment plan has been implemented appropriately.

(2) Extension Due Process Requirements.

(A) The due process required to determine whether extension criteria have been met is:

(i) a level I hearing for all youth on parole. Parole is not revoked.

(ii) a mental health status review hearing for all non-parole youth.

(B) The due process hearing shall be conducted:

(i) two weeks immediately preceding the youth's 90th day from the admission hearing or two weeks preceding the anniversary date of the latest extension hearing unless the youth is

being considered for transition out of the unit before the end of the initial 90 day stay or latest extension hearing.

[(ii) two weeks immediately preceding the youth's transition for a youth being considered for transition during the initial 90 day stay.]

(ii) [(iii)] as soon as the youth returns to the unit if s/he is in a state hospital at the time the hearing is required.

(3) The Effect of an Extension.

(A) Extension shall be in effect only if extension criteria are found in a due process hearing.

(B) An extension granted means that the period of time, beyond the initial 90 day stay, during which a youth may be treated for a psychiatric dysfunction under rules of this policy, shall be extended for up to 12 months from the date of the extension due process hearing. Successive extension hearings may be held.

[(C) As long as the extension is in effect the youth may be retained in the unit, transitioned to another placement, and/or returned to the unit without further hearings.]

(4) Release and Transition Options.

(A) The treatment team shall determine by majority vote that the youth is ready to leave the stabilization unit. The criteria for deciding releases must be consistent with the criteria for deciding admission or extension.

(B) Release options are consistent with the youth's residential placement at referral. Youth on institutional status will be transitioned through a Residential Treatment Program unless recommended otherwise by the treatment team.

[(i) Youth residing in their homes or home substitutes on parole status at the time of referral to the unit, shall be transitioned to a placement having a less restrictive environment prior to their return home. The transition placement may be the Corsicana main campus program or a medium restriction placement where the youth will continue to receive mental health treatment. Parole status is not revoked by any process in this policy.]

[(ii) Youth residing in any other placement at the time of referral to the unit, will be referred to CPU for appropriate placement. Transition to the main campus will occur for youth referred from the main campus program and for youth referred from other locations only upon recommendation of the treatment team.]

(C) The extension of time to treat the psychiatric dysfunction shall be terminated when placement is no longer needed for the primary purpose of treatment of the dysfunction.

(D) Following termination of the extension, future placement decisions, including the youth's return to his home parole placement, are made in accordance with other applicable policies and procedures.

(E) No youth may be discharged from TYC jurisdiction directly from a Corsicana Stabilization Unit unless TYC's jurisdiction ends by statute.

[(f) Professional Reviews During the Extension Period.]

[(1) A professional review shall be conducted, regardless of placement, every 30 days following the extension due process hearing, for up to 12 months to determine whether extension criteria continues to be met.]

[(2) The review shall be conducted in conjunction with the Individual Case Plan (ICP) review and documented by mental health professionals in the youth's placement.]

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

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Steve Robinson
Executive Director
Texas Youth Commission
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CHAPTER 93. YOUTH RIGHTS AND REMEDIES

37 TAC §93.53

The Texas Youth Commission (TYC) proposes an amendment to §93.53, concerning Appeals to Executive Director. The amendment to the section will add five decisions affecting Texas Youth Commission (TYC) youth to appeal directly to the executive director. The decisions are an assignment in the behavior management program length of stay and extension, assignment to the aggression management program length of stay the result of an alleged mistreatment investigation, a decision from a level IV hearing, and a decision from a mental health status review

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Graham also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be greater assurance that youth rights are being met. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendment is proposed under the Human Resources Code, §61.045, which provides the Texas Youth Commission with the authority and responsibility for the welfare, custody, and rehabilitation of the children in a school, facility, or program operated or funded by the commission.

The proposed rule affects the Human Resource Code, §61.034.

§93.53. Appeal to Executive Director.

(a) Purpose. The purpose of this rule is to permit TYC youth, their parents or guardians, and TYC or contract program employees to appeal decisions made by TYC or contract program employees to the TYC Executive Director.

(b) An appeal to the executive director may be filed concerning any TYC or contract program employee decision regarding a complaint

filed through the TYC complaint resolution system, after all preliminary levels of appeal have been exhausted.

(c) A direct appeal to the executive director may be filed in matters limited to:

(1) parole revocation;

(2) reclassification;

(3) classification;

(4) a disciplinary transfer or assigned disciplinary length of stay under (GAP) §95.11 of this title (relating to Disciplinary Transfer/Assigned Minimum Length of Stay Consequence);

(5) behavior management program length of stay and extension under (GAP) §95.17 of this title (relating to Behavior Management Program);

(6) aggression management program length of stay under (GAP) §95.21 of this title (relating to Aggression Management Program);

(7) a disapproved home evaluation;

(8) the results of an alleged mistreatment investigation under (GAP) §93.33 of this title (relating to Alleged Mistreatment);

(9) a decision from a level IV hearing pursuant to (GAP) §95.59 of this title (relating to Level IV Hearing Procedure); or

(10) a decision from a mental health status review hearing pursuant to (GAP) §95.71 of this title (relating to Mental Health Status Review Hearing Procedure).

~~[(c) A direct appeal to the executive director may be filed in matters limited to parole revocation, reclassification, classification, a disciplinary transfer, assigned minimum length of stay as a consequence, a disapproved home evaluation, or denial of a request for transfer to another facility.]~~

(d) All appeals to the executive director must be filed within six months of the decision being appealed. Appeals filed after that time may be considered, at the discretion of the executive director.

(e) The executive director shall respond to each appeal, in writing, within 30 working days after receipt of the appeal. When the response cannot be completed within 30 working days, a delay letter explaining that the decision is delayed but will be forthcoming is sent to the complainant. Failure to respond to an appeal within this time period will constitute an exhaustion of administrative remedy for purposes of appeal to the courts, but will not be construed as acceptance or rejection of any contention made in the appeal.

(f) Opinions are distributed to the youth, the youth's attorney or representative, if any and certain TYC staff.

This 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 95. YOUTH DISCIPLINE
SUBCHAPTER A. DISCIPLINARY PRACTICES

37 TAC §§95.1, 95.3, 95.7, 95.9, 95.11, 95.15, 95.17, 95.21

The Texas Youth Commission (TYC) proposes amendments to §95.1, concerning discipline system overview references; §95.3, concerning rules of conduct, contraband and dress; §95.7 concerning reclassification consequence; §95.9, concerning parole revocation consequence; §95.11, concerning disciplinary transfer/assigned minimum length of stay consequence; §95.15, concerning parole minor disciplinary consequences; and §95.21, concerning aggression management program; and a new rule §95.17, concerning behavior management program.

The amendment to §95.1 will allow for more than one disciplinary consequence to be imposed on a TYC youth for the same offense if the criteria and conditions for the imposition of each disciplinary consequence are met; and the appropriate level of due process is afforded for the most severe of the disciplinary consequences imposed.

The amendment to §95.3 will change one rule violation from the list of minor to major rule violations, add two new rules to the list of minor violations, and delete one minor rule violation. Addition to the major rule violation was to include engage in inappropriate sexual contact. Additions to minor misbehavior include threatening to cause harm to someone and engage in inappropriate physical contact. Engaging in setting a fire without permission from staff was deleted due to this being an obvious violation.

The amendment to §95.7 will allow for a youth's reclassification and thus new minimum length of stay requirement and/or specified time to be spent in a disciplinary segregation program. The new disciplinary segregation programs include the Aggression Management Program and the Behavior Management Program.

The amendment to §95.9 will allow TYC to defer to local authorities when requested in writing. TYC will cancel any directive to apprehend at the time the local authority requests to defer the allegation to their jurisdiction. All due process hearings shall be scheduled within seven days.

The amendment to §95.11 now provides additional disposition options for a TYC youth to be placed in an aggression management program or behavior management program. Additions to the rule also include that directives to apprehend be canceled when local authorities make a written request to defer an allegation to their jurisdiction.

The amendment to §95.15 clarifies that this policy does not apply to Level III decisions that involve admission or extension in a security program.

New §95.17 will provide for a youth assigned to an institution, to be placed in the facility's Behavior Management Program (BMP) and assigned a maximum length of stay in the BMP as a disciplinary consequence for behavior that violates rules. Assignment to a Behavior Management Program is a major disciplinary consequence and is controlled by specific criteria and due processes.

The amendment to § 95.21 will allow dangerously aggressive youth already placed in a TYC institution, to be segregated in the Aggression Management Program (AMP). The program will only be used when there has been no response to other interventions and the safety of staff and students continues to be threatened.

Assignment to the AMP is a major disciplinary consequence and is controlled by specific criteria and due processes.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Graham also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be increased safety of the general public and increased safety for TYC staff and youth. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these proposals.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The sections are proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to permit the youth under jurisdiction liberty under supervision, order the youth's confinement under conditions it believes best designed for the youth's welfare and interest of the public, order reconfinement or renewed release, revoke or modify any order of the commission.

The proposed rules affect the Human Resource Code, §61.034.

§95.1. Discipline System Overview [~~References~~].

(a)-(i) (No change.)

(j) More than one disciplinary consequence may be imposed for the same offense if:

(1) the criteria and conditions for the imposition of each disciplinary consequence are met; and

(2) the appropriate level of due process is afforded for the most severe of the disciplinary consequences imposed.

(k) [~~(j)~~] Youth are made aware of rules and disciplinary consequences through verbal instruction and written documents.

(l) [~~(k)~~] Disciplinary consequences will not deny youth the following:

(1) regular meals or snacks;

(2) sufficient sleep;

(3) physical exercise;

(4) mail;

(5) contact through visitation or telephone with parents, [~~or~~] attorneys, or personal minister, pastor, or religious counselor;

(6) legal assistance; or

(7) medical attention.

§95.3. Rules of Conduct, Contraband, and Dress.

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

(e) Rules of Conduct. It is a violation to knowingly violate or attempt to violate or help someone else violate any of the Rules of Conduct. Repeated violations of any rule of conduct will result in more serious disciplinary consequences.

(1) A major rule violation is any of the following acts for which major consequences may be levied. Major consequences include referral to criminal court, disciplinary movement and/or reclassification, [~~and/or~~] assignment of a disciplinary minimum length of stay.

(A)-(E) (No change.)

(F) Intentionally damage or destroy property that [~~which~~] causes a loss of $100 or more

(G)-(H) (No change.)

(I) Engage in inappropriate sexual contact.

(2) Minor misbehavior is willful behavior, which breaks rules for which minor consequences, called on-site disciplinary consequences, may be levied. Minor consequences include loss of privileges, restriction, or confiscation of contraband. It is a minor misbehavior to:

(A)-(D) (No change.)

(E) Engage in inappropriate physical [~~or sexual~~] contact.

(F) (No change.)

[~~(G) Engage in setting a fire without permission from staff.~~]

(G) [~~(H)~~] Lend, borrow, or trade personal property without permission from staff.

(H) [~~(I)~~] Curse or use disrespectful language or behavior toward another.

(I) [~~(J)~~] Fail to report to someone in authority when told to do so.

(J) [~~(K)~~] Enter restricted areas without proper permission.

(K) [~~(L)~~] Use or possess tobacco.

(L) [~~(M)~~] Disrupt an authorized activity.

(M) [~~(N)~~] Deliberately disobey a reasonable request of staff.

(N) [~~(O)~~] Miss scheduled activities or curfew time.

(O) [~~(P)~~] Gamble.

(P) [~~(Q)~~] Fail to follow the dress code.

(Q) [~~(R)~~] Fail to report others' misconduct.

(f)-(i) (No change.)

§95.7. Reclassification Consequence.

(a)-(c) (No change.)

(d) Reclassification Criteria and Disposition.

(1) If a high risk offense is proved, the youth will be assigned the appropriate classification for that offense. A youth may be reclassified to the classification appropriate to the offense, regardless of the current classification (except sentenced offenders) [~~if it is found at a level I hearing that the youth has engaged in a high risk offense~~].

[~~(2) If a high risk offense is proved and no extenuating circumstances are found incident to the offense, the youth will be assigned the appropriate classification for that offense.~~]

(2) [~~(3)~~] If a high risk offense is proved and extenuating circumstances are found incident to the offense, the youth will be assigned a classification which is appropriate under the rules for waiver of classification. Extenuating circumstances are defined in (GAP) §85.23 of this title (relating to Classification).

(3) [~~(4)~~] If a youth on parole status is reclassified for a high risk offense, the youth's parole is revoked and youth is placed in high restriction.

(4) [~~(5)~~] If a sentenced offender youth is found to have committed a high risk offense, he/she may be assigned to any appropriate placement. The appropriate placement is selected according to the totality of the circumstances, including the youth's age, sentencing offense, length of time and progress in TYC custody, and the nature of the misconduct for which the youth is being disciplined.

(e) Additional Disposition Options. If a youth currently assigned to a TYC operated institution is found in a level I hearing to have engaged in a high risk offense. If such conduct meets the criteria, other dispositions may be made by the hearing examiner, but only if specifically requested in the initial hearing request for the level 1 reclassification hearing. If extenuating circumstances are found by the hearing examiner according to the level I hearing, other eligible dispositions may be assessed if the hearing examiner decides that such dispositions are appropriate despite the finding of extenuation to the reclassifying conduct. Disposition options are as follows:

(1) Aggression Management Program. A placement in the Aggression Management Program (AMP) may be requested for a youth who is currently assigned to a TYC operated institution under (GAP) §95.21 of this title (relating to Aggression Management Program). All policy and program requirements of (GAP) §95.21 of this title will apply to the assignment in AMP.

(2) Behavior Management Program.

(A) A placement in the Behavior Management Program (BMP) may be requested for certain youth under (GAP) §95.17 of this title (relating to Behavior Management Program). All policy and program requirements of (GAP) §95.17 of this title will apply to the assignment in BMP.

(B) A maximum length of stay in BMP shall run concurrently with any new reclassification minimum length of stay.

(f) [~~(e)~~] Restrictions.

(1) A level I hearing is required in order to reclassify a youth.

(2) When local authorities make a written request to defer an allegation to their jurisdiction for prosecution, TYC will cancel the directive, unless a due process hearing will be scheduled on other allegation(s). A due process hearing on any allegation(s) shall be scheduled within seven days (excluding weekends and holidays) [~~Unless otherwise requested in writing by local authorities, a level I hearing may be held even if TYC staff receive information that criminal or delinquent proceedings against the youth are planned or anticipated by local authorities~~].

§95.9. Parole Revocation Consequence.

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

(e) Restrictions.

(1) A level I hearing is required in order to revoke a youth's parole status.

(2) When local authorities make a written request to defer an allegation to their jurisdiction for prosecution, TYC will cancel the directive, unless a due process hearing will be scheduled on other allegation(s). A due process hearing on any allegation(s) shall be scheduled within seven days (excluding weekends and holidays) [~~Unless otherwise requested in writing by local authorities, a level I hearing may be held even if TYC staff receive information that criminal or delinquent proceedings against the youth are planned or anticipated by local authorities~~].

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

§95.11. Disciplinary Transfer/Assigned Minimum Length of Stay Consequence.

(a) Purpose. The purpose of this rule is to provide for the movement of a Texas Youth Commission (TYC) youth to an appropriate placement and/or assignment of a minimum length of stay as disciplinary consequences for behavior that violates rules. Disciplinary transfer and assignment of a disciplinary minimum length of stay are considered major consequences.

(b) Applicability.

(1) (No change.)

(2) Additional procedures and restrictions are applied prior to any movement of a sentenced offender youth. See (GAP) §85.33 [~~§85.29~~] of this title (relating to Program Completion and Movement of Sentenced Offenders). Also see (GAP) §85.37 of this title (relating to Sentenced Offender Disposition).

(c) (No change.)

(d) Criteria and Disposition for Disciplinary Transfer and Disciplinary Assigned Minimum Length of Stay.

(1) If it is found at a level II hearing that the youth has failed on two or more occasions to comply with the conditions of release under supervision and/or a written reasonable request of staff that is either present in the Individual Case Plan (ICP) or is validly related to previous high risk behavior, a youth may be:

(A)-(B) (No change.)

(2) (No change.)

(3) An assigned disciplinary minimum length of stay under this policy shall only be for offenses that meet criteria and shall not exceed six months.

(4) If the hearing manager determines there are extenuating circumstances incidental to the violation(s) proved at a level II hearing, the youth shall not be [~~neither~~] transferred or [~~nor~~] assigned a disciplinary minimum length of stay, but the hearing manager shall notify the administrator responsible for the program to which the youth is assigned so an appropriate disciplinary action may be taken.

(e) Additional Disposition Options. Pursuant to a level II hearing herein, certain youth in TYC institutions or secure contract programs, who are assessed a disposition under this rule may also be assessed other eligible dispositions, but only if criteria have been met and if specifically requested in the level II hearing request pursuant to this policy. If extenuating circumstances are found by the hearing manager pursuant to a level II hearing herein, other eligible dispositions may be assessed if the hearing manager decides that such dispositions are appropriate despite the finding of extenuation in the present level II hearing. Disposition options are listed.

(1) Aggression Management Program. A placement in the Aggression Management Program (AMP) may be requested for a youth who is currently assigned to a TYC operated institution under requirements of (GAP) §95.21 of this title (relating to Aggression Management Program). All policy and program requirements of (GAP) §95.21 of this title will apply to the assignment in AMP.

(2) Behavior Management Program.

(A) A placement in the Behavior Management Program (BMP) may be requested for certain youth under requirements

of (GAP) §95.17 of this title (relating to Behavior Management Program). All policy and program requirements of (GAP) §95.17 of this title will apply to the assignment in a BMP.

(B) A maximum length of stay in BMP shall run concurrently with any new assigned minimum length of stay under this policy.

(f) [~~(e)~~] Restrictions.

(1) A youth on parole status shall not be moved or transferred into a placement of high restriction under this rule.

(2) When local authorities make a written request to defer an allegation to their jurisdiction for prosecution, TYC will cancel the directive, unless a due process hearing will be scheduled on other allegation(s). A due process hearing on any allegation(s) shall be scheduled within seven days (excluding weekends and holidays) [~~Unless otherwise requested in writing by local authorities, a level II hearing may be held even if TYC staff receive information that criminal or delinquent proceedings against the youth are planned or anticipated by local authorities~~].

(3) A level II hearing should be held prior to a disciplinary transfer. When good cause compels a prehearing movement of the youth, the hearing shall be held within three consecutive days after the movement.

(4) A youth assigned a disciplinary minimum length of stay may remain in the current program or be transferred and remain in the new placement until the assigned disciplinary length of stay and other program completion criteria are completed.

(5) The assigned disciplinary [~~Disciplinary~~] minimum length of stay may be reduced based on the youth's behavior and progress toward goals.

§95.15. Parole Minor Disciplinary Consequences.

(a) (No change.)

(b) Applicability.

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

(3) This policy does not apply to Level III decisions involving admission or extensions of stay in the security program. See (GAP) §97.40 of this title (relating to Security Program).

(c)-(d) (No change.)

§95.17. Disciplinary Segregation Program.

(a) Purpose. The purpose of this rule is to provide for a Texas Youth Commission (TYC) youth, assigned to a TYC operated institution, to be placed in the Behavior Management Program (BMP) and assigned a 90-day disciplinary maximum length of stay as a consequence for behavior that violates rules. Assurance that the youth is sufficiently in control to be returned to general population is affirmed by compliance with the BMP. Disciplinary transfer and segregation with an assigned maximum length of stay is a major consequence.

(b) Applicability. This rule does not apply to:

(1) the use of the same or adjacent space when used specifically as security intake. See (GAP) §97.37 of this title (relating to Security Intake).

(2) the use of the same or adjacent space when used specifically as a security program. See (GAP) §97.40 of this title (relating to Security Program).

(3) the use of the same or adjacent space when used specifically as detention in a TYC institution. See (GAP) §97.43 of this title (relating to Institution Detention Program).

(4) the use of same or adjacent space when used specifically as temporary admission. See (GAP) §85.41 of this title (relating to Temporary Admission Awaiting Transportation).

(5) the aggression management program. See (GAP) §95.21 of this title (relating to Aggression Management Program).

(c) Explanation of Terms Used.

(1) Special Services Panel--A panel comprised of the director of clinical services, a program administrator, and a caseworker, which reviews the recommendation for admission to BMP made by the youth's caseworker.

(2) Program Review Panel--A three-person panel chaired by the assistant superintendent, which reviews BMP extension requests.

(3) Individual Behavior Management Plan--A plan developed for each youth in the BMP which consists of objectives which address the behavior or cluster of behaviors that prevent the youth from successfully participating in regular programming.

(4) Aggression Management Program (AMP)--A program designed for removing youth from the general population for dangerously aggressive behavior.

(5) Admissions, Review, and Dismissal (ARD) committee--A committee that makes decisions on educational matters of special education students.

(6) Individual Education Plan (IEP)--The prescribed plan by which education will be delivered to a special education student.

(d) Contract Care Program Restriction. TYC contract programs shall not develop a BMP having a specific disciplinary length of stay.

(e) Program Eligibility and Admission.

(1) Eligibility.

(A) Youth eligible for the BMP are youth who knowingly engage in, aid, or abet someone else to engage in one or more of the following behaviors:

(i) willful destruction of property of $100 or more; or

(ii) assault resulting in bodily injury; or

(iii) escape or attempted escape as defined in (GAP) §97.29 of this title (relating to Escape/Abscondence and Apprehension); or

(iv) intentionally participating in riotous conduct as defined in (GAP) §97.27 of this title (relating to Riot Control); or

(v) engaging in inappropriate sexual contact, sexual assault, or aggravated sexual assault; or

(vi) possessing any item defined as a weapon in the Penal Code or threatening others with use of an object which could be used as a weapon; or

(vii) threatening bodily injury to others; or

(viii) possessing a controlled substance; or

(ix) engaging in self-harm; or

(x) chronic and substantial disruption of the routine of the facility program with ten or more security admissions or extensions in a three-month period or five or more security admissions or extensions in a 30-day period, without reduction in the frequency of the

disruptive behaviors. Disruptive behavior is behavior, which prevents or significantly interferes with others' ability to participate in scheduled activities and programs.

(B) Referral is made to a Special Services Panel and approved by the assistant superintendent based on a determination that the following criteria have been met:

(i) The youth poses a continuing risk for identified admitting behavior(s); and

(ii) when appropriate, less restrictive methods of documented intervention have failed and are unable to manage the risk; and

(iii) the mental status of the youth is assessed and there are no therapeutic contraindications for admission to the BMP.

(2) Due Process Hearing. If there is a finding of true with no extenuating circumstances in a Level II hearing that the youth engaged in one of the behavioral criteria listed in paragraph (1)(A)(i) of this subsection, the youth is admitted to the BMP with an assigned 90-day disciplinary maximum length of stay. See (GAP) §95.51 of this title (relating to Level II Hearing Procedure).

(3) Appeal. The youth shall be informed of his/her right to appeal to the executive director. See (GAP) §93.53 of this title (relating to Appeal to Executive Director). The pendency of an appeal shall not preclude implementation of the decision.

(4) Dispositions.

(A) Pursuant to a Level II hearing herein, certain youth who are assessed a disposition under this rule may also be assigned a disciplinary minimum length of stay disposition but only if criteria have been met and if the youth was given notice of the specific disposition request. All policy and program requirements of (GAP) §95.11 of this title (relating to Disciplinary Transfer/Assigned Minimum Length of Stay Consequence) will apply to the assignment of such.

(B) BMP Placement Pending Assignment to the Aggression Management Program (AMP). If the disposition at the Level II hearing held pursuant to this policy also resulted in a placement in an AMP, but bed space is not available in the AMP, the youth may be assigned to a placement in the BMP (at the youth's current placement) pending admission to AMP, but only if criteria for the AMP was proven and the youth was given notice of the specific disposition to AMP. If the youth completes the disciplinary maximum length of stay in the BMP (including the extension) prior to admission to AMP, the youth shall not be admitted to AMP as a result of the conduct determined at the Level II hearing that resulted in the placement to BMP.

(5) A BMP length of stay runs concurrently with a youth's classification minimum length of stay, or any disciplinary assigned minimum length of stay.

(6) Families are notified of youth's admission to the BMP within 24 hours of the hearing.

(f) Program Completion.

(1) An Individual Behavior Management Plan must be developed for each youth. The plan will consist of objectives that address the behavior or cluster of behaviors that prevent the youth from successfully participating in regular programming. The plan will be explained to the youth and he/she will sign the plan in acknowledgment.

(2) A youth shall be released when one of the following occurs:

(A) youth has met specific performance objectives on the Individual Behavior Management Plan; or

(B) youth has completed his/her length of stay; or

(C) youth is transferred to the AMP pursuant to subsection (e)(4) of this section.

(g) Program Extension.

(1) An extension of up to 30 days may be recommended by a Program Review Panel and approved by the superintendent if the following criteria have been met:

(A) youth's behavior does not comply with program; and

(B) an appropriate Individual Behavior Management Plan addressing the non-conforming behaviors of the youth has been developed and implemented; and

(C) the modified behavior management plan can be completed within 30 days; and

(D) the mental status of the youth was assessed and there are no therapeutic contraindications for continued confinement in the BMP.

(2) Reporting. A Program Review Panel Report must be completed and forwarded to the superintendent within 10 working days following the hearing. The report shall include the panel's findings and explanation of the rationale for the findings. If the decision is appealed, the report should be expedited.

(3) Appeal. The youth shall be informed of his/her right to appeal to the executive director. See (GAP) §93.53 of this title (relating to Appeal to Executive Director). The pendency of an appeal shall not preclude implementation of the decision.

(h) Program Requirements.

(1) Individual doors are locked.

(2) All segregation programs will ensure at a minimum the following:

(A) appropriate psychological and medical services;

(B) the same food, including snacks prepared in the same manner as for other youth except for special diets that are prescribed on an individual basis by a physician, dentist or psychiatrist or approved by a chaplain;

(C) one hour of large muscle exercise daily; and

(D) appropriate educational services.

(3) The assistant deputy executive director for juvenile corrections will approve a standardized program and rules for the security unit.

(4) The director of security will post the program schedule and rules of the security unit and ensure the rules are reviewed with and signed by the youth.

(5) Youth will engage in the standardized program and comply with the rules of the security unit, but if programming is not provided, youth may remain on their mattresses during that time.

§95.21. Aggression Management Program.

(a)-(b) (No change.)

(c) Eligibility Criteria. A youth is eligible for the aggression management program:

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

(3) If the disposition at the level II hearing held pursuant to this policy resulted in a transfer to AMP, but bed space is not available in AMP, the youth may be assigned to a placement in the Behavior Management [~~Disciplinary Segregation~~] Program (BMP [~~DSP~~]) pending admission to AMP (at the youth's current placement) with an assigned maximum length of stay, pending admission to AMP. However, if the youth completes the maximum length of stay in the BMP [~~DSP~~] prior to admission to AMP, the youth shall not be admitted to AMP as a result of the conduct determined at the level II hearing that resulted in the current assignment to BMP [~~DSP~~].

(4) (No change.)

(d) Admission Criteria.

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

(3) The AMP Admission Review Committee shall not approve admission to the AMP for a youth who was placed in BMP [~~DSP~~] pending admission to AMP if the maximum length of stay assigned for that BMP [~~DSP~~] placement has been completed.

(4) The AMP Admission Review Committee should not approve admission to the AMP if a youth has substantially completed a placement in BMP [~~DSP~~] without an incidence of aggression.

(5) (No change.)

(e)-(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 November 20, 2000.

TRD-200008100
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 424-6301

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SUBCHAPTER B DUE PROCESS HEARINGS PROCEDURES

37 TAC §§95.51, 95.55, 95.57, 95.59

The Texas Youth Commission (TYC) proposes an amendment to §95.51, concerning Level I Hearing Procedure; §95.55, concerning Level II Hearing Procedure; and §95.57, concerning Level III Hearing Procedure, and new rule §95.59, concerning Level IV Hearing Procedure. The amendment to §95.51 will delete the reference of admission to an intensive resocialization program. Other changes include deletions regarding documents required for hearings. The amendment to §95.55 adds admission to a behavior management program and admission to the aggression management program as a possible disciplinary consequence and deletes any reference to placement in an intensive resocialization program or special management program, or schedule a hearing. A control measure was added that requires a level II hearing to be held within ten days of admission to detention. Failure to document reasonable circumstances preventing a hearing within ten days would result in a dismissal of a hearing. Other measures were implemented in the policy to protect the youth's rights such as; automatic appeal rights, fact finding criteria that would not include the youth's prior behavior, and would only consider the immediate allegation; and provisions were added for non-English speaking youth to be provided an interpreter or an advocate who speaks the preferred language of the youth. The amendment to §95.57 include expanding the use of Level III hearings for the purpose of extending a youth's in a security program. Additional measures to ensure proper due process were added to the policy. The amendment to §95.59 was repealed and a new policy for Level IV hearings has been implemented. The significant difference allows youth to be detained in a detention program at an institution pending a trial or hearing. Specific criteria and due process has been added to the policy.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Graham also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be increased accountability placed on TYC youth as well as increased due process for youth to ensure their rights are protected. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposals may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendments are proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to determine the appropriate types of treatment and sanctions for youth committed to the care custody and control of the Texas Youth Commission.

The proposed rules affect the Human Resource Code, §61.034.

§95.51. Level I Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish the rules and procedure to be followed when the highest level of due process is afforded a youth. The level I hearing procedure is appropriate due process in the following instances.

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

~~[(3) admission to intensive resocialization at Giddings State School]~~

(3) [~~(4)~~] extension of time to treat a psychiatric disorder in connection with a Corsicana Stabilization Unit placement at the Corsicana Residential Treatment Center (as appropriate).

(b) Applicability.

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

~~[(4) See (GAP) §87.83 of this title (relating to Intensive Resocialization Program).]~~

(4) [~~(5)~~] See (GAP) §87.67 of this title (relating to Corsicana Stabilization Unit).

(c) (No change.)

(d) Procedure.

(1) The hearing shall be conducted by a hearings examiner appointed by the Texas Youth Commission (TYC) hearings section chief. [director of legal services] The hearings examiner shall be impartial.

(2) - (29) (No change.)

(30) The rules of evidence will generally be [those] applicable [to civil non-jury trials in the district courts of Texas]. Unless specifically precluded by statute, evidence not admissible under those rules may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

(31) Copies of due process hearing documents [received through the interstate compact administrator or document(s) admitted for purposes of classifying a youth] need not be certified if such document(s) are part of the youth's record(s).

(32) - (35) (No change.)

(36) A youth's oral statement is admissible only if it relates facts which would not have otherwise been discovered, are found to be true and which tend to establish the youth's involvement in illegal activities.

(37) - (39) (No change.)

(40) The hearings examiner may receive additional evidence for purposes of disposition. The evidence received at disposition may be in the form of testimony from witnesses submitted during fact finding or at disposition, as well as written reports offered by youth, staff, professionals, counselors or consultants. Relevant documents contained in the youth's record may be admitted and considered. All written [reports] documents offered shall be provided to the parties three (3) days prior to the hearing unless otherwise waived.

(41) - (46) (No change.)

§95.55. Level II Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish the rules and procedure to be followed when the second highest level of due process is afforded a youth. The level II hearing procedure is appropriate due process in the following instances:

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

(3) admission to a behavior management program (BMP); [of youth in Giddings State School to intensive resocialization program;]

(4) admission to the aggression management program (AMP); [special management and treatment program for assaultive youth;]

[(5) movement to a transitional placement (if requested by youth);]

(5) [(6)] with a few exceptions in procedure:

(A) admission to the Corsicana Stabilization Unit, Corsicana Residential Treatment Center[, Corsicana Stabilization Unit]; and

(B) extension of time to treat a psychiatric disorder in connection with a Corsicana Stabilization Unit placement at the Corsicana Residential Treatment Center (as appropriate).

(b) Applicability.

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

(3) See (GAP) § 95.17 of this title (relating to Behavior Management Program). [See (GAP) §87.83 of this title (relating to Intensive Resocialization Program).]

(4) See (GAP) §95.21 of this title (relating to Aggression Management Program). [See (GAP) §87.81 of this title (relating to Special Management and Treatment Program).]

(5) (No change.)

(6) For exceptions in procedures used for admission to [Corsicana Residential Treatment Center,] Corsicana Stabilization Unit, Corsicana Residential Treatment Center, and extension of time to treat the psychiatric disorder, see (GAP) §95.71 of this title (relating to Mental Health Status Review Hearing Procedure).

(c) (No change.)

(d) Procedure.

(1) The designated primary service worker (PSW) or the Administrative Duty Officer (ADO), shall request permission to schedule a hearing from the appropriate supervisor, institutional superintendent, halfway house superintendent, parole supervisor, or quality assurance administrator. The hearing must be scheduled as soon as practical but not later than seven days, excluding weekends and holidays, after the alleged violation. A delay of more than seven days in scheduling the hearing must be justified by documentation of circumstances, which made it impossible, impractical, or inappropriate to schedule the hearing [earlier]. Failure to document circumstances making it impossible, impractical, or inappropriate to schedule the hearing may result in a dismissal or reversal of the decision of the hearing manager.

(2) A hearing shall be conducted within ten days from date of admission to detention. A delay of more than ten days in conducting the hearing must be justified by documentation of circumstances, which made it impossible, impractical, or inappropriate to conduct the hearing earlier. Failure to document circumstances making it impossible impractical or inappropriate to conduct the hearing may result in a dismissal or reversal of the decision of the hearing manager.

(3) [(2)] The appropriate supervisor, institutional superintendent, halfway house superintendent, parole supervisor, or quality assurance administrator will appoint an impartial staff member to act as hearing manager.

(4) [(3)] The hearing manager shall be a Texas Youth Commission (TYC) staff member who is trained to function as a hearing manager [and has not previously participated in a level II hearing for the youth].

(A) If the youth is currently assigned to an institution, the hearing manager shall be someone not directly responsible for supervising the youth.

(B) If the youth is currently assigned to a halfway house, the hearing manager shall not be a member of the halfway house staff.

(C) If the youth is currently assigned to a contract program, the hearing manager shall not be the TYC quality assurance specialist assigned to that youth [case manager assigned to that program].

(D) If the youth is currently assigned to his or her home, the hearing manager shall not be the parole officer assigned to the youth's case.

(5) [(4)] The youth's PSW [primary service worker] shall be responsible for assembling all evidence and giving all notices required for the hearing.

(6) [(5)] The youth shall be given written notice of his rights not less than 24 hours prior to the hearing. The youth's rights are:

(A) the right to remain silent;

(B) the right to be assisted by an advocate at the hearing;

(C) the right to confront and cross-examine adverse witnesses who testify at the hearing;

(D) the right to contest adverse evidence admitted at the hearing;

(E) the right to call readily available witnesses and present readily available evidence on his own behalf at the hearing; and

(F) the right to appeal from the results of the hearing. The youth's right to appeal cannot be waived.

(7) [~~(6)~~] The youth and the youth's advocate shall be given written notice of the reasons for calling the hearing, the proposed action to be taken, and the evidence to be relied upon not less than 24 hours prior to the hearing. After receipt of the written notice and consultation with the advocate, the youth may waive the 24-hour notice period by agreeing, in writing, to an earlier hearing time.

(8) [~~(7)~~] Reasonable efforts shall be made to inform [~~notify~~] the youth's parent(s) of the time and place of the hearing not less than 24 hours prior to the hearing.

(9) [~~(8)~~] The hearing shall consist of two parts: fact-finding and disposition, and shall be held where the youth resides unless the hearing manager determines that some other site is more appropriate. During the fact-finding portion of the hearing, only evidence concerning the alleged misconduct may be considered; the youth's prior behavior shall not be considered unless disposition is reached.

(10) [~~(9)~~] The youth shall be assisted by an informed and responsible advocate appointed by the hearing manager. In cases where the youth is not proficient in the English language, the appointed advocate shall be proficient in the primary language of the youth or an interpreter shall be used. [~~Whenever practical, the advocate shall be a person chosen by the youth.~~]

(11) [~~(10)~~] The hearing shall be tape recorded and the recording shall be the official record of the hearing. Tape recording and the hearing packet shall be preserved for six months following the hearing.

(12) [~~(11)~~] The youth shall be present during the hearing unless he waives his presence or his behavior prevents the hearing from proceeding in an orderly and expeditious fashion.

(A) A waiver of the youth's presence shall be in writing and signed by the youth and his advocate. If the youth does not sign the waiver for any reason, his presence is not waived.

(B) If the youth waives his presence, the hearing may be conducted by teleconference.

(C) If a youth is excluded for behavioral reasons, those reasons shall be documented in the hearing record.

(D) A true plea cannot be entered on behalf of a youth who has waived his presence at the hearing.

(13) [~~(12)~~] A victim who appears as a witness should be provided a waiting area where he is not likely to come in contact with the youth except during the hearing.

(14) [~~(13)~~] Witnesses shall take an oath prior to testifying.

(15) [~~(14)~~] The hearing manager, PSW [~~primary service worker~~], and advocate may question each witness in turn. The primary service worker and advocate may offer summation statements.

(16) [~~(15)~~] To protect the confidential nature of the hearing, persons other than the youth, the youth's advocate, staff representative, and the youth's parent(s) may be excluded from the hearing room at the discretion of the hearings manager, however any person except the youth's advocate may be excluded from the hearing room if their presence causes undue disruption or delay of the hearing. The reason(s) for the exclusions are stated on the record.

(17) [~~(16)~~] With the exception of the youth, any person designated as a witness may be excluded from the hearing room during the testimony of other witnesses and may be instructed to refrain from discussing their testimony with anyone until all the witnesses have been dismissed

(18) [~~(17)~~] The hearings manager may permit a witness to testify outside the presence of the youth if such appears reasonable and necessary to secure the testimony of the witness. If the youth is excluded from the hearing room during testimony, the advocate for the youth shall be present during the testimony and shall have the opportunity to review the testimony with the youth before questioning the witness.

(19) [~~(18)~~] The youth shall not be called as a witness unless, after consulting with the advocate, he or she waives his right to remain silent on the record. Neither the hearing manager or the PSW may question the youth unless he/she waives the right to remain silent.

(A) The youth's failure to testify shall not create a presumption against him.

(B) A youth who waives his right to remain silent may only be questioned concerning those issues addressed by his testimony.

(20) [~~(19)~~] All credible evidence may be considered, irrespective of its form.

(21) [~~(20)~~] The standard of proof for all disputed issues is a preponderance of the evidence.

(22) [~~(21)~~] The hearings manager may, for good cause, recess or continue the hearing for such period(s) of time as may be necessary to insure an informed and accurate fact-finding.

(23) The hearing manager will announce his findings of fact.

(24) [~~(22)~~] If there is finding of true[~~After announcing his findings of fact~~], the hearing manager shall proceed to disposition and order the disposition recommended by the staff representative unless the hearing manager finds extenuating circumstances[~~to determine whether the action proposed by staff is appropriate under TYC policy~~].

(A) A hearing manager's decision that a youth be transferred is final.

(B) A hearing manager's decision to assign a disciplinary minimum length of stay (with or without a transfer) is final subject to approval by the appropriate director of juvenile corrections [~~executive director~~] or designee. If, subsequent to the assignment of a disciplinary minimum length of stay, the appropriate director of juvenile corrections[~~executive director~~] disapproves the assignment, neither the assignment nor a transfer may then occur.

(C) A hearing manager's decision that a youth will be transferred and/or an assigned a length of stay in a disciplinary segregation program is final subject to an appeal by the youth.

(25) [~~(23)~~] The hearing manager shall prepare the Hearing Manager's Report of a Level II Hearing form, CCF-170, of his findings which includes grounds for the hearing and evidence relied upon and the decision.

(26) [~~(24)~~] The youth is informed of his/her right to appeal to the executive director at the close of the hearing. The pendency of an appeal shall not preclude implementation of the hearing manager's dispositional decision.

(27) [~~(25)~~] A copy of the report (CCF-170) is given to the youth immediately following the close of the hearing.

§95.57. Level III Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish a hearing procedure as the appropriate informal due process for immediately imposing [~~relatively minor~~] disciplinary consequences [~~measures~~] at the site of the youth's program.

(b) Applicability.

(1) See [~~Also see~~] (GAP) §95.13 of this title (relating to On-Site Disciplinary Consequences); and

(2) When a Level III hearing is conducted to determine admission or extension to the security program also see the requirements of (GAP)§97.40 of this title (relating to Security Program).

(c) (No change.)

(d) To initiate the level III hearing, the youth will be notified orally of the time and date of the hearing, the rule violation(s) and the recommended consequences to be imposed prior to implementing any action[~~the staff member imposing the discipline will discuss with youth the rule violation~~].

[~~(e) The staff member will give the youth oral notice of the proposed action and the reasons for it prior to implementing the action.~~]

(e) [~~(f)~~] The youth has the right and will be given the opportunity to speak on his or her behalf regarding alleged misconduct or the appropriateness of the disciplinary measure

(f) If the Level III hearing involves a decision for admission or an extension to the security program the youth will be appointed an advocate.

(g) The decision administrator staff member may consider any reasonably reliable information in reaching a decision regarding the truth of the youth's alleged misconduct and the appropriateness of the disciplinary consequences.

(h) The youth may appeal the disciplinary decision to the appropriate staff or team on grounds that:

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

(3) there were extenuating circumstance to the commission of the violation.

(i) (No change.)

§95.59. Level IV Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish a procedure to determine whether justification exists to warrant holding a youth in detention pending a hearing or trial when the hearing or trial cannot be held within ten days of the detention.

(b) Applicability.

(1) The level I due process procedures referred to herein are found in (GAP) §95.51 of this title (relating to Level I Hearing Procedure).

(2) The level II due process procedures referred to herein are found in (GAP) §95.55 of this title (relating to Level II Hearing Procedure).

(c) A detention review hearing procedure (level IV hearing) shall be held to determine whether justification exists to warrant holding a youth in detention pending a hearing or trial when a level I or II hearing or a trial is not held and continued detention is necessary and appropriate based stated criteria in (GAP) §97.41 of this title (relating to Community Detention) or (GAP) §97.43 of this title (relating to Institution Detention Program). The timing of the required due process level IV hearing is related to the facility in which the youth is detained. A detention review hearing will be conducted by TYC staff:

(1) for youth assigned to a TYC institution held in the TYC institution detention program:

(A) on or before 48 hours from admission to the institution detention program; and

(B) within ten working days of the previous detention review hearing.

(2) for a youth held in community detention when the level I or II hearing cannot be held within ten days if the community detention staff does not hold a detention hearing. The hearing will be conducted ten working days from initial detention.

(d) Procedure.

(1) Decision Maker.

(A) A parole supervisor, quality assurance administrator, halfway house superintendent, or an institution superintendent shall appoint a decision maker, who will schedule the hearing.

(B) The decision-maker shall be impartial and shall not have been the person who admitted the youth to the security intake program or the institution detention program.

(2) Detention Review Hearings.

(A) The youth has a right and shall be informed of his right to be represented:

(i) in a level I hearing, a youth shall be represented by counsel. Counsel is:

(I) an attorney obtained by the youth; or

(II) the attorney appointed to represent the youth.

(ii) in a level II hearing or pending a trial, a youth shall be represented by a youth advocate. If the trial attorney chooses to be the youth's advocate in a level IV hearing, he may represent the youth but is not required to do so.

(B) The youth may waive the level IV hearing after being advised by an attorney (for level I hearing) or an advocate (for a level II hearing).

(C) The hearing shall be tape-recorded and the recording shall be the official record of the hearing. Tape recordings shall be preserved for six months following the hearing.

(D) When a detention review is necessary due to the adjournment of a Level I telephone hearing under (GAP) §95.53 of this title (relating to Level I Hearing by Telephone), the hearings examiner may conduct a Level IV hearing following adjournment of the telephone hearing.

(E) The staff responsible for calling for the level I or II hearing, or the Primary Service Worker (PSW) of the youth being held for trial must show cause to detain the youth pending the hearing or trial. The attorney or advocate may present evidence as to why the youth should not be detained.

(3) The Decision.

(A) The decision of the decision-maker shall be based on criteria for detaining/extending the stay of the youth. See criteria in (GAP) §97.41 of this (relating to Community Detention) and (GAP) §97.43 of this title (relating to Institution Detention Program).

(B) If criteria are not met, the youth must be released to his assigned location.

(4) Appeal.

(A) The youth is informed of his/her right to appeal to the executive director pursuant to (GAP) §93.53 of this title (relating to Appeal to Executive Director).

(B) The pendency of an appeal shall not preclude implementation of the hearing manager's dispositional decision; however this appeal shall be expedited by the PSW by notifying the complaint coordinator in the office of general counsel of the appeal and forwarding the record and evidence for consideration within 72 hours from notice of appeal.

(C) For youth assigned to a TYC institution, who are held in an institution detention program, an automatic appeal to the executive director will be filed on the third and subsequent level IV hearing to determine if the institution detention criteria have been proven. The PSW will initiate the automatic appeal.

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

Filed with the Office of the Secretary of State, on November 20, 2000.

TRD-200008083
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 424-6301

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37 TAC §95.59

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

The Texas Youth Commission (TYC) proposes the repeal of §95.59, concerning Level IV Hearing Procedure. The repeal of the section will allow for the publication of a new section.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Graham also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the increased information in the acknowledgment of the rights of the victims of TYC youth. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The repealed section is proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to determine the appropriate types of treatment and sanctions for youth committed to the care custody and control of the Texas Youth Commission.

The proposed rule implements the Human Resource Code, §61.034.

§95.59. Level IV Hearing Procedure.

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

Filed with the Office of the Secretary of State, on November 20, 2000.

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Texas Youth Commission
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For further information, please call: (512) 424-6301

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CHAPTER 97. SECURITY AND CONTROL
SUBCHAPTER A. SECURITY AND CONTROL

37 TAC §§97.23, 97.37, 97.39, 97.40, 97.41, 97.43

The Texas Youth Commission (TYC) proposes an amendment to §97.23, concerning Use of Force; to §97.39, concerning Isolation; and §97.41 concerning Community Detention New rule §97.37, concerning Security Intake, new rule §97.40, concerning Security Program and new rule §97.43, concerning Institution Detention Program. The amendment to §97.23 only changes the name of the unit from detention to security unit, due to the agency's change in the security program. The amendment to §97.39 adds increased supervision of youth by staff while the youth is isolated. There are provisions for visually observing youth on suicide alert status. The amendment to §97.41 will clarify expectations for referral or detainment of youth in a community detention center. The amendment clarifies age requirements, that youth 17 and under may be detained in the community with the consent of the local authorities and youth 17 and older may be referred to an adult facility. The amendment also includes that community detention will be sought for appropriate youth prior to requesting detention in a TYC institution. There was also a change to refer to these as community detention rather than county detention. Other changes relate to holding a youth in community detention while there are other charges pending. Procedural changes include notification and due process review hearing requirements. New rule §97.37 will provide for a security intake unit. This is the first step in admission to a security program. Specific referral and admission criteria was established to clarify reasons for a youth to be referred to the security unit. Youth will remain in the intake unit for up to one hour with an allowance for an extension. Within the hour, staff must determine if admission criteria exist and then the youth would be placed in the Institution Detention Program pending a hearing or into the security program due to continued misbehavior. New rule

§97.40 relates to the security program. Youth would be placed in this program after going through security intake if they continue to meet the criteria. Criteria for admission states the youth is an escape risk, that the youth is placing himself or others in danger, preventing the youth from destroying property, preventing the youth from disrupting the program, and or failure on the youth's part to comply with standard security program rules. New rule §97.43 will allow youth to be detained in the institution detention program. Youth that meet admission criteria and will be pending a level I or II hearing may be detained in the institution detention program. A youth may also be detained in this program if they are pending transportation to another facility after a due process hearing has been held. Detention review hearings will be required every ten days for youth that are pending a hearing.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Graham also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be increased accountability for youth and better definition of the specific programs developed to help discipline negative behavior. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposals may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendments and new sections are proposed under the Human Resources Code, §61.045, which provides the Texas Youth Commission with the authority to operate programs and facilities that meet the rehabilitation needs of delinquent youth.

The proposed rules affect the Human Resource Code, §61.034.

§97.23. Use of Force.

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

(e) Criteria for Use. Force may be used only as a last resort and only as a control measure to ensure the safety and welfare of youth, staff, or the public. The use of force (to restrain or compel movement) shall be limited to instances of:

(1) - (5) (No change.)

(6) movement of a referred youth to the security[~~/detention~~] unit or alternative education classroom. A youth may also be moved within the security [~~or detention~~] unit when the youth's behavior is substantially disruptive and the youth refuses to follow a reasonable order of the security[~~/detention~~] staff.

(7) (No change.)

(f) - (g) (No change.)

§97.37. Security Unit.

(a) Purpose. The purpose of this rule is to establish criteria and procedure for segregating youth from the general population under certain circumstances. Each Texas Youth Commission (TYC) operated high restriction facility or secure contract program provides for segregation programs. Placement in a segregation program may be imposed only in specific situations for specified periods of time. Youth who may be eligible for a placement in a segregation program may be initially referred to the security intake. Such youth are placed into a secure setting that is controlled exclusively by staff.

(b) Applicability. This rule does not apply to:

(1) The use of the same or adjacent space when used specifically as a security program. See (GAP) §97.40 of this title (relating to Security Program).

(2) The use of the same or adjacent space when used specifically as detention in lieu-of-county detention or specifically as institution detention. See (GAP) §97.43 of this title (relating to Institution Detention Program).

(3) The use of the same or adjacent space when used specifically as a disciplinary segregation program. See (GAP) §95.17 of this title (relating to Behavior Management Program).

(4) The use of the same or adjacent space when used specifically as temporary admission. See (GAP) §85.41 of this title (relating to Temporary Admission Awaiting Transportation).

(5) The aggression management program (AMP). See (GAP) §95.21 of this title (relating to Aggression Management Program).

(c) Referral and Admission Criteria. A youth may be admitted to security intake if there is reason to believe, based on overt acts by the youth, and/or under the following circumstances:

(1) the youth is a serious and continuing escape risk; or

(2) the youth is a serious and immediate physical danger to himself or herself or others and staff cannot protect the youth or others except by referring the youth to security intake; or

(3) confinement is necessary to prevent imminent and substantial destruction of property; or

(4) confinement is necessary to control behavior that creates disruption of the youth's current program; or

(5) the youth requests confinement, unless campus-wide self referrals have been disallowed by the superintendent or designee; or

(6) staff requests detention for a youth.

(d) Referral and Admission Process.

(1) A youth may be referred to the security intake by staff or at the youth's own request.

(2) A youth may be held in security intake on referral for up to one hour.

(3) The superintendent or designee may extend the one-hour time limit up to one additional hour if requested and necessary in order to make a proper decision.

(4) Within one hour (or two hours if an extension has been granted) of the youth's arrival at security intake, the designated staff shall determine whether criteria for admission have been met.

(5) Designated staff include the superintendent, assistant superintendent, administrative duty officer (ADO), program administrator (PA), institution placement coordinator (IPC), principal, a caseworker, or a designated juvenile correctional officer (JCO) V trained in the security intake policy and procedure to admit youth to the security intake program. On the late night shift, a JCO IV trained in the security intake admission policy and procedure may admit a youth to security intake. The director of security may not admit a youth to security intake.

(6) The director of security or designee will review all admission decisions to determine if admission criteria have been met. The director of security or designee shall not have been involved in the admission decision.

(7) As a result of the review, staff may release youth to general population or admit the youth to the security intake unit for up to 24 hours.

(8) The appeal of an *admission* to security intake will be to the superintendent, assistant superintendent or the administrative duty officer (ADO) as long as they were not the admitting staff.

(e) Security Intake Termination/Other Segregation Programs.

(1) Within 24 hours of admission to security intake, a youth shall be:

(A) released to the general population; or

(B) admitted to one of the following programs:

(i) security program - if it is determined that there are reasonable grounds to believe one or more of the security program admission criteria is occurring. See (GAP) §97.40 of this title (relating to Security Program);

(ii) institution detention program - if it is determined that there are reasonable grounds to believe one or more of the institution detention admission criteria is occurring. See (GAP) §97.43 of this title (relating to Institution Detention Program).

(2) Youth may be released by the director of security or any designated staff authorized to admit youth in this policy.

(f) Restrictions.

(1) Segregation shall not be used for retribution at any time.

(2) No minimum length of time in security intake shall be imposed.

(3) The superintendent or designee may disallow the self-referrals campus-wide at his or her discretion.

(g) Program Requirements.

(1) Doors of individual security intake rooms may be locked during the process of referral to security intake, and will be locked following admission.

(2) All segregation programs will ensure at a minimum the following:

(A) appropriate psychological and medical services;

(B) the same food, including snacks prepared in the same manner as for other youth except for special diets that are prescribed on an individual basis by a physician, dentist or psychiatrist or approved by a chaplain;

(C) one hour of large muscle exercise daily; and

(D) appropriate educational services.

(3) The assistant deputy executive director for juvenile corrections will approve a standardized program and rules for the security unit.

(4) The director of security will post the program schedule and rules of the security unit and ensure the rules are reviewed with and signed by the youth.

(5) Youth will engage in the standardized program and comply with the rules of the security unit, but if programming is not provided, youth may remain on their mattresses during that time.

§97.39. Isolation.

(a) (No change.)

(b) Applicability. This rule does not apply:

(1) once a youth has been admitted to the security intake [~~unit~~]. See (GAP) §97.37 of this title, (relating to Security Intake [~~Unit~~]).

(2) (No change.)

(c) - (d) (No change.)

(e) Criteria. A youth may be confined in isolation in cases when the youth is:

(1) out of control;[~~:~~]and

(2) - (3) (No change.)

(f) Release.

(1) A youth placed in isolation shall be released within three hours or be referred to the security intake [~~unit~~].

(2) As soon as a youth is sufficiently under control so as to no longer pose a serious and immediate danger to himself or others, isolation will be terminated.

(g) Isolation Requirements.

(1) Staff shall visually check youth placed in the security unit, in any program, at least every 15 minutes unless placed under provisions in (GAP) §91.89 of this title (relating to Suicide Alert).

[~~(1) A youth in isolation who is on suicide alert shall be visually checked by staff in accordance with recommendations by the mental health professional placing the youth on suicide alert and in any case, not less frequently than every ten (10) minutes. All other youth in isolation shall be visually checked by staff at least every 15 minutes.~~]

(2) If youth is placed under provisions in (GAP) §91.89 of this title (relating to Suicide Alert), one-on-one observation is required prior to assessment by a mental health professional. After the youth is assessed, staff shall visually check youth as determined by the mental health professional in accordance with (GAP) §91.89 of this title (relating to Suicide Alert).

(3) [~~(2)~~] Youth in isolation shall receive appropriate psychological and medical services.

(4) [~~(3)~~] On release, youth in isolation shall receive the same food including snacks prepared in the same manner as for other youth except as special diets may be prescribed on an individual basis by medical personnel.

§97.40. Security Program.

(a) Purpose. The purpose of this rule is to provide for a security program in Texas Youth Commission (TYC) institutions and secure contract programs for the placement of out of control youth when specific criteria are met and to establish program operation requirements. Assurance that youth is sufficiently in control to be returned to general population is affirmed by compliance with the standardized program or rules of the security program which are supplied to the youth upon admission to security intake.

(b) Applicability.

(1) This rule does not apply to:

(A) the use of the same or adjacent space when used specifically as security intake. See (GAP) §97.37 of this title (relating to Security Intake).

(B) the use of the same or adjacent space when used specifically as detention in a TYC institution. See (GAP) §97.43 of this title (relating to Institution Detention Program).

(C) the use of the same or adjacent space when used specifically as disciplinary segregation. See (GAP) §95.17 of this title (relating to Behavior Management Program).

(D) the use of the same or adjacent space when used specifically as temporary admission. See (GAP) §85.41 of this title (relating to Temporary Admission Awaiting Transportation).

(E) the aggression management program (AMP). See (GAP) §95.21 of this title (relating to Aggression Management Program).

(2) When a Level III hearing is conducted to determine admission or an extension to the security program, this policy needs to be read in conjunction with (GAP) §95.57 of this title (relating to Level III Hearing Procedures).

(c) Admission Criteria. A youth may be admitted to the security program if there are reason to believe, based on overt acts by the youth, and/or under the following circumstances:

(1) the youth is a serious and continuing escape risk; or

(2) the youth is a serious and immediate physical danger to himself or herself or others and staff cannot protect the youth or others except by admitting the youth to security program; or

(3) the confinement is necessary to prevent imminent and substantial destruction of property; or

(4) the confinement is necessary to control behavior that creates disruption of the youth's current program; or

(5) the youth is not complying with the standardized program or rules of the security unit while in security intake or in the security program; or

(6) upon the youth's own request, unless campus-wide self referral has been disallowed by the superintendent or designee.

(d) Admission Process.

(1) A hearing administrator is appointed by the superintendent to conduct a Level III hearing to determine whether admission criteria have been met. As a result of the hearing, the youth shall be either:

(A) released to the general population; or

(B) admitted to the security program for up to 24 hours.

(2) The following staff may be appointed to be the hearing administrator: superintendent, assistant superintendent, administrative duty officer (ADO), program administrator (PA), institution placement coordinator (IPC), principal, a caseworker, or a designated juvenile correctional officer (JCO) V trained in the security policy and procedure to admit youth to the program. The director of security may not admit a youth to security.

(3) The director of security or designee will review all admission decisions to determine if admission criteria have been met. The director of security or designee shall not have been involved in the level III hearing.

(4) Based upon a finding of true to the admission criteria, and no extenuating circumstances, the youth will be admitted into the security program.

(5) The youth will be notified of his or her right to appeal in writing. The appeal of an *admission* to the security program will be to the superintendent, assistant superintendent or the ADO as long as they were not the hearing administrator for admission.

(6) The youth's advocate will be assigned by the hearing administrator for the Level III due process hearing. Whenever practical, the advocate may be a person chosen by the youth.

(7) The youth may be released from the security program by the director of security or designated staff authorized to admit youth in this policy.

(e) Restrictions.

(1) A youth shall not remain in the security program more than 24 hours from admission to the program solely on the basis of the behavior for which he was admitted to security intake.

(2) A youth shall not remain in the security program more than 24 hours from admission without the required extended stay due process hearing protections.

(f) Extended Stay Requirements.

(1) A youth's stay in the security program may be extended beyond the 24 hours from admission to the program if there are reasonable grounds to believe that one of the admission criteria to security is continuing.

(2) Extended confinement due process protections will be provided to determine whether reasonable grounds exist for the youth to remain in the security program longer than 24 hours.

(A) A Level III hearing is afforded the youth before security program confinement is extended past 24 hours.

(B) A hearing administrator is appointed by the superintendent to determine the reasons for the extended confinement and make a decision on the facts presented.

(C) The following staff may be appointed to be the hearing administrator: superintendent, assistant superintendent, administrative duty officer (ADO), program administrator (PA), institution placement coordinator (IPC), principal, a caseworker, or a designated juvenile correctional officer (JCO) V trained in the security policy and procedure to extend youth in the program. The director of security may not be the hearing administrator.

(D) The director of security or designee will approve the 24-hour extension decision if admission criteria continue to exist based on current behavior. The director of security or designee shall not have been involved in the level III hearing.

(E) Based upon a finding of true to the admission criteria, and no extenuating circumstances, the youth's stay in the security program may be extended up to an additional 24 hours.

(F) The youth will be notified in writing of his or her right to appeal. The appeal of an extension to the security program will be to the superintendent, assistant superintendent or the ADO as long as they were not the hearing administrator for admission or extension. The youth is notified in writing of the outcome of the appeal.

(3) After the initial Level III due process extension hearing, up to five subsequent Level III hearings may be conducted as set forth in paragraph (2) of this subsection every 24 hours thereafter for additional extensions of up to 24 hours for up to 168 hours from admission into the security program.

(4) After 168 hours, a due process extension Level III hearing will be conducted as set forth in paragraph (2) of this subsection for an additional extension of up to 72 hours for up to 240 hours from admission into the security program.

(A) The appropriate director of juvenile corrections will approve the 72-hour extension decision if admission criteria continue to exist based on current behavior.

(B) The extension decision approved by the director of juvenile corrections may be appealed to the assistant deputy executive director for juvenile corrections and the youth is notified in writing of the outcome of the appeal.

(5) After 240 hours, a due process extension Level III hearing will be conducted as set forth in paragraph (2) of this subsection every 72 hours thereafter for only two additional extensions of up to 72 hours each.

(A) The assistant deputy executive director for juvenile corrections will approve the 72-hour extension decision if admission criteria continue to exist based on current behavior.

(B) Extension decisions approved by the assistant deputy executive director for juvenile corrections may be appealed to the deputy executive director, and the youth is notified in writing of the outcome of the appeal.

(6) After 384 hours (16 days), the youth shall be either released back to the general population or other alternatives must be recommended by the assistant deputy executive director for juvenile corrections.

(7) If admission decision or due process extension hearings are not timely held or approved the youth shall be released from the security program.

(g) Program Requirements.

(1) Individual doors are locked.

(2) All segregation programs will ensure at a minimum the following:

(A) appropriate psychological and medical services;

(B) the same food, including snacks prepared in the same manner as for other youth except for special diets that are prescribed on an individual basis by a physician, dentist or psychiatrist or approved by a chaplain;

(C) one hour of large muscle exercise daily; and

(D) appropriate educational services.

(3) The assistant deputy executive director for juvenile corrections will approve a standardized program and rules for the security unit.

(4) The director of security will post the program schedule and rules of the security unit and ensure the rules are reviewed with and signed by the youth.

(5) Youth will engage in the standardized program and comply with the rules of the security unit, but if programming is not provided, youth may remain on their mattresses during that time.

§97.41. Community Detention.

(a) Purpose. The purpose of this rule is to establish:

(1) criteria for detaining youth in detention facilities in the community (juvenile or adult); and

(2) expectations for interaction between TYC staff and community [~~county~~] detention staff when youth in TYC custody are detained in community [~~county~~] detention facilities [~~centers~~].

(b) Applicability.

(1) This rule applies to TYC youth admitted to community [~~county~~] detention facilities [~~centers or to TYC institutions in lieu of admission to county detention centers~~].

(2) This rule does not apply to TYC youth admitted to a TYC institution detention program. See (GAP) §97.43 of this title (relating to Institution Detention Program).

(c) Explanation of Terms Used.

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

(3) Community Detention Facilities - Refers to the local detention facilities designed for either juveniles or for adults. References to community staff mean staff who work at community detention facilities.

(d) Youth in TYC custody, who are age 17 and younger, [~~who have escaped/absconded from a TYC placement or violated a condition of parole who are 17 or older may be referred to detention in an adult jail. Youth who are younger than age 18, may be referred to juvenile community detention facilities with the consent of local authorities~~] may be referred to juvenile community detention facilities with the consent of local authorities. Youth in TYC custody who have escaped/absconded from a TYC placement or violated a condition of parole who are age 17 and older may be referred to detention in an adult jail facility.

(e) TYC will utilize community detention facilities in a manner consistent with local policies. If community detention is not available, a TYC youth may be detained in a TYC institution detention program of a TYC training school in lieu of community detention in accordance with (GAP) §97.43 of this title (relating to Institution Detention Program) [~~the security unit of a TYC training school~~]. Detention admission in a training school may be sought only if a local community detention facility is not available.

(f) Criteria for Detention.

(1) A youth may be detained when there are reasonable grounds [~~is probable cause~~] to believe the youth engaged in criminal behavior delinquent conduct, a major rule violation, or conduct indicating a need for supervision and one of the following criteria is met:

(A) - (C) (No change.)

(2) (No change.)

(g) Detention Hearings.

(1) If detention hearings are conducted by the community [~~county~~] for TYC youth that is held in a community [~~county~~] detention facility [~~centers~~], TYC staff will participate as requested by the community [~~county~~] and no other hearing is necessary.

(2) If detention hearings are not conducted by the community [~~county~~] for a TYC youth that is held in a community [~~county~~] detention facility [~~centers~~], TYC staff shall hold a detention review hearing (level IV hearing) on or before the tenth day of detention when a level I or II hearing cannot be held within ten days and further detention is necessary and appropriate. See (GAP) §95.59 of this title (relating to Level IV Hearing Procedure):

[~~(3) TYC staff shall hold detention review hearings for TYC youth held in TYC training schools as detention centers on or before the tenth day of detention when a level hearing cannot be held within ten days and further detention is necessary and appropriate.~~]

(h) Disposition.

(1) If the parole officer or other local TYC staff responsible for the youth determines the youth has not committed any offense

or is from a facility and local authorities have not ordered the youth's detention, arrangements are made for immediate return to the TYC facility or other appropriate placement.

(2) Even If TYC staff receives information that criminal or delinquent proceedings against the youth are planned, pending, or anticipated by local authorities, TYC may continue to hold the youth in detention and may schedule and hold an administrative hearing.

(i) Procedure.

(1) Upon notification by detention staff, a TYC staff will confirm whether the youth is under TYC authority and notify the assigned placement facility of the detention, if appropriate, and the parole supervisor of the allegations regarding behavior.

(2) If the parole officer or other staff determines that there is probable cause to believe that offenses have been committed and that detention is warranted, he or she will hold a detention review conference with the parole supervisor or other TYC program administrator to justify and obtain approval for having the youth held in detention. The conference must be held no later than the second working day after the youth is detained unless the youth is detained on a Friday or Saturday, then on the first working day after the youth is detained.

(3) TYC staff will visit detained youth daily where possible. No more than three days may pass without a contact by the staff responsible for the youth.

§97.43. Institution Detention Program.

(a) Purpose. The purpose of this rule is to establish criteria and procedures for detaining appropriate Texas Youth Commission (TYC) youth in an Institution Detention Program (IDP) operated within each TYC institution.

(b) Applicability.

(1) This rule applies to TYC youth detained in TYC operated institutions.

(2) This rule does not apply to:

(A) TYC youth detained in community detention facilities. See (GAP) §97.41 of this title (relating to Community Detention).

(B) the use of the same or adjacent space when used specifically as segregation intake. See (GAP) §97.37 of this title (relating to Segregation Intake).

(C) the use of the same or adjacent space when used specifically as custody control. See (GAP) §97.40 of this title (relating to Custody Control).

(D) the use of the same or adjacent space when used specifically as disciplinary segregation. See (GAP) §95.17 of this title (relating to Disciplinary Segregation Program).

(E) the use of the same or adjacent space when used specifically as temporary admission. See (GAP) §85.41 of this title (relating to Temporary Admission Awaiting Transportation).

(F) the aggression management program. See (GAP) §95.21 of this title (relating to Aggression Management Program).

(c) Explanation of Terms Used. Detention Review Hearing - the TYC level IV hearing required by this policy.

(d) Criteria for Placement in an Institution Detention Program.

(1) Designated staff will conduct a review to determine whether admission criteria have been met.

(2) Admission Criteria.

(A) A youth assigned to an institution may be admitted to the IDP program (for up to 48 hours):

(i) if a level hearing or trial has been requested in writing; and

(ii) there are reasonable grounds to believe the youth has committed a violation; and

(iii) one of the following applies:

(I) suitable alternative placement within the facility is unavailable due to on-going behavior of the youth that creates disruption of the routine of the youth's current program by failing on two or more occasions to follow a reasonable request of staff; or

(II) the youth is likely to interfere with the hearing or trial process; or

(III) the youth represents a danger to himself or others;

(IV) the youth has escaped or attempted escape as defined in (GAP) §97.29 of this title (relating to Escape Abscondence and Apprehension); or

(V) the youth is under felony indictment and pending trial.

(B) A youth who is assigned to a placement other than a TYC operated institution may be detained in a TYC operated IDP (beyond 48 hours):

(i) if a level hearing or trial has been requested in writing; and

(ii) based on current behavior or circumstances, all detention criteria in (GAP) §97.41 of this title (relating to Community Detention) have been met.

(3) Criteria for Detention Beyond 48 Hours.

(A) A youth who is assigned to a TYC operated institution may be detained in the IDP beyond 48 hours:

(i) if a level hearing or trial has been scheduled; and

(ii) based on current behavior or circumstances, all other criteria in paragraph (2) of this subsection have been met.

(B) A youth who is assigned to a placement other than a TYC operated institution may be detained in a TYC operated IDP (beyond 48 hours):

(i) if a level hearing or trial has been scheduled; and

(ii) based on current behavior or circumstances, all detention criteria in (GAP) §97.41 of this title (relating to Community Detention) have been met.

(C) A level I or II hearing or trial is considered to be *scheduled* if, within seven days (excluding weekends and holidays) from date of the violation a hearing or trial date and time has been set and the information submitted at a level IV hearing;

(D) A youth whose level hearing or trial has been held may be detained without a level IV hearing when the youth is waiting for transportation:

(i) to TDCJ, ID following a transfer hearing;

(ii) to a different high restriction placement following a level I or II hearing; or

(iii) pursuant to (GAP) §85.41 of this title (relating to Temporary Admission Pending Transportation).

(e) Detention Hearings Required for Any Youth Held in an Institution Detention Program.

(1) A youth, who meets admission criteria, may be detained in an IDP for up to 48 hours.

(2) For extensions beyond 48 hours an initial detention review hearing (level IV hearing) must be held on or before 48 hours from admission to the IDP.

(3) Subsequent detention review hearings must be held within ten working days from the previous detention review hearing when a level hearing or trial is not held and continued detention is necessary and appropriate based upon current behavior or circumstances that meet criteria unless the youth is under indictment pending trial. See (GAP) §95.59 of this title (relating to Level IV Hearing Procedure).

(4) A detention review hearing is not required for youth detained pending transportation pursuant to subsection (d)(3)(D) of this section.

(5) If a level IV hearing is not timely held or is not properly waived, the youth shall be released from the IDP.

(6) Institution or a designated community staff will hold the required level IV detention review hearings. The Primary Service Worker (PSW) for youth not assigned to an institution, will coordinate with institution staff to ensure that hearings are held timely or waived properly.

(f) Program Requirements.

(1) Individual doors are locked.

(2) The IDP will ensure the following:

(A) appropriate psychological and medical services;

(B) the same food, including snacks prepared in the same manner as for other youth except for special diets that are prescribed on an individual basis by a physician, dentist or psychiatrist or approved by a chaplain;

(C) one hour of large muscle exercise daily; and

(D) appropriate educational services.

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

Filed with the Office of the Secretary of State, on November 20, 2000.

TRD-200008084
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 424-6301

♦ ♦ ♦

37 TAC §97.37

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

The Texas Youth Commission (TYC) proposes the repeal of §97.37, concerning Security Unit. The repealed section will allow for the publication of a new section.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Graham also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the increased information in the acknowledgment of the rights of the victims of TYC youth. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The repealed section is proposed under the Human Resources Code, §61.045, which provides the Texas Youth Commission with the authority to operate programs and facilities that meet the rehabilitation needs of delinquent youth.

The proposed rule implements the Human Resource Code, §61.034.

§97.37. Security Unit.

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

Filed with the Office of the Secretary of State, on November 20, 2000.

TRD-200008072
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 424-6301

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 362. DEFINITIONS

40 TAC §362.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to § 362.1, concerning Definitions. The amendment will delete a definition for a term which is no longer consistent with the law.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there

will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 clarification of terms used in the OT rules. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, augusta.gelfand@mail.capnet.state.tx.us.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§362.1. Definitions.

The following words, terms, and phrases, when used in this part, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Act--The Occupational Therapy Practice Act, Texas Civil Statutes, Article 8851.

(2) AOTA--American Occupational Therapy Association.

(3) Applicant--A person who applies for a license to the Texas Board of Occupational Therapy Examiners.

(4) Application Review Committee--Reviews and makes recommendations to the board concerning applications which require special consideration.

(5) Board--The Texas Board of Occupational Therapy Examiners (TBOTE).

(6) Certified Occupational Therapy Assistant (COTA)--An alternate term for a Licensed Occupational Therapy Assistant. An individual who uses this term must hold a regular or provisional license to practice or represent self as an occupational therapy assistant in Texas and must practice under the general supervision of an OTR or LOT. An individual who uses this term is responsible for ensuring that he or she is otherwise qualified to use it.

(7) Class A Misdemeanor--An individual adjudged guilty of a Class A misdemeanor shall be punished by:

(A) a fine not to exceed $3,000;

(B) confinement in jail for a term not to exceed one year; or

(C) both such fine and imprisonment (Vernon's Texas Codes Annotated, Penal Code, §12.21).

(8) Close Personal Supervision--Implies direct, on-site contact whereby the supervising OTR, LOT, COTA or LOTA is able to respond immediately to the needs of the patient.

(9) Complete Application--Notarized application form with photograph, license fee, jurisprudence examination with at least 70% of questions answered correctly and all other required documents.

(10) Complete Renewal--Contains renewal fee, [~~continuing education record card (if applicable)~~], home/work address(es) and phone number(s), jurisprudence examination with at least 70% of questions answered correctly and supervision log (if applicable).

(11) Consultation--The provision of occupational therapy expertise to an individual or institution. This service may be provided on a one time only basis or on an ongoing basis.

(12) Continuing Education Committee--Reviews and makes recommendations to the board concerning continuing education requirements and special consideration requests.

(13) Continuing Supervision, OT--Includes, at a minimum, the following:

(A) Frequent communication between the supervising OTR or LOT and the temporary licensee by telephone, written report or conference, including the review of progress of patients/clients assigned to the OT.

(B) Face-to-face encounters twice a month where the OTR or LOT directly observes the temporary licensee providing OT services to one or more patients/clients.

(14) Continuing Supervision, OTA--Includes, at a minimum, the following:

(A) Frequent communication between the supervising OTR or LOT and the temporary licensee by telephone, written report or conference, including the review of progress of patients/clients assigned to the OTA.

(B) Face-to-face encounters twice a month where the OTR or LOT directly observes the temporary licensee providing OT services to one or more patients/clients.

(C) Sixteen hours of supervision per month must be documented for a full-time OTA. A part-time OTA may prorate the documented supervision, but shall document no less than eight hours per month.

(15) Coordinator of Occupational Therapy Program--The employee of the Executive Council who carries out the functions of the Texas Board of Occupational Therapy Examiners.

(16) Direct Service--Refers to the provision of occupational therapy services to individuals to develop, improve, and/or restore occupational functioning.

(17) Endorsement--The process by which the board issues a license to a person currently licensed in another state, the District of Columbia, or territory of the United States that maintains professional standards considered by the board to be substantially equivalent to those set forth in the Act, and is apply for a Texas license for the first time.

(18) Evaluation--Refers to a process of determining an individual's status for the purpose of determining the need for occupational therapy services or for implementing a treatment program.

(19) Examination--The Examination as provided for in Section 17 of the Act. The current Examination is the initial certification Examination given by the National Board for Certification in Occupational Therapy (NBCOT).

(20) Executive Council--The Executive Council of Physical Therapy and Occupational Therapy Examiners.

(21) Executive Director--The employee of the Executive Council who functions as its agent. The Executive Council delegates implementation of certain functions to the Executive Director.

(22) First Available Examination--Refers to the first scheduled Examination after successful completion of all educational requirements.

(23) General Supervision--Includes, at a minimum, the following:

(A) Frequent communication between the supervising OTR or LOT and the regular or provisional COTA or LOTA by telephone, written report or conference, including the review of progress of patients/clients assigned to the COTA or LOTA.

(B) Eight hours of supervision per month must be documented for a full-time COTA or LOTA. Twenty-five percent of the required documented supervision time must consist of face-to-face encounters where the OTR or LOT directly observes the COTA or LOTA providing OT services to one or more patients/clients.

(C) A part-time COTA or LOTA may prorate the documented supervision.

(24) Health Care Condition-See Medical Condition

(25) Investigation Committee--Reviews and makes recommendations to the board concerning complaints and disciplinary actions regarding licensees and facilities.

(26) Investigator--The employee of the Executive Council who conducts all phases of an investigation into a complaint filed against a licensee, an applicant, or an entity regulated by the board.

(27) Jurisprudence Examination--An examination covering information contained in the Texas Occupational Therapy Practice Act and Texas Board of Occupational Therapy Examiners rules. This test is an open book examination with multiple choice or true-false questions. made up of multiple choice and/or true-false questions. The passing score is 70%.

(28) License--Document issued by the Texas Board of Occupational Therapy Examiners which authorizes the practice of occupational therapy in Texas.

(29) Licensed Occupational Therapist (LOT)--A person who holds a valid regular or provisional license to practice or represent self as an occupational therapist in Texas.

(30) Licensed Occupational Therapy Assistant (LOTA)--A person who holds a valid regular or provisional license to practice or represent self as an occupational therapy assistant in Texas and who is required to practice under the general supervision of an OTR or LOT.

(31) Medical Condition--A condition of acute trauma, infection, disease process, psychiatric disorders, addictive disorders, or post surgical status Synonymous with the term health care condition.

(32) Monitored Services--The checking on the status/condition of students, patients, clients, equipment, programs, services, and staff in order to make appropriate adjustments and recommendations. Minimum contact for the purpose of monitoring will be one time a month.

(33) NBCOT (formerly AOTCB)--National Board for Certification in Occupational Therapy (formerly American Occupational Therapy Certification Board).

(34) Non-Medical Condition--A condition where the ability to perform occupational roles is impaired by developmental disabilities, learning disabilities, the aging process, sensory impairment, psychosocial dysfunction, or other such conditions which does not require the routine intervention of a physician.

(35) Occupational Therapist (OT)--A person who holds a Temporary License to practice as an occupational therapist in the state of Texas, who is waiting to receive results of taking the first available Examination, and who is required to be under continuing supervision of an OTR or LOT.

(36) Occupational Therapist, Registered (OTR)--An alternate term for a Licensed Occupational Therapist. An individual who uses this term must hold a regular or provisional license to practice or represent self as an occupational therapist in Texas. An individual who uses this term is responsible for ensuring that he or she is otherwise qualified to use it.

(37) Occupational Therapy--The use of purposeful activity or intervention to achieve functional outcomes. Achieving functional outcomes means to develop or facilitate restoration of the highest possible level of independence in interaction with the environment. Occupational Therapy provides services to individuals limited by physical injury or illness, a dysfunctional condition, cognitive impairment, psychosocial dysfunction, mental illness, a developmental or learning disability or an adverse environmental condition, whether due to trauma, illness or condition present at birth. Occupational therapy services include but are not limited to:

(A) The evaluation/assessment, treatment and education of or consultation with the individual, family or other persons;

(B) interventions directed toward developing, improving or restoring daily living skills, work readiness or work performance, play skills or leisure capacities;

(C) intervention methodologies to develop restore or maintain sensorimotor, oral-motor, perceptual or neuromuscular functioning; joint range of motion; emotional, motivational, cognitive or psychosocial components of performance.

(38) Occupational Therapy Assistant (OTA)--A person who holds a Temporary License to practice as an occupational therapy assistant in the state of Texas, who is waiting to receive results of taking the first available Examination, and who is required to be under continuing supervision of an OTR or LOT.

(39) Occupational Therapy Plan of Care--A written statement of the planned course of Occupational Therapy intervention for a patient/client. It must include goals, objectives and/or strategies, recommended frequency and duration, and may also include methodologies and/or recommended activities.

(40) OT Aide or OT Orderly--A person who aids in the practice of occupational therapy and whose activities require on-the-job training and close personal supervision by an OTR, LOT, COTA or LOTA.

(41) Place(s) of Business--Any facility in which a licensee practices.

(42) Practice--Providing occupational therapy as a clinician, practitioner, educator, or consultant. Only a person holding a license from TBOTE may practice occupational therapy in Texas.

~~[(42) Provisional License--A license issued by TBOTE to an applicant who holds a valid license in good standing from another state, District of Columbia, or territory of the United States requesting licensure; or a license issued to an applicant who has passed the Examination and who has been employed as an OTR, LOT, COTA or LOTA within five years of the receipt date of current, complete application for licensure with TBOTE.]~~

(43) [~~(44)~~] Recognized Educational Institution--An educational institution offering a course of study in occupational therapy that

has been accredited or approved by the American Occupational Therapy Association.

(44) [~~45~~] Regular License--A license issued by TBOTE to an applicant who has met the academic requirements and who has passed the Examination.

(45) [~~46~~] Rules--Refers to the TBOTE Rules.

(46) [~~47~~] Screening--A process or tool used to determine a potential need for occupational therapy interventions. This information may be compiled using observation, medical or other records, the interview process, self-reporting, and/or other documentation.

(47) [~~48~~] Temporary License--A license issued by TBOTE to an applicant who meets all the qualifications for a license except taking the first available Examination after completion of all education requirements; or a license issued to an applicant who has passed the Examination but has not been employed as an OTR, LOT, COTA or LOTA for five years or more from the receipt date of current, complete application for licensure with TBOTE.

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008063
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-3962

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CHAPTER 370. LICENSE RENEWAL

40 TAC §370.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to § 370.1, concerning License Renewal. The amendment replaces the current chapter and will clarify what is needed by the agency, in what timeframe, and add an explanation for restoration of a license, which has been in Act, but not rule.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 clarification of terms used in the OT rules. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, augusta.gelfand@mail.capnet.state.tx.us.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§370.1. License Renewal.

(a) Licensees are required to renew their licenses every two years by the end of their birth month. A licensee may not provide occupational therapy services without a current license or renewal certificate in hand. If a license expires after all required items are submitted but before the licensee receives the renewal certificate, the licensee may not provide occupational therapy services until the renewal certificate is in hand.

(1) General Requirements. The renewal application is not complete until the Board receives all required items. The components required for license renewal are:

(A) Signed renewal application form verifying completion of 30 hours of continuing education (SEE Chapter 367 Continuing Education);

(B) The renewal fee and any late fees which may be due;

(C) A passing score on the Jurisprudence exam.

(2) Notification of license expiration. The Board will mail an application to each licensee at least 30 days prior to the license expiration date. However, the licensee is responsible for ensuring that the license is renewed. Licensees should contact the Board if they do not receive a renewal application approximately 30 days prior to the expiration date.

(3) Late Renewals. A renewal application is late if all required materials are not postmarked prior to the expiration date of the license. Licensees who do not complete the renewal process prior to the expiration date are subject to late fees as described.

(A) If the license has been expired for 90 days or less, the late fee is one-half of the examination fee for the license.

(B) If the license has been expired for more than 90 days, the late fee is equal to the examination fee for the license.

(C) If the license has been expired for one year or longer, the person may not renew the license. To obtain a new license, the applicant must retake and pass the national examination and comply with the requirements and procedure for obtaining an original license set by Chapter 364 Requirements for Licensure.

(b) Restoration of a Texas License

(1) Eligibility. A person whose license has been expired for one year or more may restore the license without reexamination if the applicant holds a current license in another state, and has been in practice in the other state for the two years preceding application for restoration.

(2) Duration. When a license is restored, the expiration date will be calculated using the nearest past birth month. The restored license will be valid for no less than one year and no more than two years.

(3) Requirements. The components required for restoration of a license are:d

(A) Notarized restoration application;

(B) A passing score on the Jurisprudence exam;

(C) Fee equal to the cost of the examination fee for licensure;

(D) Verification of Licensure from the current licensed state;

(E) History of Employment form for the two years proceeding application; and

(F) Other application information as needed by the Board.

(c) Restrictions to Renewal/Restoration

(1) The Board will not renew a license if a license has defaulted with the Student Loan Corporation (TGSLC). Upon notice from TGSLC that a repayment agreement has been established, the license shall be renewed.

(2) The Board will not renew a licensee if the licensee has defaulted on a court or attorney general's notice of child support. Upon receipt that repayment agreement has been established, the license shall be renewed.

[(a) Renewal of an unexpired license shall be in accordance with the Act, §24, and renewal of an expired license shall be in accordance with the Act, §25.]

[(1) Regular licenses must be renewed every two years. Renewals are due by the end of the licensee's birth month.]

[(2) For each biennial renewal, licensees must submit 30 contact hours of continuing education. These 30 contact hours must have been obtained in the 24 months immediately preceding the renewal month. (See Chapter 367 of this title (relating to Continuing Education)).]

[(b) Each licensee is responsible for license renewal before the expiration date and shall not be exempt from paying applicable late fees. Failure to receive a renewal notice from the board prior to the expiration date of a license will not exempt a licensee from renewing his or her license on time.]

[(c) All licensees must complete and return a board prepared jurisprudence examination (as defined in §362.1 of this title (relating to Definitions)) as part of the renewal application. The test will be scored by TBOTE staff. At least 70% of questions must be answered correctly.]

[(1) A passing score on the jurisprudence examination will be noted in the licensee file, and the test will be returned to the licensee upon issuance of a renewal certificate.]

[(2) A failing score on the jurisprudence examination will be noted in the licensee file and a new test will be sent to the licensee to complete. Once a passing score on the jurisprudence examination is achieved, that will be noted in the licensee file and the test will be returned to the licensee upon issuance of a renewal certificate.]

[(d) To be assured receipt of a license renewal certificate or written verification of licensure for display purposes, the complete renewal application must be postmarked by the fifteenth of the month preceding the birth month.]

[(e) For the purpose of assessing late fees, the board considers a complete renewal (refer to §362.1 of this title (relating to Definitions)) on-time if it is postmarked not later than the expiration date of the license.]

[(f) If the renewal application does not include all requirements for a complete renewal (refer to §362.1 of this title), it is not complete. If the required additional material is not postmarked by the expiration date, the licensee must pay the late fee before a renewal certificate is issued.]

[(g) A licensee who fails to renew his or her license by the expiration date and continues to work as an OTR, LOT, COTA or LOTA shall be subject to disciplinary action.]

[(h) A license shall not be renewed if a licensee has defaulted on a Guaranteed Student Loan from the Texas Guaranteed Student Loan Corporation (TGSLC). Upon notice from TGSLC that a repayment agreement has been established, the license shall be renewed.]

[(1) On receipt of notification that an individual is in default on a guaranteed student loan, the coordinator shall immediately determine whether or not the board has issued a license to the obligator named in the notification.]

[(2) The licensee will be notified the license will not be allowed to be renewed while the guaranteed student loan remains in default status.]

[(3) If the licensee remains in default past the expiration of the license, the license will be expired and cannot be renewed until paragraph (5) of this subsection has been met.]

[(4) An individual who continues to use the titles "Occupational Therapist, Registered" (OTR), "Licensed Occupational Therapist" (LOT), "Certified Occupational Therapy Assistant" (COTA), "Licensed Occupational Therapy Assistant" (LOTA), "Occupational Therapist" (OT), or "Occupational Therapy Assistant" (OTA) after the expiration of the license is practicing in violation of the Act and rules and shall be subject to disciplinary action.]

[(5) On notification from the guaranteed student loan program that a repayment agreement has been established, the licensee shall be informed of such receipt. If the license is current or if it has been expired for less than one year from receipt date of notification, the licensee will be notified of the opportunity to renew the license. If the licensee elects to renew his/her license, the licensee must submit a complete renewal application, including any and all license renewal fees and late renewal fees, as applicable.]

[(6) If the license has been expired for one year or more from receipt date of such notification, the licensee will be notified that he or she is subject to §25 of the Act and may not renew the license.]

[(7) If the licensee remains in default past the expiration of a temporary license, extended temporary license, or provisional license, the license will be expired. The license will not be converted to a regular license until paragraph (5) of this subsection is met.]

[(i) The board shall suspend a license for failure to pay child support according to requirements as set forth in these rules.]

[(1) On receipt of a final court or attorney general's order suspending a license due to failure to pay child support, the coordinator shall immediately verify whether the board has issued a license to the obligator named on the order. If a license has been issued the board shall:]

[(A) record the suspension of the license in the board's records and licensee's file;]

[(B) report the suspension as appropriate; and]

[(C) demand surrender of the suspended license.]

[(2) The board shall implement the terms of a final court or attorney general's order suspending a license without additional review or hearing by the board. The board will provide appropriate notice to the licensee and to any entity to which the licensee provides occupational therapy services.]

[(3) The board may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued

~~under the Family Code, Chapter 232 as added by Acts 1995, 74th Legislature Chapter 751, §85 (House Bill 433) and may not review, vacate, or reconsider the terms of an order.]~~

~~[(4) A licensee who is the subject of a final court or attorney general's order suspending the license is not entitled to a refund for any fee paid to the board.]~~

~~[(5) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the routine renewal procedures in the Act and rules. The license will not be renewed until paragraph (8) of this subsection is met.]~~

~~[(6) If a suspension overlaps a period during which a temporary license, extended temporary license, or provisional license should be converted to a regular license, an individual with a license suspended under this section shall comply with the routine conversion procedures in the Act and rules. The license will not be converted to a regular license until paragraph (8) of this subsection is met.]~~

~~[(7) An individual who continues to use the titles and/or initials "Occupational Therapist, Registered" (OTR), "Licensed Occupational Therapist" (LOT), "Certified Occupational Therapy Assistant" (COTA), "Licensed Occupational Therapy Assistant" (LOTA), "Occupational Therapist" (OT), or "Occupational Therapy Assistant" (OTA) after the issuance of a court or attorney general's order suspending the license is liable for the same penalties as stated in §28 of the Act.]~~

~~[(8) Upon the board's receipt of a court or attorney general's order vacating or staying an order suspending a license, the board shall reissue the license to the individual, provided no other restrictions exist and all applicable fees have been paid.]~~

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

Filed with the Office of the Secretary of State, on November 17, 2000.

TRD-200008062
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: December 31, 2000
For further information, please call: (512) 305-3962

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 115. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL -- DENTAL HYGIENE

22 TAC §115.2

The State Board of Dental Examiners has withdrawn from consideration proposed amendment to 115.2 which appeared in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9339).

Filed with the Office of the Secretary of State on November 13, 2000.

TRD-200007921
Jeffry Hill
Executive Director
State Board of Dental Examiners
Effective date: November 13, 2000
For further information, please call: (512) 463-6400

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PART 18. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

CHAPTER 375. RULES GOVERNING CONDUCT

22 TAC §375.1

The Texas State Board of Podiatric Medical Examiners has withdrawn from consideration proposed amendment to §375.1 which appeared in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9350).

Filed with the Office of the Secretary of State on November 14, 2000.

TRD-200007950
Janie Alonzo
Staff Services Officer I
Texas State Board of Podiatric Medical Examiners
Effective date: November 14, 2000
For further information, please call: (512) 305-7000

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CHAPTER 378. CONTINUING EDUCATION

22 TAC §378.1

The Texas State Board of Podiatric Medical Examiners has withdrawn from consideration proposed amendment to §378.1 which appeared in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9355).

Filed with the Office of the Secretary of State on November 14, 2000.

TRD-200007951
Janie Alonzo
Staff Services Officer I
Texas State Board of Podiatric Medical Examiners
Effective date: November 14, 2000
For further information, please call: (512) 305-7000

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

SUBCHAPTER K. RELEASE OF INFORMATION

1 TAC §55.501

The Office of the Attorney General adopts new §55.501 concerning release of information with changes to the proposed text as published in the September 15, 2000 issue of the *Texas Register* (25 TexReg 9125)

The section is being adopted to define information which can be released upon request and who can make requests on a case. The changes in the text are made to correct an error by replacing "copies of information" with "amount".

No comments have been received regarding the adoption of this section.

The section is being adopted under the September 1, 1999 statutory changes, found in the Texas Family Code, Chapter 231, Subchapter B, Services Provided by Title IV-D Program.

The Code affected by this new section is Texas Family Code, §Section 231, Title IV-D Services.

§55.501. Release of Information.

(a) Upon request to the IV-D agency by an authorized person or his or her authorized representative, the IV-D agency may provide the following information about a IV-D case involving the authorized person:

(1) the status of pending or possible legal action regarding a case involving the authorized person;

(2) copies of legal documents that have been filed with the court and that are maintained in the files and records of the agency, so long as the documents have not been sealed by the court or there is no order prohibiting the release of the documents;

(3) copies of correspondence or documents previously provided to the IV-D agency by the authorized person;

(4) copies of correspondence or documents previously provided by the IV-D agency to the authorized person;

(5) records of child support payments and arrearage balances regarding the authorized person's child support case;

(6) amount submitted to a credit reporting agency regarding the authorized person's child support obligation; and

(7) any other information authorized to be released pursuant to federal statute or rule.

(b) As used herein, "authorized person" means:

(1) the applicant or recipient, or former applicant or recipient, of IV-D services;

(2) the custodial parent;

(3) the noncustodial parent;

(4) the alleged or presumed father;

(5) the obligor or obligee;

(6) the authorized representative of any of the above, as defined herein.

(c) As used herein, the term authorized representative means:

(1) a private attorney representing an authorized person as identified herein;

(2) a person designated in writing by an authorized person, including a public official, so long as the designation has not been rescinded by the authorized person.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2000.

TRD-200008086
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Effective date: December 10, 2000
For information regarding this publication, please call A.G. Younger at (512) 463-2110.
Proposal publication date: September 15, 2000

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PART 9. STATE AIRCRAFT POOLING BOARD

CHAPTER 181. GENERAL PROVISIONS

1 TAC §181.8, §181.13

The State Aircraft Pooling Board adopts amended §181.8, concerning general provisions, to correct omissions from §181.8 during previous rule adoption, June 14, 1999, and new §181.13, concerning compliance with the historically underutilized business (HUB) rules passed by the General Services Commission, pursuant to requirements set out in SB 178, 76th Regular Session. Amended §181.8 and new §181.13 are being adopted without changes to the proposed text as published in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9301).

The amendments to §181.8 are adopted in order to add back subsections (b), (c), and (d) that appeared in the rule prior to the last amendment. These subsections were inadvertently dropped from the format but are important to agency operations in setting competitive rates for services in order to recover costs.

New §181.13 is required by the provisions of SB 178, 76th, dealing with HUB requirements for purchases and reporting activities.

No comments were received regarding adoption of these rules.

These rules are adopted under Texas Government Code, Title 10, Chapter 2205, §2205.010 which provide the board with authority to adopt rules for conducting business.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2000.

TRD-200008056
Jerald A. Daniels
Executive Director
State Aircraft Pooling Board
Effective date: December 7, 2000
Proposal publication date: September 22, 2000
For further information, please call: (512) 936-8900

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER B. REGULATION OF LICENSES

7 TAC §25.10

The Texas Department of Banking (the department) adopts amendments to §25.10 concerning record-keeping requirements for insurance-funded prepaid funeral benefit contracts. The amendments are adopted with changes to the proposed text as published in the July 21, 2000, issue of the *Texas Register* (25 TexReg 6871).

The department adopts the amendments to reduce regulatory burden, improve regulatory certainty, and add specific new requirements to match current regulatory and industry practices.

Reduce regulatory burden. To reduce regulatory burden, the amendments eliminate unnecessary requirements and provide alternative means of complying with existing requirements. Specifically, the amendments:

eliminate the necessity of maintaining the initial permit application;

require the retention only of approved contract forms used in the last three years (rather than as long as there is an outstanding contract using the form);

eliminate the requirement that a matured contact file, when the services were not provided by the contracted provider, contain a certificate of performance of contract services. Instead, the file must contain only a signed request that the funds be provided to the alternative provider, evidence of payment to the provider, a copy of the death certificate, and the policy payment history (annuity contracts only);

increase the flexibility of a permit holder in meeting existing requirements by permitting retention of a copy of death certificate instead of an original, allowing the use of an annual report filed with any insurance regulator (rather than providing a financial statement), and allowing use of a proprietary claims form rather than the department-specified form;

require reconciliation of the in-force register and individual policies annually and at the end of each examination period, rather than quarterly, and allow reconcilements to be maintained electronically rather than in hard copy;

provide that a document or information can be maintained electronically if it can be expeditiously retrieved and printed for examination purposes; and

specify that contracts may be removed from the register upon the elapse of three years from the final disposition date.

Improve regulatory certainty. To improve regulatory certainty, the amendments clarify and add detail to the prior rule. Specifically, the amendments:

clarify that the historical contract register may be maintained either chronologically, by policy number, or by contract number;

clarify that the contract file must contain documentation confirming the contract was issued to the purchaser within 30 days of receipt of the initial down payment and policy application;

specify that the in-force policy register may be maintained alphabetically, by policy-issuance date, or by policy number, and must be balanced to the individual files and to the insurance companies policy records annually and at the end of each examination period; and

require maintenance of one report on out-of-force policies rather than the previously required separate lapsed policy, cash surrender policy, death maturity claim, and reduced paid-up reports.

New requirements. The amendments impose certain new record-maintenance requirements on permit holders that, for the most part, address information routinely requested by the department and already maintained by permit holders. Consequently, most permit holders will not incur additional record production burdens, and examination efficiency and consumer protections will be enhanced. These amendments require:

maintenance of the funeral providers' price lists related to any contract sold within the last three years that did not specify whether or not a casket or outer-burial container is sealer or protective, or alternative documentation that demonstrates compliance with the rule requirement that each contract contain such a description if the price list did;

matured contract files to contain either an itemized list of services provided or an at-need contract, one of which is necessary to ascertain that contractual terms were met;

in connection with a canceled policy, documentation of premium payment history that supports the available cash surrender value; and

· individual policy ledgers, maintained in hard-copy, electronically, or on microfiche, to contain the financial specifics concerning each policy and contract, including dividends and interest provisions related to the policy.

The Office of Public Insurance Counsel and two permit holders commented on the amendments. No commentor expressed approval or disapproval of the amendments as a whole, and no specific proposal was addressed by more than one commentor. The following paragraphs set out specific comments and the department's responses.

A permit holder should continue to be required to maintain copies of approved contract forms so long as any contract using the form exists, rather than only those used in the last three years, as proposed by subsection (b)(3). Reference to the form may be required if the original contract is lost or illegible. The department disagrees. The permit holder is required to keep a copy of the contract and the purchaser is given a copy and presumably keeps it. Further, other contracts using a given form would have been issued and a copy similarly maintained. Finally, the department maintains copies of approved forms for each permit holder for ten years. A circumstance in which the contents of a lost or illegible contract cannot be alternatively verified through one or more other copies would be unlikely and does not justify additional record-keeping redundancy imposed for the department's regulatory purposes. However, nothing prevents a permit holder from maintaining additional records for its own purposes.

The amendment to subsection (e)(1), permitting contract removal from the historical contract register three years from the date of final disposition, should be changed to four years to match the general contract statute of limitations. The department disagrees and declines to impose the requested requirement for the reasons stated in the preceding paragraph.

The proposed amendment to subsection (b)(5) requires only consolidated financial statements, which may be inadequate to analyze the financial condition of the permit holder. The permit holder should be required to maintain the accounting work papers supporting the consolidated statement so that the necessary detail could be obtained. The department disagrees. If the permit holder is an insurance company or an affiliate of an insurance company, as nearly all insurance-funded permit holders are, a consolidated statement, or the permit holder's insurance regulatory filing, is sufficient for the department's limited review of the permit holder's financial condition. Insurance companies are highly regulated in every state and the department's reliance on the insurance regulator to monitor the company's financial condition is justified. A requirement for retention of work papers to support a consolidated financial statement would be an additional burden on permit holders with little or no practical regulatory benefit.

Subsection (b)(12) is unreasonably burdensome in requiring an insurance company that is a permit holder to maintain copies of the funeral price lists for the funeral providers who will perform the contracted services. The insurance company does not develop, maintain, or control the lists. The company cannot assure that the lists provided to them were valid at the time of use. In any event, the "funeral rule" of the Federal Trade Commission provides adequate protection for the contract purchaser. There is therefore no compelling state reason for imposing this requirement. The department agrees that the proposed amendment should be clarified but disagrees that it should be eliminated. The department does not monitor compliance with the FTC funeral rule, Code of Federal Regulations, Title 16, Part 453 (16 C.F.R. Part 453), and does not require maintenance of price lists for that purpose. Finance Code, §154.151, requires a prepaid funeral contract to "state the detail of the prepaid funeral benefits to be provided, including a description and specifications of the material used in the caskets or grave vaults to be furnished." Contract descriptions and specifications, required to be in the contract by 7 TAC §25.7, include whether the casket and/or outer-burial container is "sealer, non-sealer, protective, or non-protective, if specified on the permit holder's price list." Absent an adequate description in the contract itself, the only way to determine whether a contract complies is through reference to a price list. Consequently, the adopted rule has been changed to eliminate the requirement to maintain prices lists to the extent that contracts specify whether caskets and outer-burial containers are sealer/non-sealer and protective /non-protective.

The wording of subsection (c)(3)(B) should be changed to reflect the apparent intention that it applies only when services are not provided by (i) the contracted provider, (ii) a provider under common ownership with the contracted provider, or (iii) a successor provider agreed to by all parties. The department agrees the provision could be worded more clearly and the adopted text has been amended to indicate that it applies only when services are provided by a person other than those listed in subsection (c)(3)(A).

The requirement of subsection (c)(3)(B)(i), that the file contain a signed request that funds be disbursed to an alternate provider is unnecessary, will delay the funeral, and will create animosity between the contract purchaser and the funeral provider. The department disagrees. The previous rule required a signed at-need contract or itemization of services performed and merchandise transferred. The department believes the proposed requirement is less burdensome and simplifies procedures for services provided by an alternate funeral provider. The commentor provided no explanation for the asserted problems with this simplification and the department is not aware of any.

*The requirements of subsections (c)(3)(A)(v), (c)(3)(B), and (c)(4), that certain files contain a premium payment history, are unduly burdensome. A better procedure would allow printing the information only for files reviewed at the examination, as in the past.*The department does not intend for the amended provisions to disallow the described procedure. Subsection (d) is intended to permit file system and electronic flexibility in a manner addressing this specific concern, and has been edited slightly to clarify this result.

The previous requirement that the in-force policy register be reconciled each quarter is preferable to the requirement of new subsection (e)(3), that records be reconciled at the end of each calendar year and as of the close of each examination effective date. The department sets examination effective dates as of the

end of a calendar quarter. Consequently, if a permit holder reconciles at the end of each calendar quarter, the requirement is met, and no change in procedure is needed. The new provision merely provides flexibility for those permit holders that do not reconcile quarterly. The department declines to make any change to the proposed amendments in this regard.

The requirement to maintain and reconcile individual policy ledgers, contained in new subsection (e)(5), is unnecessary and burdensome because all of the required information is contained in the in-force insurance files of our insurance company and reconciled when those files are reconciled. The department disagrees and believes the commentor misperceives the potential impact of this requirement. The rule does not require that duplicate files be maintained. If the necessary information is contained in another file and the stipulated reconcilement is performed, the other file is considered part of the individual policy ledgers pursuant to subsection (d). Subsection (d) has been edited slightly to clarify this result.

The amendment is adopted pursuant to rule-making authority under Finance Code, §154.051, which authorizes the department to prescribe reasonable rules concerning the keeping and inspection of records relating to the sale of prepaid funeral benefits.

§25.10. Record Keeping Requirements for Insurance-Funded Contracts.

(a) Application. This section applies to a permit holder who sells or maintains insurance-funded prepaid funeral benefit contracts. Unless the Department of Banking (the department) is petitioned for and agrees to a different location under subsection (i) of this section, all specified records must be made available to the department for examination at the physical location in Texas that the permit holder has designated in written notice to the department on file at the time of the examination.

(b) General files. A permit holder subject to this section must maintain general files regarding its prepaid funeral benefits operations. Such files may be maintained in hard-copy form or on microfiche or in an electronic database from which they may be expeditiously retrieved in hard-copy form. These files must contain the original or a copy of the following:

(1) the latest approved renewal permit application for the permit holder and its last filed annual report;

(2) the current permit issued to the permit holder by the department;

(3) each contract form approved for sales transacted within the last three years unless no outstanding contracts exist using such form;

(4) all department-approved insurance depository letters received within the last three years and all insurance depository letters pertaining to active contracts;

(5) the most current consolidated financial statement, or the most recent annual statement filed with the insurance regulatory agency of each state in which the permit holder is required to file or, if not available, of the parent corporation;

(6) each department-approved agent appointment made and resignation given within the last three years and all appointments that are still active;

(7) all examination reports made by the department within the last three years;

(8) all Texas Department of Insurance approved insurance policies used in conjunction with the sale of prepaid funeral contracts or the conversion of trust-funded contracts for the last three years and all insurance policies used for such purposes that are funding new contracts or contracts that are outstanding;

(9) a list of insurance conversions performed for the last three years, a copy of each Order approving each such conversion, and a copy of the post-conversion summary provided to the department for each conversion;

(10) all correspondence with the department for the last three years;

(11) if the permit holder is an insurance company or an entity that controls or is controlled by an insurance company, a copy of all state insurance regulatory agency examination reports for the last three years; and

(12) for any contract written in the last three years that does not specify whether a casket or outer-burial container is either sealer/non-sealer or protective/non-protective, then either:

(A) general price lists for the corresponding or contracted funeral provider;

(B) casket and outer burial container price lists for the corresponding or contracted funeral provider; or

(C) alternative documentation that will demonstrate compliance with required casket and outer-burial container descriptions.

(c) Individual files.

(1) Each permit holder subject to this section shall maintain a prepaid funeral benefits contract file on each purchaser. These files must be either maintained separately or capable of retrieval separately for outstanding contracts (including reduced paid-up policy contracts), matured contracts, and canceled contracts. Files may be maintained either chronologically or alphabetically in hard-copy form or on microfiche or in an electronic database from which they may be expeditiously retrieved in hard-copy form. Each individual file should contain all correspondence pertaining to the contract for that file including documentation to evidence that the executed preneed contract has been issued to the contract purchaser and the funding policy has been issued to the contract purchaser or policy owner within 30 days of the receipt of the initial down payment and insurance application.

(2) Each file pertaining to an outstanding contract must contain a copy of the prepaid funeral benefits contract, any revocable and irrevocable assignment, and the data face sheet of the insurance policy or annuity contract funding the contract.

(3) Each file pertaining to a matured contract must be retained for three years. Each such file must contain copies of all documents required for an outstanding contract and a completed department withdrawal form, or evidence of department withdrawal approval, or a proof of claim form prepared and completed by the permit holder which contains all the required information included on the department's prescribed withdrawal form. In addition:

(A) a matured-contract file for which services were provided by the contracted funeral provider, a funeral provider related by common ownership to the contracted funeral provider, or a successor provider accepted by all contracting parties must contain:

(i) the original or a copy of the completed at-need contract or funeral purchase agreement, or an itemization of services performed and merchandise transferred signed by the decedent's personal representative; or, if the preneed funeral contract relates only to

the opening and closing of a grave, the cemetery interment order and/or other documents signed by the decedent's representative, provided the interment order or other documents must denote the balance, if any, that was due on the preneed contract at the time of death and any preneed discount;

(ii) a certified death certificate or a copy of a certified original death certificate;

(iii) the certificate of performance of contract services executed by the decedent's personal representative;

(iv) evidence of payment to the servicing funeral provider, e.g., a copy of payment check or check stub; and

(v) documentation of premium payment history and death benefits paid.

(B) a matured contract file for which services were provided by a person other than those listed in subparagraph (A) of this paragraph must contain:

(i) a signed statement from the purchaser or purchaser's representative requesting the delivery of funds to the servicing funeral provider;

(ii) evidence of payment to the servicing funeral provider;

(iii) a certified death certificate or a copy of a certified original death certificate; and

(iv) documentation of premium payment history for annuity contracts and death benefits paid.

(4) Each file pertaining to a canceled contract must be retained for three years. Each such file must contain copies of all documents required for an outstanding contract, a completed departmental withdrawal form or evidence of departmental withdrawal approval, documentation of premium payment history to support available cash surrender value, and evidence of payment of cancellation benefit, e.g., a copy of payment check or check stub.

(5) Each file pertaining to a reduced paid-up policy must be retained for three years. Each reduced paid-up policy file must contain copies of all documents required for an outstanding contract and a copy of the permit holder's letter to the purchaser informing the purchaser of contract status. Each reduced paid-up policy file must also include copies of an election form indicating the purchaser has chosen reduced paid-up status, unless the policy has automatic reduced paid-up provisions.

(d) Document maintenance. A document or record is considered to be maintained in a file or ledger as required by this section if the specified information can be expeditiously retrieved for examination, whether by hard copy or produced electronically and printed for review.

(e) Consolidated records. Each permit holder subject to this section shall maintain the following records regarding its prepaid funeral benefits operations for both new and conversion sales, either in hard copy or stored on microfiche or in an electronic database from which they may be expeditiously retrieved and printed for review:

(1) an historical contract register maintained chronologically or by policy number or by contract number reflecting all prepaid funeral contracts and policies, and a notation of the status of the contracts and policies as outstanding, matured, canceled, or reduced paid-up. Contracts may be removed from the register when three years or more has elapsed from the date of final disposition. The contract register should contain columns indicating:

(A) the contract and corresponding policy number(s);

(B) the contract issue date or purchase date;

(C) the purchaser's name;

(D) the beneficiary's name (if different from the purchaser's name);

(E) the face amount of the contract; and

(F) the final disposition of the contract, including notations as to whether the contract and policy are matured, canceled, surrendered, lapsed, reduced paid-up, extended term, voided, or not taken. The notation must also include the date of withdrawal claim and the amount of funds paid; or, in lieu thereof, a record separate from the register, listing matured, canceled, surrendered, lapsed, reduced paid-up, extended term, voided, or not taken contracts and policies for the examination period and setting out the contract and/or policy number, contract purchaser, date of the withdrawal claim paid, and amount of the withdrawal claim paid;

(2) payment-receipt records which detail individual payment histories indicating payments collected;

(3) an in-force policy register maintained either chronologically by date of policy issuance, alphabetically by the insured's name, or serially by policy number, balanced at least each calendar year-end and at the close of each department examination period to the individual files and insurance company records relating to the active preneed contracts. The reconciliations should be retained in hard-copy form or on microfiche or in an electronic database from which they may be expeditiously retrieved in hard-copy form for review by the examiner for a period of three years. The in-force register must accumulate to grand totals for all policies with respect to the information required under subparagraphs (C), (E), (F), and (G) of this paragraph and contain the following information for each policy or contract at a minimum:

(A) the insured's name;

(B) the policy number or numbers;

(C) the face amount of prepaid funeral contract;

(D) the date of policy issuance;

(E) the death benefit, or insurance in force, whichever is applicable;

(F) growth, e.g., dividends and interest, attributable to outstanding policies for the reporting period; and

(G) cumulative growth totals for each outstanding policy.

(4) out-of-force policy reports identified by status codes for death maturity, canceled, surrendered, lapsed, reduced paid-up, extended term, voided, not taken, or such other codes which may be used to designate policies no longer in force, maintained either chronologically by date of policy issuance, alphabetically by the insured's name, or serially by policy number. This report must be prepared at each calendar year-end and at the close of each department examination period. Each of these reports must be retained for a period of three years and contain at a minimum:

(A) the insured's name;

(B) the date of policy issuance;

(C) the policy number or numbers;

(D) the date the policy matured, lapsed, or was surrendered or canceled; and

(E) the amount of in-force coverage or face value of insurance that has been paid, reduced, deleted, or transferred.

(5) individual policy ledgers for each contract purchaser, balanced at least each calendar year-end and at the close of each department examination period to the in-force policy register and to the records of the insurance depository. These ledgers should be retained in hard-copy form, or on microfiche or in an electronic database from which they may be expeditiously retrieved in hard-copy form, for review by the examiner for a period of three years, and should reflect:

(A) the insured's name;

(B) the date of policy issuance;

(C) the policy number(s);

(D) the contract amount;

(E) the policy face amount;

(F) the premium amount;

(G) the premiums collected to date for annuity policies only;

(H) the death benefit, or insurance in force, whichever is applicable; and

(I) cumulative growth, e.g., dividends and interest, attributable to policies.

(f) Conversions. A permit holder subject to this section shall maintain a file copy of the original trust-funded prepaid funeral contracts that have been converted to insurance funding and the payment history records for each converted contract prior to conversion.

(g) Corporate records. Corporate records of a permit holder subject to this section pertaining to actual or anticipated regulatory action or litigation that could result in the permit holder's insolvency and all corporate minutes must be maintained and made available to the department at each examination.

(h) Exceptions.

(1) A permit holder that sells only insurance-funded contracts is not required to maintain records that are applicable only to trust-funded contracts.

(2) With respect to contracts sold prior to the effective date of this section, a permit holder will not violate this section if it cannot produce records required under this section which were not previously required by statute or rule. However, basic reporting of in-force benefit amounts and policy activity from the last examination date to the current examination date will be required of all permit holders for insurance companies that have outstanding insurance policies funding preneed funeral contracts in Texas.

(3) A permit holder may apply to the Commissioner for an exception to the record keeping requirements as provided under this subsection. An exception may be granted for good cause only by prior written approval of the Commissioner.

(i) Relocation of records. Prior to changing the location where required records are maintained or where the examination is to be performed pursuant to Section 154.053(a) of the Texas Finance Code, a permit holder must notify the department, specifying the new address in writing, and, if the change in location requires the granting of an exception, comply with subsection (h)(3) of this section before required records are moved to the new location.

(j) Maintenance of files. Documents and records required to be maintained under this section must be filed within 30 days of receipt. Cash received must be posted within 30 days of receipt, and cash withdrawn on death maturity must be posted within 30 days of actual withdrawal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 13, 2000.

TRD-200007916
Everette D. Jobe
Certifying Official
Texas Department of Banking
Effective date: December 3, 2000
Proposal publication date: July 21, 2000
For further information, please call: (512) 475-1300

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 6. STATE RECORDS

SUBCHAPTER C. STANDARDS AND PROCEDURES FOR MANAGEMENT OF ELECTRONIC RECORDS

13 TAC §§6.91 - 6.99

The Texas State Library and Archives Commission adopts the repeal of 13 TAC §§6.91-6.99 without changes to the proposal published in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9306).

The repeal will allow the commission to adopt new rules relating to the management, retention and disposition of state agency records created and maintained in electronic format. The new rules will help ensure that such records are managed in a manner that is not a detriment to the interests of state government or the public's access to information about state government.

No comments were received regarding the proposal to repeal these sections.

The repeals are adopted under the Government Code, §441.189(a), which authorizes the Texas State Library and Archives Commission to adopt rules concerning the creation and storage of the electronic records of state agencies.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2000.

TRD-200008008
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Effective date: December 6, 2000
Proposal publication date: September 22, 2000
For further information, please call: (512) 463-5459

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13 TAC §§6.91 - 6.96

The Texas State Library and Archives Commission adopts new 13 TAC §§6.91-6.96, concerning the management, retention, and disposition of state agency records in electronic format, with changes to the proposed text as published in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9306).

Government Code, Chapter 441, Subchapter L allows each state agency to create or store electronic records in accordance with standards and procedures adopted as administrative rules of the commission. The commission believes that these new sections are necessary to conform rules relating to the management of electronic state records with the requirements and intent of the Government Code, Chapter 441, Subchapter L.

These new sections will replace 13 TAC §§6.91-6.99, which the agency is repealing in a separate action. In contrast to the repealed sections, the proposed new sections are reorganized and re-worded to enable state agencies to interpret and apply the rules more readily, are expanded to include all state agency records created or maintained in electronic format, and specifically address the management and disposition of the e-mail records of state agencies.

Comments on the proposed rules were received during the public comment period from the University of Texas at Austin, the Texas Department of Health, and the Texas Department of Insurance.

Comment: The word "searchable" in section 6.95 (b) should be replaced by the word "processable".

Response: The commission feels the word "searchable" clearly conveys the intent that information must be able to be searched and retrieved and that "processable" might be unclear to some users.

Comment: Section 6.96 (f)(4) states that a visual quality control evaluation must be performed for each scanned image and related index data. The commenter suggests that a supervisory level person be required to perform this task to prevent agencies from using the lowest paid staff.

Response: An agency may require supervisory staff to perform this task, but the commission believes it is best that the rules not specify who is required to perform the quality control evaluation. The commission operates an imaging services bureau in which the appropriate staff perform visual quality control tasks.

Comment: The reference to the Government Code, §441.180 (10) in §6.91(7) of the rules appears to be incorrect. The reference should be to the Government Code, §441.180 (11).

Response: The commission agrees and the rules are amended to correct the error in citation.

Comment: Section 6.96(d) does not explicitly state that electronic state records maintained on floppy disks be recopied once a year. It is unclear whether the rules apply to official state records or convenience copies.

Response: The commission agrees and §6.96(d) is amended to indicate that electronic state records maintained on floppy disks be recopied a minimum of once a year.

These sections are proposed under Government Code, §441.189(a), which authorizes the Texas State Library and Archives Commission to adopt rules relating to the management of state electronic records.

§6.91. Definitions.

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise. Terms not defined in these sections shall have the meanings defined in the Government Code, §441.180.

(1) Archival state record--A state record of enduring value that will be preserved on a continuing basis by the Texas State Library and Archives Commission or another state agency until the state archivist indicates that based on a reappraisal of the record it no longer merits further retention.

(2) Electronic mail record--An electronic state record sent or received in the form of a message on an electronic mail system of a state agency, including any attachments transmitted with the message.

(3) Electronic mail system--A computer application used to create, receive, retain, and transmit messages and other attached records. Excluded from this definition are file transfer utilities.

(4) Electronic records system--Any information system that produces, manipulates, and stores electronic state records by using a computer.

(5) Electronic state record--Information that meets the definition of a state record in the Government Code, §441.180, and is maintained in electronic format for computer processing, including the product of computer processing of the information.

(6) Mailing list service--An electronic mailing list hosting service (e.g., Listserv) used for discussions and announcements within a specified group of individuals. Subscribers to the service participate by sending information to and receiving information from the list using electronic mail messages.

(7) State record--As defined by the Government Code, §441.180(11), any written, photographic, machine-readable, or other recorded information created or received by or on behalf of a state agency or an elected state official that documents activities in the conduct of state business or use of public resources. The term does not include library or museum material made or acquired and maintained solely for reference or exhibition purposes; an extra copy of recorded information maintained only for reference; or a stock of publications or blank forms.

(8) Transitory information--Records of temporary usefulness that are not an integral part of a records series of an agency, that are not regularly filed within an agency's recordkeeping system, and that are required only for a limited period of time for the completion of an action by an official or employee of the agency or in the preparation of an on-going records series. Transitory records are not essential to the fulfillment of statutory obligations or to the documentation of agency functions.

§6.92. General.

(a) These sections establish the minimum requirements for the management of all electronic state records.

(b) The head of each state agency must ensure:

(1) that a program is established for the management of state records created, received, retained, used, transmitted, or disposed on electronic media;

(2) that the management of electronic state records is integrated with other records and information resources management programs of an agency;

(3) that electronic records management objectives, responsibilities, and authorities are incorporated in pertinent agency directives;

(4) that procedures are established for addressing records management requirements, including retention requirements and disposition;

(5) that training is provided for users of electronic records systems, including electronic mail systems, in the operation, care, and handling of the information, equipment, software, and media used in the systems;

(6) that up-to-date documentation is developed and maintained about all electronic state records that is adequate for retaining, reading, or processing the records and ensuring their timely, authorized disposition; and

(7) that a security program for electronic state records is established that is in compliance with subsection (b) of 1 TAC 201.13 (relating to Information Resource Standards).

§6.93. Creation of Electronic State Records.

(a) Any state agency electronic records system, already in use on the effective date of these sections, should meet the minimum requirements in subsection (b) of this section to the extent possible.

(b) Any electronic records system developed or acquired by a state agency, after the effective date of these sections, must meet the following requirements:

(1) have the capability for preserving any electronic state record resident in the system for its full retention period; or, there must not be any system impediments that prevent migrating the record to another electronic records system, in as complete a form as possible;

(2) sufficiently identify records created on the system to enable agency staff to retrieve, protect, and carry out the disposition of records in the system;

(3) ensure that any electronic state records can be identified that are part of a records series maintained in multiple records media such as paper, microform, etc.; and

(4) provide a standard interchange format, when determined to be necessary by the agency, to permit the exchange of records on electronic media between agency computers using different software/operating systems and the conversion or migration of records on electronic media from one system to another.

§6.94. Retention of Electronic State Records.

(a) A state agency must establish policies and procedures to:

(1) ensure that an electronic state record and any software, hardware, and/or documentation, including maintenance documentation, required to retrieve and read the electronic state record are retained as long as the approved retention period for the record; or

(2) provide for recopying, reformatting, and other necessary maintenance to ensure the availability and usability of an electronic state record until the expiration of its retention period.

(b) Except as provided in subsection (c), a state agency's records retention schedule submitted for certification or recertification after the effective date of these sections must schedule by record series all electronic state records maintained by the agency, in accordance with the Government Code, §441.185, and Chapter 6, Subchapter A of this title (relating to Records Retention Schedule).

(c) An electronic state record must be individually accessible. System tapes used for data backup or disaster recovery, unless indexed for accessibility, must not be used to satisfy records retention requirements.

(d) A state agency's electronic mail system, already in use on the effective date of these sections, should meet the minimum requirements in subsection (e) of this section to the extent possible.

(e) Any electronic mail system developed or acquired by a state agency, after the effective date of these sections, must meet the following requirements.

(1) Some transmission data (name of sender and addressee(s); date/time the message was sent) must be retained for each electronic mail record, except for mailing list services that do not identify the addressees.

(2) A state agency must determine if any other transmission data is needed to maintain the integrity of the electronic mail record.

(3) A state agency that uses an electronic mail system that identifies users by codes or nicknames or identifies addressees only by the name of a distribution list must instruct staff on how to retain names on directories or distribution lists to ensure identification of the sender and addressees of messages.

(4) A state agency having an electronic mail system that allows users to request confirmation that a message has been received or opened must establish guidelines for the appropriate retention of this information.

(5) A state agency must provide for the organization of electronic mail records according to the agency's approved records retention schedule.

§6.95. Final Disposition of Electronic State Records.

(a) Any electronic state record may be destroyed only in accordance with a records retention schedule approved in accordance with the Government Code §441.185 or, in lieu of an approved records retention schedule, an approved records disposition authorization request.

(b) An electronic state record that is an archival record must be maintained by the agency through hardware and software migrations and upgrades as authentic evidence of the state's business in accessible and searchable form, except as otherwise determined by the state archivist.

(c) A state agency must ensure that:

(1) an electronic state record scheduled for destruction is disposed of in a manner that ensures protection of any confidential information; and

(2) magnetic storage media previously used for an electronic state record containing confidential information is not reused if the previously recorded information can be recoverable through reuse in any way, when the media passes out of custody of the agency.

(d) A state agency must establish and implement procedures that address the disposition of an electronic mail record by staff in accordance with its approved records retention schedule and, specifically, must establish guidelines to enable staff to determine if an electronic

mail record falls under transitory information (records series item number 1.1.057) on the agency's approved records retention schedule in order to encourage its prompt disposal after the purpose of the record has been fulfilled.

(e) The following requirements apply when a state agency receives a court order for expunging of information recorded on an optical Write-Once-Read-Many (WORM) disk.

(1) Two methods are allowed for expunging information from a WORM disk:

(A) all of the indices, pages, or documents on a disk, other than the expunged document(s), must be rewritten to a new disk and the old disk must be physically destroyed, or;

(B) the information may be overwritten to obliterate the original image, leaving no evidence of the original information.

(2) In cases where a complete page or record is expunged, all reference to the page or record must be removed from the index. If the index has been copied, the index must be recopied after the reference to the page or record has been removed.

(3) Copies of the original WORM disk and copies of the information removed by expungement must be destroyed or changed to reflect the court order. All copies of the record, index, or reference to the original unrevised information on WORM disk copies or copies in any other media must be destroyed.

§6.96. Maintenance of Electronic Records Storage Media.

(a) If an agency has a storage room for magnetic tape, it must be maintained within 65 degrees Fahrenheit to 75 degrees Fahrenheit, and 30% to 50% relative humidity.

(b) A random sample of all magnetic tapes stored in tape libraries must be read annually to identify any loss of data and to discover and correct the causes of data loss according to the following:

(1) at least a 5% sample or a sample size of 50 magnetic tapes, whichever is less, must be tested for read errors;

(2) tapes with unrecoverable errors must be replaced and the data must be restored to the extent possible; and

(3) all other tapes which might have been affected by the same cause (i. e. poor quality tape, high usage, poor environment, improper handling) must be read and corrected.

(c) A state agency must establish a schedule for recopying electronic state records maintained on electronic media to ensure that no information is lost.

(d) Electronic state records maintained on floppy disks (diskettes) must be recopied a minimum of once a year.

(e) Electronic storage media must have an external label or an index, such as electronic records systems utilizing automated disk/tape library management systems, that includes the following information:

(1) name or other identifier of the organizational unit responsible for the records;

(2) descriptive title of the contents;

(3) dates of creation and authorized disposition date;

(4) security classification;

(5) identification of the software (to include specific application if appropriate) and hardware used; and

(6) operating system title and version.

(f) The following standards must be met for electronic records stored as digital images on optical media.

(1) A non-proprietary image file header label must be used, or the system developer must provide a bridge to a non-proprietary image file header label, or the system developer must supply a detailed definition of image file header label structure.

(2) The system hardware and/or software must provide a quality assurance capability that verifies information written to the optical media.

(3) Scanned image quality must be evaluated according to the standard procedures in *American National Standard for Information and Image Management-Recommended Practice for Quality Control of Image Scanners* (most current version of ANSI/AIIM MS44).

(4) A visual quality control evaluation must be performed for each scanned image and related index data.

(5) A scanning resolution with a minimum of 200 dots per inch is required for recording documents that contain no type font smaller than six point.

(6) For documents with a type font smaller than 6 point, scanning resolution must be adequate to ensure that no information is lost.

(7) The selected scanning resolution must be validated with tests on actual documents.

(8) The use of the International Telecommunication Union-Technical (ITU-T) Group 3 or Group 4 compression techniques is required for document images without continuous tonal qualities. If use of a proprietary compression technique is unavoidable, the vendor must provide a gateway to either Group 3 or Group 4 compression techniques.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2000.

TRD-200008009
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Effective date: December 6, 2000
Proposal publication date: September 22, 2000
For further information, please call: (512) 463-5459

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CHAPTER 7. LOCAL RECORDS
SUBCHAPTER E. ELECTRONIC FILING AND RECORDING

13 TAC §§7.141 - 7.145

The Texas State Library and Archives Commission adopts new §§7.141 - 7.145 concerning electronic filing and recording by county clerks without change to the proposal published in the October 6, 2000, issue of the *Texas Register* (25 TexReg 10077) and will not be republished.

SB888, enacted by the 76th Legislature, directs the Texas State Library and Archives Commission to adopt rules no later than

January 1, 2001, that will enable county clerks, for the first time, to accept instruments filed electronically and to record the instruments electronically. The new sections prescribe the manner and means by which county clerks may establish electronic filing and recording programs in their offices and prescribe procedures to help ensure the integrity of electronically recorded instruments. These initial sections are confined to instruments eligible for recording in the real property records.

No comments were received regarding the adoption of these sections.

These new sections are proposed under the Local Government Code, §195.002(a), which requires the Texas State Library and Archives Commission to adopt administrative rules by which a county clerk may accept instruments by electronic filing and record instruments electronically under the Local Government Code, §191.009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2000.

TRD-200008010
Edward Seidenberg
Assistant State Librarian
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Effective date: December 6, 2000
Proposal publication date: October 6, 2000
For further information, please call: (512) 463-5459

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 107. DENTAL BOARD PROCEDURES

SUBCHAPTER B. PROCEDURES FOR INVESTIGATING COMPLAINTS

22 TAC §107.102

The State Board of Dental Examiners adopts amendments to §107.102, Procedures in Conduct of Investigations without changes to the text proposed in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9310).

The amended §107.102 expands the list of possible actions that the Board Secretary may be take on a pending complaint by adding referral to a Professional Evaluation Committee, which will provide a forum where more than one board member can discuss allegations. The Committee may propose to process the case by any of the methods available to the Board Secretary, or it may propose an Agreed Board Order, without the necessity for an Informal Settlement Conference. The decision to make such an offer will be based on the unilateral determination that a violation has occurred, and that an appropriate sanction should be imposed. A respondent who wishes to present a defense may do so in an Informal Settlement Conference and/or a hearing before the State Office of Administrative Hearings (SOAH). Use of the Professional Evaluation Committee can have a positive effect on time required to process complaints. Currently the Board Secretary may be reluctant to propose dismissal of a case and out of a sense of caution refer it to Settlement Conference. A considerable investment of staff time is required to move a case through the Settlement Conference process and resolution of the case is delayed. Many cases are dismissed at Settlement Conference and board members at conference often ask why such cases were referred to Settlement Conference. When the Board Secretary believes that dismissal may be appropriate, but is uncomfortable making the decision alone, the case can be referred to the Professional Evaluation Committee where three board members can discuss it and dismiss it if appropriate.

The Professional Evaluation Committee will also consider other cases where there is no disagreement between board members and respondents that a violation of the Dental Practice Act has occurred and there are no issues concerning sanctions. In such a case, if a recommendation could be made and accepted earlier in the process, again time and agency resources can be saved. The Professional Evaluation Committee can review and recommend in appropriate cases and secure resolutions that are satisfactory to all parties.

An important feature of this process is the requirement that an offer of settlement from the Professional Evaluation Committee must include a statement that the respondent should not accept the offer if any element of the conduct that is the basis of the complaint should be explained. This is intended to make certain that respondents do not feel compelled to accept the agreement offered by the Professional Evaluation Committee.

New language found in subsection (h) affords greater opportunity for a complainant who is unhappy with the dismissal of a complaint to request reconsideration.

No comments were received regarding adoption of the proposal.

The rule is adopted under Texas Government Code §2001.021 et. seq.; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 13, 2000.

TRD-200007923
Jeffry Hill
Executive Director
State Board of Dental Examiners
Effective date: December 3, 2000
Proposal publication date: September 22, 2000
For further information, please call: (512) 463-6400

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SUBCHAPTER C. ADMINISTRATIVE PENALTIES

22 TAC §107.201

The State Board of Dental Examiners adopts the repeal of §107.201, Administrative Penalties for Continuing Education Violations without changes to the text proposed in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9311).

The Dental Practice Act was amended effective September 1, 1999 to require completion of at least 12 hours of continuing education as a prerequisite for annual renewal of a license. The Act previously required 36 hours in a three year period in order to maintain licensure. Since, under the prior statute, a licensee could renew even though required continuing education was not completed the Board provided for administrative penalties. Under current law, licensees who do not have required continuing education may not be renewed until continuing education has been completed and thus may not legally practice dentistry until the license is renewed. Under the amended statute the licensee will not have a license for a period of time and must pay a penalty for late renewal (required by statute). These two factors constitute a penalty for failure to timely complete continuing education.

No comments were received regarding adoption of the proposal.

The repeal of the rule is adopted under Texas Government Code §2001.021 et. seq.; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 13, 2000.

TRD-200007922
Jeffry Hill
Executive Director
State Board of Dental Examiners
Effective date: December 3, 2000
Proposal publication date: September 22, 2000
For further information, please call: (512) 463-6400

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 363. EXAMINATION

22 TAC §363.1

The Texas State Board of Plumbing Examiners adopts amendments to §363.1 which state the requirements and qualifications necessary for an individual to obtain a license or endorsement issued by the Board without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5540).

The amendments to §363.1 delete all superfluous or obsolete language and add all of the necessary language that is currently contained in §365.3. The result is that all license and endorsement requirements are contained in one rule section instead of two. The new language contained in §363.1(e)-(h)(3) represents the same language that was erroneously omitted in the *Texas Register* at the time of a previously proposed amendment to §363.1. The amendments to §363.1 do not change any of the current requirements or qualifications to obtain a license or endorsement issued by the Board.

No comments were received regarding the proposed amendments.

The amendments are adopted under and affect Texas Revised Civil Statutes Annotated Article 6243-101("Act"), §5(a), (Vernon Supp. 2000), the rule it amends and House Bill 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 together with the Board's rule review plan. Section 5(a) of the Act authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act. House Bill No. 1, 75th Legislature, Regular Session, 1998-1999, Article IX, §167 and the Board's rule review plan require the Board to complete a review of Chapter 365 of the Board Rules by August 31, 2000.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2000.

TRD-200008004
Robert L. Maxwell
Administrator
Texas State Board of Plumbing Examiners
Effective date: December 5, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 458-2145

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PART 31. TEXAS STATE BOARD OF EXAMINERS OF DIETITIANS

CHAPTER 711. DIETITIANS

The Texas State Board of Examiners of Dietitians (board) adopts amendments to §§711.1 - 711.14, §§711.16 - 711.17, and §711.19, and the repeal of §711.15 and new §711.15 relating to the licensing and regulation of dietitians. Sections 711.3, 711.5, 711.7, 711.9, 711.15 - 711.17, and 711.19 are adopted with changes to the proposal published in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4694). Sections 711.1 - 711.2, 711.4, 711.6, 711.8, 711.10 - 711.14 are adopted without changes and therefore will not be republished.

The amendments cover definitions, the board's operation, the profession of dietetics, academic requirements for licensure, experience requirements for examination, examinations for dietitian licensure, application procedures, determination of eligibility, provisionally licensed dietitians, licensing, changes of name or address, license renewal, licensing of persons with criminal backgrounds to be licensed and provisionally licensed dietitians, violations, complaints and subsequent board actions, inactive status, continuing education requirements and informal disposition. The repeal and new section cover formal hearings.

Sections 711.18, 711.20 and 711.21 are simultaneously readopted without changes to the existing rules. These sections cover temporary license, default orders and suspension of license for failure to pay child support.

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 711.1- 711.21 have been reviewed and the board has determined that the reasons for adopting these sections continue to exist; however, the language of these sections has been updated, clarified and simplified. Citations to the Licensed Dietitian Act have been updated to conform to the Texas Occupations Code throughout the sections. As unnecessary wording has been deleted and sections have been simplified or updated, and sections of the rules have been changed to reflect the new section designations. Some text was deleted as unnecessary because the dates in the text no longer apply due to the passage of time. The amendments also corrected typographical errors.

The board published a Notice of Intention to Review the sections in the *Texas Register* (24 TexReg 999) on February 12, 1999. No comments were received regarding the Notice of Intention to Review.

The following minor changes were made due to department staff comments.

Change: Concerning §§711.3(d), 711.9(a) and (c)(2), 711.15(b)(1), 711.16(d), 711.17(a), 711.19(d)(1)(D), (k), and (o), unnecessary and redundant language was deleted and typographical errors were corrected in order to simplify and update the sections. Also, the proposed subsections (a) in both §§711.7 and 711.15 were deleted to eliminate redundant language and the existing subsections were renumbered.

The following comments were received concerning the proposed rules. Following each comment is the board's response and any resulting change(s).

Comment: Concerning §711.3(d)(1)(B) a comment was received stating that the words "knowingly or recklessly" be inserted between the words "not" and "make" to prohibit a dietitian from "knowingly or recklessly" making a false or misleading claim about a nutrition service or dietary supplement. Without the modifying language, an unintentional error or omission could be considered as false or deceptive.

Response: The board agrees and has inserted the words "knowingly or recklessly" between the words "not" and "make" in §711.3(d)(1)(B).

Comment: Concerning §711.4(b)(7), a comment was received stating that the phrase "conferred by a college or university regionally accredited at the time of conferral" be inserted between the words "degree" and "with" to clarify the requirement that persons applying for licensure possess a baccalaureate or post-baccalaureate degree from such institutions.

Response: The board does not agree that the language should be inserted in §711.4(b)(7) because similar language is exists in §711.4(b)(1). No change was made as a result of this comment.

Comment: Concerning §711.5 and §711.9, several commenters questioned the granting of provisional licensure status to student trainees in an internship, coordinated undergraduate, preprofessional practice programs. The commenters stated that the board was creating a second class of provisionally licensed dietitians who were inadequately prepared to practice safely. The commenters believed that a person should be eligible for the provisional licensure when the person had completed the internship, coordinated undergraduate program (CUP) or preprofessional practice program. The commenters stated it would be impossible to grant a license to a person completing a CUP because the academic and experience are completed simultaneously. Other commenters stated the granting of a license to a person who had only completed the academic requirements for licensure was contrary to the language in the Licensed Dietitian Act.

Response: The board disagrees. The amendments do not alter the qualifications the existing for the provisional licensed dietitian (PLD). Rather, for the past 17 years the board's rules have established the minimum qualifications for the PLD as being the academic degree, including specific course work. When the board was under Sunset Commission review, testimony was given before the Texas House of Representatives during the 1993 legislative session by both the chair and vice-chair of the board explaining that, "The provisional license was designed in the original legislation to allow individuals who have completed academic requirements for licensure to work under supervision while completing preprofessional experience . . . and/or examination requirements." The proposed amendment in §711.5 was intended to require that only trainees participating in board-approved programs hold the PLD. To clarify that the PLD is only required under these circumstances, the board has added wording in §711.5(d) to clarify that the term "trainee" shall apply only to students while completing a board-approved preprofessional program(s).

Comment: Regarding §711.5(d)(1), a commenter stated that the wording requiring that trainees be provisionally licensed was redundant. The commenter noted the requirement for provisional licensure is already stated in §711.5(b).

Response. The board agrees and has deleted the wording from §711.5(d)(1).

Comment: Throughout §711.5 several comments were received questioning the board's authority to set guidelines for preprofessional experience programs approved by organizations such as the Commission on Dietetic Registration. The commenters were also concerned about the additional licensing workload that would be placed on the board staff related to issuing PLDs for all persons completing a preprofessional experience program in Texas. The commenters also had concerns about the cost to applicants and the waiting time to receive the PLD before getting their program underway.

Response: Wording has been added to subsections (c) and (e) - (g) to clarify the application of the rules and the intent of the board, which was to establish requirements for board-approved programs. The rules relating to board-approved program do not apply to programs accredited by other organizations.

Comment: Concerning §711.5, commenters requested that the proposed amendments not be approved and that a work group or other committee be formed to further study the section.

Response: No changes were made to the section based on the comments. The board disagrees and is concerned that the commenters misunderstood the intent and effect of the amendments as proposed. The board holds the opinion that once the intent of the amendments is clarified and the misunderstanding is addressed, there would be no need for further review and study of this section. Persons completing the experience requirements for the examination must complete either a board-approved program or a program approved by the American Dietetic Association. The amendments in §711.5 relating to trainees will only apply to persons participating in board-approved programs. Programs and participants in programs approved by other dietetic organizations are not subject to these rules.

The following commenters had questions and suggestions for change, but were neither for nor against the rules in their entirety: Austin Dietetic Association, Hermann Hospital, Memorial Hermann Health Care System, Presbyterian Hospital of Dallas, Texas Dietetic Association, University of Houston Dietetic Internship Program and University of Texas CUP in Dietetics.

22 TAC §§711.1 - 711.14, 711.16, 711.17, 711.19

The amendments are adopted under the Texas Occupations Code, §701.151 and §701.152 which provides the board with the authority to make and enforce rules reasonably required in the exercise of its general powers and jurisdiction.

§711.3. The Profession of Dietetics.

(a) Purpose. The rules on the profession of dietetics shall be to establish the standards of professional and ethical conduct required of a licensee.

(b) Dietetics. The profession of dietetics includes five primary areas of expertise: clinical, educational, management, consultation, and community; and includes without limitation the development, management, and provision of nutritional services, as follows:

(1) planning, developing, controlling, and evaluating food service systems;

(2) coordinating and integrating clinical and administrative aspects of dietetics to provide quality nutritional care;

(3) establishing and maintaining standards of food production, service, sanitation, safety, and security;

(4) planning, conducting, and evaluating educational programs relating to nutritional care;

(5) developing menu patterns and evaluating them for nutritional adequacy;

(6) planning layout designs and determining equipment requirements for food service facilities;

(7) developing specifications for the procurement of food and food service equipment and supplies;

(8) developing and implementing plans of nutritional care for individuals based on assessment of nutritional needs;

(9) counseling individuals, families, and groups in nutritional principles, dietary plans, and food selection and economics;

(10) communicating appropriate diet history and nutritional care data through written record systems;

(11) participating with physicians and allied health personnel as the provider of nutritional care;

(12) planning, conducting or participating in, and interpreting, evaluating, and utilizing pertinent current research related to nutritional care;

(13) providing consultation and nutritional care to community groups and identifying and evaluating needs to establish priorities for community nutrition programs;

(14) publishing and evaluating technical and lay food and nutrition publications for all age, socioeconomic, and ethnic groups;

(15) planning, conducting, and evaluating dietary studies and participating in nutritional and epidemiologic studies with a nutritional component.

(c) Provider of nutrition services. A person licensed by the board is designated as a health care provider of nutrition services.

(d) Code of ethics. These rules shall constitute a code of ethics as authorized by the Act, §701.151.

(1) Professional representation and responsibilities.

(A) A licensee shall conduct himself/herself with honesty, integrity and fairness.

(B) A licensee shall not misrepresent any professional qualifications or credentials. A licensee shall not knowingly or recklessly make any false or misleading claims about the efficacy of any nutrition services or dietary supplements.

(C) A licensee shall not permit the use of his/her name for the purpose of certifying that nutrition services have been rendered unless that licensee has provided or supervised the provision of those services.

(D) A licensee shall not promote or endorse products in a manner that is false or misleading.

(E) A licensee shall disclose to a client, a person supervised by the licensee, or an associate any personal gain or profit from any item, procedure, or service used by the licensee with the client, supervisee, or associate.

(F) A licensee shall maintain knowledge and skills required for professional competence. A licensee shall provide nutrition services based on scientific principles and current information. A licensee shall present substantiated information and interpret controversial information without bias.

(G) A licensee shall not abuse alcohol or drugs in any manner which detrimentally affects the provision of nutrition services.

(H) A licensee shall comply with the provisions of the Texas Controlled Substances Act, the Health and Safety Code, Chapter 481 and Chapter 483 relating to dangerous drugs; and any rules of the board of health or the Texas State Board of Pharmacy implementing those chapters.

(I) A licensee shall have the responsibility of reporting alleged misrepresentations or violations of board rules to the board's executive secretary.

(J) A licensee shall comply with any order relating to the licensee which is issued by the board.

(K) A licensee shall not aid or abet the practice or misrepresentation of an unlicensed person when that person is required to have a license under the Act.

(L) A licensed dietitian shall supervise a provisional licensed dietitian in accordance with §711.9 of this title (relating to Provisional Licensed Dietitians).

(M) A licensee shall not make any false, misleading, or deceptive claims in any advertisement, announcement, or presentation relating to the services of the licensee, any person supervised by the licensee or any dietary supplement.

(N) A licensee shall conform to generally accepted principles and standards of dietetic practice which are those generally recognized by the profession as appropriate for the situation presented, including those promulgated or interpreted by or under the association or commission, and other professional or governmental bodies. A licensee shall recognize and exercise professional judgement within the limits of his/her qualifications and collaborate with others, seek counsel, or make referrals as appropriate.

(O) A licensee shall not interfere with an investigation or disciplinary proceeding by willful misrepresentation of facts to the

board or its authorized representative or by the use of threats or harassment against any person.

(2) Professional relationships.

(A) A licensee shall make known to a prospective client the important aspects of the professional relationship including fees and arrangements for payment which might affect the client's decision to enter into the relationship. A licensee shall bill a client or a third party in the manner agreed to by the licensee and in accordance with state and federal law.

(B) A licensee shall not receive or give a commission or rebate or any other form of remuneration for the referral of clients for professional services.

(C) A licensee shall disclose to clients any interest in commercial enterprises which the licensee promotes for the purpose of personal gain or profit.

(D) A licensee shall take reasonable action to inform a client's physician and any appropriate allied health care provider in cases where a client's nutritional status indicates a change in medical status.

(E) A licensee shall provide nutrition services without discrimination based on race, creed, sex, religion, national origin, or age.

(F) A licensee shall not violate any provision of any federal or state statute relating to confidentiality of client communication and/or records. A licensee shall protect confidential information and make full disclosure about any limitations on his/her ability to guarantee full confidentiality.

(G) A licensee shall not engage in sexual contact with a client. The term "sexual contact" means any type of sexual behavior described in the Texas Penal Code, Chapters 21, 22, or 43, and includes sexual intercourse. A licensee shall not engage in sexual harassment in connection with professional practice.

(H) A licensee shall terminate a professional relationship when it is reasonably clear that the client is not benefiting from the services provided.

(I) A licensee shall not provide services to a client or the public if by reason of any mental or physical condition of the licensee, the services cannot be provided with reasonable skill or safety to the client or the public.

(J) A licensee shall not provide any services which result in mental or physical injury to a client or which create an unreasonable risk that the client may be mentally or physically harmed.

(K) A licensee shall provide sufficient information to enable clients and others to make their own informed decision.

(L) A licensee shall be alert to situations that might cause a conflict of interest or have the appearance of a conflict. A licensee shall make full disclosure when a real or potential conflict of interest arises.

(3) Supervision of provisional licensed dietitian. A licensed dietitian shall adequately supervise a provisional licensed dietitian or a temporary licensed dietitian for whom the licensee has assumed supervisory responsibility.

(4) Billing information required; prohibited practices.

(A) On the written request of a client, a client's guardian, or a client's parent, if the client is a minor, a licensee shall provide, in plain language, a written explanation of the charges for client nutrition services previously made on a bill or statement for the client. This requirement applies even if the charges are to be paid by a third party.

(B) A licensee may not persistently or flagrantly overcharge or overtreat a client.

(5) Sanctions. A licensee shall be subject to disciplinary action by the board if under the Crime Victims Compensation Act, Texas Code of Criminal Procedure, Article 56.31, the licensee is issued a public letter of reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office.

(e) Disclosure.

(1) A licensee shall make a reasonable attempt to notify each client of the name, mailing address, and telephone number of the board for the purpose of directing complaints to the board by providing notification:

(A) on each written contract for services of a licensee;

(B) on a sign prominently displayed in the primary place of business of each licensee; or

(C) in a bill for service provided by a licensee to a client or third party.

(2) A provisional licensed dietitian must include the name and telephone number of his or her supervisor in all advertising and announcements of services including business cards and applications for employment.

(f) Unlawful, false, misleading, or deceptive advertising.

(1) A licensee shall use factual information to inform the public and colleagues of his/her services. A licensee shall not use advertising that is false, misleading, or deceptive or that is not readily subject to verification.

(2) False, misleading, or deceptive advertising or advertising that is not readily subject to verification includes advertising that:

(A) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(B) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(C) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(D) contains a testimonial;

(E) causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;

(F) advertises or represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;

(G) advertises or represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;

(H) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient; or

(I) advertises or represents in the use of a professional name a title or professional identification that is expressly or commonly reserved to or used by another profession or professional.

(3) A "health care professional" includes a licensed dietitian, provisional licensed dietitian, temporary licensed dietitian, or any other person licensed, certified, or registered by the state in a health-related profession.

(g) Applicants. A violation of any provision of subsection (d) of this section by a person who is an applicant or who subsequently applies for a license (even though the person was not a licensee at the time of the violation) may be a basis for disapproval of the application under §711.8(e)(7) of this title (relating to Determination of Eligibility).

§711.5. Experience Requirements for Examination.

(a) Purpose. The purpose of this section is to set out the experience requirements to qualify for examination and licensure as a dietitian.

(b) General. Applicants for examination must have satisfactorily completed an approved preplanned, documented professional experience program or internship in dietetics practice under the sponsorship of a licensed dietitian or a registered dietitian. The program or internship and the sponsor must be approved by the board or the association. A person who participates as a trainee in a board-approved program or internship must be provisionally licensed in accordance with §711.9 of this title (relating to Provisional Licensed Dietitians).

(1) An internship shall:

(A) be a dietetic internship, a coordinated undergraduate program in dietetics or a preprofessional practice program in dietetics approved by the association or by the board; and

(B) have an endorsement submitted from the director of the program with the application.

(2) A preplanned professional experience program shall be:

(A) completed within three years after commencement of the program;

(B) an individualized program, beyond the undergraduate level approved by the board or the association; and

(C) be planned and sponsored by at least one licensed or registered dietitian.

(3) Documentation of the internship or preplanned professional experience program must be provided to the board by completion of the proper documentation form prescribed by the board.

(4) Applicants who are registered in active status by the commission at the time of making application shall submit a photocopy of the registration card issued by the commission. The applicant's internship or preplanned professional experience program accepted for registration by the commission shall be acceptable for licensure by the board. No further proof of completion of an internship or preplanned professional experience shall be required.

(5) Provisional licensed dietitians shall be deemed to have met the academic requirements for admission into board approved preplanned professional experience and internship programs.

(c) Application and approval or disapproval procedures for board approved programs.

(1) The board shall delegate responsibility for the review and approval or denial of preplanned professional experience programs in dietetics and dietetic internships to the program approval committee. Determinations made by the committee are subject to ratification at the next regular meeting of the board. At the request of the committee, the chairman of the board may appoint, on a volunteer basis, consultants recommended by the board from dietetic experience programs to advise this committee.

(2) Approval of each program shall be obtained prior to commencement of the program. Each program may commence upon receipt of notification from the executive secretary that the program has been approved by the program approval committee.

(3) Sponsor(s) or applicant(s) desiring approval of a program, or reapproval of program plans when applicable, shall submit to the executive secretary properly completed application forms provided by the board.

(A) The applicant or sponsor shall submit the application processing fee with the application.

(B) An original and four copies of the entire application must be submitted in binders with all pages clearly legible and numbered. All signatures on the required forms in the original application must be originals, not photocopies.

(C) If the application is revised or supplemented during the review process, the applicant must submit an original and four copies of a transmittal letter plus an original and four copies of the revision or supplement specified.

(D) If a page is to be revised, the complete new page must be submitted with the changed item or information clearly marked on the four copies, but not on the original page.

(4) The program approval committee may request clarification of program plans and/or additional information it deems necessary prior to deciding the approval status of the application.

(A) The program approval committee may recommend changes in program plans.

(B) The program approval committee reserves the right to request dietetic faculty vitae and endorsements.

(5) Sponsor(s) of all approved and provisionally approved programs shall notify the program approval committee of any changes in the dietetic faculty and facilities, agencies, or organizations utilized in the program, and shall request program approval committee approval for major curriculum changes.

(6) All programs which are not approved, or which lost their approval, shall receive a report of deficiencies from the program approval committee and may reapply for approval following correction of the deficiencies previously cited. Documentation of the corrections shall be submitted with the reapplication. Application fees, and site inspection fees, if applicable, shall be submitted in the reapplication process.

(7) If the program approval committee determines that another state licensing agency's criteria for similar programs meets this board's criteria, programs approved by that state licensing agency shall be deemed to be approved.

(8) The program approval committee reserves the right to deny approval to additional programs sponsored by an individual after the fifth program sponsored by that individual, or to an internship after the third year, if more than 50% of the graduates of those programs are unable to pass the competency examination prescribed by the board.

(d) General guidelines for board-approved programs.

(1) Students of the programs shall be referred to as trainees.

(2) The sponsor(s) of the program shall be one or more licensed dietitians who shall be employed by the facilities, agencies, or organizations utilized in the program. The sponsor shall be employed either full-time, part-time, or on a consultant basis. All sponsor(s) shall observe and professionally assess the trainee's performance and competence.

(3) The sponsor, on behalf of the trainee, shall enter into written agreements of affiliation with appropriate accredited or certified and licensed organization(s).

(4) The program shall be planned to extend over a period of not less than 12 months, nor more than two years. In the event that any program extends over its planned time, the sponsor(s) shall submit progress reports to the program approval committee at the planned completion date and annually thereafter until the program is completed. The progress reports shall include the reason(s) for delay and the anticipated date of completion of the program.

(5) Admission requirements shall include academic requirements as set out in §711.4(b)(7) and (8) of this title (relating to Academic Requirements for Licensure).

(6) The written agreement clarifying the terms of the program between the trainee and the sponsors shall include the following:

(A) a statement providing for periodic evaluation of the trainee's performance, including criteria for continuation in or dismissal from the program;

(B) a statement of the sponsor's responsibility for obtaining another sponsor, should the sponsor become unable to fulfill his/her commitments to the program for any reason. It must include a provision that a written evaluation of the trainee's performance shall be completed and submitted to the program approval committee and to the trainee by the sponsor(s) who is terminating the relationship; and

(C) a statement that recruitment and selection of applicants and participation in all programs shall be made without discrimination based on race, creed, gender, religion, national origin, or age.

(e) Sponsor guidelines for board-approved programs.

(1) The sponsor shall be a licensed or registered dietitian who has had five years of full-time experience as a licensed or registered dietitian.

(2) A sponsor may not sponsor more than one program at a time.

(f) Curriculum guidelines for board-approved programs.

(1) The curriculum of each program shall be planned and implemented primarily by the sponsoring dietetic faculty of the program. The trainee may assist in planning the curriculum.

(2) The curriculum offered shall be clearly defined in writing, and shall include statements of:

(A) goals, competencies, and specific objectives for all aspects of the program;

(B) dietetic learning experiences planned to meet the objectives; and

(C) methods and procedures planned to evaluate trainee performance in meeting the objectives.

(3) Dietetic learning experiences and work experiences in all programs shall include opportunities for decision making, development of independent judgment and professionalism, and shall require increasing levels of skill and responsibility.

(4) All programs shall include a variety of instructional methods and opportunities to strengthen the trainee's communication skills. Planned instruction implemented by the dietetic faculty shall be distributed throughout the program, and may be supplemented by classes offered by colleges and/or medical centers and by dietetic seminars and workshops.

(5) The curriculum shall include a minimum of 450 clock hours of work experience supervised, directed, and evaluated by a licensed or registered dietitian, as set out in §711.9(a)(4) of this title (relating to Provisional Licensed Dietitians), at a level of professional responsibility equivalent to that of a licensed dietitian, as set out in §711.3(b) of this title (relating to the Profession of Dietetics), plus a minimum of 450 clock hours of planned dietetic learning experiences with stated objectives divided to meet one of the following areas of specialization. All rotations must be supervised, directed, evaluated and signed off by a licensed dietitian or registered dietitian.

(A) General dietetics programs shall provide at least 40% of the curriculum in foodservice systems management, at least 40% of the curriculum in clinical dietetics, and at least 10% of the curriculum divided among the community, education, and consultation areas of dietetics. The program shall offer a variety of clinical services and a comprehensive range of foodservice systems management functions. The remaining 10% of the curriculum shall be planned to offer areas of specialization and/or career support selected by the trainee.

(B) Clinical dietetics programs shall provide at least 60% of the curriculum in clinical dietetics, at least 20% of the curriculum in foodservice systems management, and at least 10% of the curriculum divided among the community, education, and consultation areas of dietetics. The program shall offer a variety of clinical services, specializations, and subspecializations. The remaining 10% of the curriculum shall be planned to offer areas of specialization and/or career support selected by the trainee.

(C) Management dietetics programs shall provide at least 60% of the curriculum in foodservice systems management, at least 20% of the curriculum in clinical dietetics, and at least 10% of the curriculum divided among the community, education, and consultation areas of dietetics. The program shall offer different types and sizes of foodservice systems, including at least one production and service facility that requires managing a complete range of foodservice subsystems. The remaining 10% of the curriculum shall be planned to offer areas of specialization and/or career support selected by the trainee.

(D) Community nutrition programs shall provide at least 40% of the curriculum in community nutrition, at least 10% of the curriculum divided between the education and consultation areas of dietetics, at least 25% of the curriculum in clinical dietetics, and at least 15% of the curriculum in foodservice systems management. The primary sites for learning experiences shall include federal, state, and locally funded community health agencies. The remaining 10% of the curriculum shall be planned to offer areas of specialization and/or career support selected by the trainee.

(6) The program shall, following completion of the learning and work experiences, include rotation relief for three weeks. Rotation relief shall provide an opportunity for the trainee to demonstrate professional proficiency in the area of specialization. The sponsor, sponsoring licensed dietitian, or another licensed dietitian shall be available at reasonable times. The trainee shall perform at the level of a licensed dietitian based on the area of specialization.

(A) The rotation must be conducted between the hours of 6 a.m. and 8 p.m., Monday through Sunday with a minimum of 20 clock hours per week.

(B) The rotation must include one weekend day.

(g) Records guidelines for board-approved programs.

(1) A record of each trainee's activities, program plan, and evaluation instruments, including the number of hours spent fulfilling curriculum plans, shall be kept by the sponsor, shall be preserved for five years, and shall be made available to examining boards and other appropriate agencies if requested.

(2) A written report of the trainee's activities shall be sent to the board. The trainee shall provide to the board, at six-month intervals, a written report approved by the sponsor describing the trainee's activities.

(3) The sponsor(s) shall issue to each trainee, upon successful completion of the program, a written statement and/or certificate of accomplishment, and shall notify the executive secretary in writing of the name(s) of the trainee(s) who have completed the program and of the date the program was completed.

§711.7. Application Procedures.

(a) Fitness of applicants for licensure.

(1) In determining the fitness of an applicant for licensure, the board shall consider the following:

(A) the skills and abilities of an applicant to provide adequate nutrition services; and

(B) the ethical behavior of an applicant in relationships with other professionals and clients.

(2) In determining the fitness of applicants for licensure the board may request and consider any of the following:

(A) evaluations of supervisors or instructors;

(B) statements from persons submitting references for the applicant;

(C) evaluations of employers and/or professional associations;

(D) allegations of clients;

(E) transcripts or findings from official court, hearing, or investigative proceedings; and

(F) any other information which the board considers pertinent to determining the fitness of an applicant.

(3) The substantiation of any of the following items related to an applicant may be, as the board determines, the basis for the denial of, or delay of, licensure of the applicant:

(A) lack of the necessary skills and abilities to provide adequate nutrition services;

(B) misrepresentation of professional qualifications or associations;

(C) misrepresentation of nutrition services, dietary supplements and the efficacy of nutrition services to clients;

(D) use of misleading advertising or false advertising;

(E) violation of any provision of any federal or state statute relating to confidentiality of client communication and/or records;

(F) abuse of alcohol or drugs or the use of illegal drugs of any kind in any manner which detrimentally affects the provision of nutrition services;

(G) any misrepresentation in application or other materials submitted to the board; and

(H) the violation of any board rule in effect at the time of application which is applicable to an unlicensed person.

(b) General.

(1) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on official board forms.

(2) The board will not consider an application as officially submitted until the applicant pays the application fee. The fee must accompany the application form. See fee schedule in §711.2(u) of this title (relating to the Board's Operation).

(3) The board must receive all required application materials at least 60 days prior to the date the applicant wishes to take the examination.

(4) The executive secretary will send a notice listing the additional materials required to an applicant who does not complete the application in a timely manner. An application not completed within 30 days after the date of the board's notice may be voided.

(c) Required application materials.

(1) The application form shall contain:

(A) specific information regarding personal data, social security number, birth month and day, place of employment, other state licenses and certifications held, misdemeanor and felony convictions, educational and training background, and work experience;

(B) a statement that the applicant has read the Act and board rules and agrees to abide by them;

(C) the applicant's permission to the board to seek any information or references it deems fit to determine the applicant's qualifications and fitness;

(D) a statement that the applicant, if issued a license, shall return the license certificate and license identification card to the board upon the revocation or suspension of the license;

(E) a statement that the applicant understands that fees submitted in the licensure process are nonrefundable;

(F) a statement that the applicant understands that materials submitted in the licensure process become the property of the board and are nonreturnable; and

(G) the signature of the applicant which has been dated and notarized.

(2) The internship of preplanned professional experience program documentation form shall contain:

(A) the applicant's name;

(B) the name and address of the agency, organization, or institution where the program was undertaken (a separate form should be used for each one);

(C) the name and job title of the director or coordinator of each program at the time;

(D) the inclusive dates of the program and the number of clock hours per week;

(E) the type of setting, the type of clients served, and the type of work performed;

(F) the credentials of the director or coordinator of each program; and

(G) the signed statement(s) of endorsements from the person(s) who can formally attest to the applicant's successful completion of experience as set out in §711.5(b)(1) and (2) of this title (relating to Experience Requirements for Examination).

(3) Applicants must submit official transcript(s) of all relevant college work.

(4) An applicant shall have two professional references (included in the application packet) submitted by licensed dietitians or registered dietitians who can attest to the applicant's dietetic skills and professional standards of practice. The references shall be persons who are not named elsewhere in the applicant's application and who are not current members of the board.

(5) Applicants must submit a full-face photo, a minimum in size of 1 1/2 inches by 1 1/2 inches, signed on the reverse side with the applicant's signature as it appears on the application. The photograph must have been taken within the two-year period prior to application.

(6) If an applicant is or has been licensed, certified, or registered in another state, territory, or jurisdiction, the applicant must submit information required by the board concerning that license, certificate, or registration on official board forms.

(7) Vitae, resumes, and other documentation of the applicant's credentials may be submitted.

(8) A provisional licensed dietitian applicant must submit a completed supervision contract.

§711.9. Provisional Licensed Dietitians.

(a) Sponsorship. This section sets out the nature and the scope of the sponsorship provided for a provisional licensed dietitian (PLD). The sponsor shall be a licensed dietitian.

(1) Sponsorship contract. The PLD must submit a contract on board forms to the board prior to the date that sponsorship is to begin. The contract shall include:

(A) the name and signature of the sponsor and the name and signature of the PLD;

(B) the license number of the sponsor and license number of the PLD if applicable;

(C) the primary location and address where nutrition services are to be rendered;

(D) a description of nutrition services to be rendered by the PLD;

(E) a statement that the sponsor and the PLD have read and agree to adhere to the requirements of this chapter; and

(F) the date that the sponsor and the PLD signed the contract.

(2) Termination. The sponsor must submit a written notification of termination of sponsorship to the board and the PLD within 14 days of when sponsorship has ceased. The PLD shall make a good faith effort to ensure that the sponsor submits the appropriate notification. The board notification of termination of sponsorship shall include:

(A) the name, license number, and signature of the sponsor and the name and license number of the PLD;

(B) a statement that sponsorship has terminated;

(C) the reason for termination;

(D) the date of termination of sponsorship; and

(E) a statement indicating whether the sponsor and the PLD have complied with the requirements of this chapter.

(3) Changes. Any change in the sponsorship contract shall require submission of a new contract.

(4) Requirements of sponsorship.

(A) The sponsor must have adequate training, knowledge, and skill to render competently any nutrition services which the PLD undertakes. The sponsor shall have discretion to refer the PLD for specific sponsorship from another licensed dietitian.

(B) The sponsor is responsible for determining the adequacy of the PLD's ability to perform the nutrition services.

(C) The sponsor may not sponsor more than three PLDs unless board approval is provided in advance.

(D) The PLD must clearly state the sponsored status to patients, clients, and other interested parties and must provide the name, address, and telephone number of the sponsor.

(E) The sponsor may not be employed by the PLD, may not lease or rent space from the PLD, and must avoid any dual relationship with the PLD which could impair the sponsor's professional judgment.

(F) The sponsor must provide each PLD with no less than one hour of regularly scheduled face-to-face meetings weekly, regardless of the number of hours employed per week. Group meetings may be used as an adjunct to the face-to-face meetings but not as a substitute. A written record of the scheduled meetings must be maintained by the sponsor and include a summary of the PLD's work activities. The record shall be provided to the board at its request.

(G) The sponsor must be available for discussion of any problems encountered by the PLD at reasonable times in addition to the scheduled meetings.

(H) The sponsor will provide an alternate licensed dietitian to provide sponsorship for the PLD in circumstances when the sponsor is not available for more than four continuous weeks.

(5) Payment. A PLD may not pay for sponsorship.

(b) Required sponsor. A PLD must have a sponsoring licensed dietitian at all times whether or not the PLD is actively employed.

(c) Upgrading a provisional license. The purpose of this subsection is to set out the procedure to upgrade from PLD to a licensed dietitian.

(1) The PLD who has completed a board approved experience program in accordance with §711.5 of this title (relating to Experience Requirements for Examination) shall submit to the board a letter from the sponsor indicating the date the PLD completed the program.

(2) A PLD who become registered by the commission shall submit proof of current registration status with a written request to upgrade and submit the required fee for upgrade to a licensed dietitian.

(3) The requirements of sponsorship as defined in subsection (a)(4)(F) of this section, shall continue until the PLD becomes a licensed dietitian.

(d) Time limits. A provisional license is valid for one year from the date it is issued and may be renewed annually not more than

twice by the procedures set out at §711.12 of this title (relating to License Renewal).

(e) Examination failures. An individual who fails the examination as set out in §711.6 of this title (relating to Examinations for Dietitian Licensure) three times prior to application or after licensure as a PLD must meet one of the following requirements:

(1) meet with his or her sponsoring licensed dietitian no less than two hours per week for regularly scheduled face-to-face meetings until the PLD passes the examination as set out in §711.6 of this title (relating to Examinations for Dietitian Licensure); or

(2) complete course work taken for credit with a passing grade in the area(s) of weakness as determined by the board and within the time period established by the board.

§711.16. Inactive Status.

(a) A licensed dietitian may request that his or her license be declared inactive by written request to the board prior to the expiration of the license. The request must include the inactive status fee. Inactive status shall not be granted to persons whose licenses are not current. Inactive status periods shall not exceed five years.

(b) An inactive status period shall begin on the first day of the month following receipt of the request by the board.

(c) If the licensed dietitian wishes to reactivate the license, the licensed dietitian must:

(1) request to return to active status in writing on or before the end of the five year maximum period;

(2) furnish proof of having earned, during the inactive period (minimum one year, maximum five years) six approved continuing education hours. Proof is to be furnished at the time of reactivation; and

(3) pay the applicable fees. The renewal fee shall be prorated if the next renewal date after reactivation occurs less than 12 months after the renewal date of licensure. Prorated fees shall be rounded off to the nearest dollar.

(d) A license that is not reactivated within the five year period may not be renewed, and the license may not be restored, reissued, or reinstated thereafter, but that person may reapply for and obtain a new license if requirements of the Act are met.

(e) A person may not represent himself or herself as a licensed dietitian during the period of inactive status.

(f) A person is subject to investigation and action under §711.14 of this title (relating to Violations, Complaints, and Subsequent Board Actions) during the period of inactive status

(g) A licensed dietitian may return to active status by written request to the board postmarked, faxed or sent by electronic mail within the five year period after becoming inactive. Active status shall begin the first day of the month following receipt of the request by the board.

(h) Upon return to active status, the licensed dietitian's next continuing education cycle will begin on the first day of the month following the licensed dietitian's birth month.

§711.17. Continuing Education Requirements.

(a) This section sets out the continuing education requirements a licensee shall meet to maintain licensure. The requirements are intended to maintain and improve the quality of services provided to the public by licensed dietitians and provisional licensed dietitians. Continuing education credit includes programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills, and develop attitudes for the enhancement of licensed dietitians and provisionally licensed dietitians, thus improving nutrition services provided to the public.

(b) Proof of having earned a minimum of six clock hours of continuing education credit shall be required at the time of renewal of each license.

(1) The hours must have been completed within 12 months prior to the date of expiration of the license.

(2) The hours must be offered or approved by the Commission on Dietetic Registration or its agents or a regionally accredited college or university.

(c) The licensee shall be responsible for maintaining a record of his or her continuing education experiences. The certificates, diplomas, or other documentation verifying earning of continuing education hours are not to be forwarded to the board at the time of renewal unless the licensee has been selected for audit by the board. Only the completed continuing education report form should accompany the renewal form and fee if the licensee has not been selected for audit.

(d) The audit process shall be as follows.

(1) The board shall select for audit a random sample of licensees for each renewal month. Audit forms shall be sent to the selected licensees at the time the renewal notice is mailed.

(2) All licensees selected for audit will furnish documentation such as official transcripts, certificates, diplomas, agendas, programs, or an affidavit identifying the continuing education experience satisfactory to the board, to verify proof of having earned the continuing education hours listed on the continuing education report form. The documentation must be provided at the time the renewal form is returned to the board.

(3) Failure to timely furnish this information or knowingly providing false information during the audit process or the renewal process are grounds for disciplinary action against the licensee.

(e) A licensee who has failed to complete the requirements for continuing education may be granted a 90-day extension to the continuing education period by the executive secretary.

(1) The request for an extension of the continuing education period must be made in writing prior to the expiration of the license.

(2) A subsequent continuing education period shall end one year from the date the previous continuing education period expired, not the date of the end of the extension period.

(3) Credit earned during the extension period may only be applied to the previous continuing education period.

(4) A person who fails to complete continuing education requirements for renewal holds an expired license and may not use the titles "licensed dietitian" or "provisional licensed dietitian" during the extension period.

(5) A license may be renewed upon completion of the required continuing education within the given extension period, submission of the license renewal form, and payment of the applicable late renewal fee.

(f) A person who fails to complete continuing education requirements for renewal and failed to request an extension to the continuing education period may not renew the license. The person may obtain a new license by complying with the current requirements and procedures for obtaining a license.

(g) Continuing education undertaken by a licensee for renewal shall be acceptable if the experience falls in one or more of the following categories:

(1) academic courses related to dietetics;

(2) clinical courses related to dietetics;

(3) in-service educational programs, training programs, institutes, seminars, workshops, and conferences in dietetics;

(4) self-study modules;

(5) instructing or presenting continuing education programs or activities that were offered or approved by the Commission on Dietetic Registration or its agents. Multiple presentations of the same programs only count once;

(6) acceptance and participation in poster sessions offered by a nationally recognized professional organization in the dietetics field or its state equivalent organization. Participation will be credited one hour for six poster sessions with a maximum of two clock hours for 12 poster sessions;

(7) books or articles published by the licensee in relevant professional books and refereed journals. A minimum of three continuing education hours will be credited for the publication; or

(8) self-study of professional materials that include self-assessment examinations. Three hours maximum will be credited for self study.

(h) Activities unacceptable as continuing education for which the board may not grant continuing education credit are:

(1) education incidental to the regular professional activities of a licensee such as learning occurring from experience or research;

(2) professional organization activity such as serving on committees or councils or as an officer;

(3) any continuing education activity completed before or after the period of time described in subsection (b)(1) or (e) of this section;

(4) activities described in subsection (g) of this section which exceed the maximum allowed or which have been completed more than once during the continuing education period;

(5) performance of duties that are job duties or requirements; or

(6) participation in conference exhibits.

(i) Continuing education experiences shall be credited as follows.

(1) Completion of course work at or through an accredited college or university shall be credited for each semester hour on the basis of six clock hours of credit for each semester hour successfully completed for credit or audit.

(2) An activity which meets the criteria of subsection (g)(2) or (3) of this section shall be credited on a one-for-one basis with one clock hour credit for each clock hour spent in the continuing education experience.

(j) The continuing education committee may determine whether continuing education activities fit within the descriptions of this section.

(k) Any licensee attaining the age of 60 years who is not in the active practice of dietetics shall have the continuing education requirements waived upon the licensee's request.

(l) The continuing education requirement will begin upon first renewal. Each subsequent renewal will require documentation of the continuing education experience.

§711.19. Informal Disposition.

(a) Informal disposition of any complaint or contested case involving a licensee or an applicant for licensure may be made through an informal settlement conference held to determine whether an agreed settlement order may be approved.

(b) If the executive secretary or the complaints committee of the board determines that the public interest might be served by attempting to resolve a complaint or contested case by an agreed order in lieu of a formal hearing, the provisions of this section shall apply. A licensee or applicant may request an informal settlement conference; however, the decision to hold a conference shall be made by the executive secretary or the complaints committee.

(c) An informal conference shall be voluntary. It shall not be a prerequisite to a formal hearing.

(d) The executive secretary shall decide upon the time, date and place of the settlement conference and provide written notice to the licensee or applicant of the same. Notice shall be provided no less than ten days prior to the date of the conference by certified mail, return receipt requested, to the last known address of the licensee or applicant or by personal delivery. The ten days shall begin on the date of mailing or delivery. The licensee or applicant may waive the ten-day notice requirement.

(1) The notice shall inform the licensee or applicant of the following:

(A) the nature of the alleged violation;

(B) that the licensee may be represented by legal counsel;

(C) that the licensee or applicant may offer the testimony of witnesses and present other evidence as may be appropriate;

(D) that a committee member may be present;

(E) that the board's legal counsel or a representative of the Office of the Attorney General will be present;

(F) that the licensee's or applicant's attendance and participation is voluntary;

(G) that the complainant and any client involved in the alleged violations may be present; and

(H) that the settlement conference shall be cancelled if the licensee or applicant notifies the executive secretary that he or she or his or her legal counsel will not attend.

(2) A copy of the board's rules concerning informal disposition shall be enclosed with the notice of the settlement conference.

(e) The notice of the settlement conference shall be sent by certified mail, return receipt requested, to the complainant at his or her last known address or personally delivered to the complainant. The complainant shall be informed that he or she may appear and testify or may submit a written statement for consideration at the settlement conference. The complainant shall be notified if the conference is cancelled.

(f) A member of the complaints committee may be present at a settlement conference.

(g) The settlement conference shall be informal and shall not follow the procedures established in this chapter for contested cases and formal hearings.

(h) The licensee, the licensee's attorney, committee member, and board staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(i) The board's legal counsel shall attend each settlement conference. The board member or executive secretary may call upon the attorney at any time for assistance in the settlement conference.

(j) The licensee shall be afforded the opportunity to make statements that are material and relevant.

(k) Access to the board's investigative file may be prohibited or limited in accordance with the APA, and the Public Information Act, Texas Government Code, Chapter 552.

(l) At the discretion of the executive secretary or the committee member, a tape recording may be made of none or all of the settlement conference.

(m) The committee member or the executive secretary shall exclude from the settlement conference all persons except witnesses during their testimony, the licensee, the licensee's attorney, and board staff.

(n) The complainant shall not be considered a party in the settlement conference but shall be given the opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(o) At the conclusion of the settlement conference, the committee member or executive secretary may make recommendations for informal disposition of the complaint or contested case. The recommendations may include any disciplinary action authorized by the Act. The committee member or executive secretary may also conclude that the board lacks jurisdiction, conclude that a violation of the Act or this chapter has not been established, order that the investigation be closed, or refer the matter for further investigation. The committee member or executive secretary may also refer the matter for further investigation.

(p) The licensee or applicant may either accept or reject at the conference the settlement recommendations. If the recommendations are accepted, an agreed settlement order shall be prepared by the board office or the board's legal counsel and forwarded to the licensee or applicant. The order shall contain agreed findings of fact and conclusions of law. The licensee or applicant shall execute the order and return the signed order to the board office within 10 days of his or her receipt of the order. If the licensee or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the settlement recommendations.

(q) If the licensee or applicant rejects the proposed settlement, the matter shall be referred to the executive secretary for appropriate action.

(r) If the licensee or applicant signs and accepts the recommendations, the agreed order shall be submitted to the entire board for its approval. Placement of the agreed order on the board agenda shall constitute only a recommendation for approval by the board.

(s) The identity of the licensee or applicant shall not be made available to the board until after the board has reviewed and accepted the agreed order unless the licensee or applicant chooses to attend the board meeting. The licensee or applicant shall be notified of the date, time, and place of the board meeting at which the proposed agreed order will be considered. Attendance by the licensee or applicant is voluntary.

(t) Upon an affirmative majority vote, the board shall enter an agreed order approving the accepted settlement recommendations. The board may not change the terms of a proposed order but may only approve or disapprove an agreed order unless the licensee or applicant is present at the board meeting and agrees to other terms proposed by the board.

(u) If the board does not approve a proposed agreed order, the licensee or applicant and the complainant shall be so informed. The matter shall be referred to the executive secretary for other appropriate action.

(v) A proposed agreed order is not effective until the full board has approved the agreed order. The order shall then be effective in accordance with APA, §2001.144.

(w) A licensee's opportunity for an informal conference under this section shall satisfy the requirement of the APA, §2001.054(c).

(1) If the executive secretary or complaints committee determines that an informal conference shall not be held, the executive secretary shall give written notice to the licensee or applicant of the facts or conduct alleged to warrant the intended disciplinary action and the licensee or applicant shall be given the opportunity to show, in writing and as described in the notice, compliance with all requirements of the Act and this chapter.

(2) The complainant shall be sent a copy of the written notice. The complainant shall be informed that he or she may also submit a written statement to the board office.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2000.

TRD-200008025
Patricia Mayers Krug
Chair
Texas State Board of Examiners of Dietitians
Effective date: December 7, 2000
Proposal publication date: May 26, 2000
For further information, please call: (512) 458-7236

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22 TAC §711.15

The repeal is adopted under the Texas Occupations Code, §701.151 and §701.152 which provides the Board with the authority to make and enforce rules reasonably required in the exercise of its general powers and 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 November 17, 2000.

TRD-200008026

Patricia Mayers Krug
Chair
Texas State Board of Examiners of Dietitians
Effective date: December 7, 2000
Proposal publication date: May 26, 2000
For further information, please call: (512) 458-7236

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22 TAC §711.15

The new section is adopted under the Texas Occupations Code, §701.151 and §701.152 which provides the Board with the authority to make and enforce rules reasonably required in the exercise of its general powers and jurisdiction.

§711.15. Formal Hearings.

(a) Notice requirements.

(1) Notice of the hearing shall be given according to the notice requirements of APA.

(2) If a party fails to appear or be represented at a hearing after receiving notice, the Administrative Law Judge may proceed with the hearing or take whatever action is fair and appropriate under the circumstances.

(3) All parties shall timely notify the Administrative Law Judge of any changes in their mailing addresses.

(b) Right to counsel.

(1) Each party to a contested case has a right to the assistance of counsel.

(2) A party may expressly waive the right to assistance of counsel.

(c) Prehearing conferences.

(1) In a contested case, the Administrative Law Judge, on his own motion or the motion of a party, may direct the parties to appear at a specified time and place for a conference prior to the hearing for the purpose of:

(A) the formulation and simplification of issues;

(B) the necessity or desirability of amending the pleading;

(C) the possibility of making admissions or stipulations;

(D) the procedure at the hearing;

(E) specifying the number of witnesses;

(F) the mutual exchange of prepared testimony and exhibits;

(G) the designation of parties; and

(H) other matters which may expedite the hearing.

(2) The Administrative Law Judge may have the minutes of the conference recorded in an appropriate manner and shall issue whatever orders are necessary covering the said matters or issues.

(3) Any action taken at the prehearing conference may be reduced to writing, signed by the parties, are made a part of the record.

(d) Assessing the cost of a court reporter and the record of the hearing.

(1) In the event a court reporter is utilized in the making of the record of the proceedings, the board shall bear the cost of the per diem or other appearance fee for such reporter.

(2) The board may prepare or order the preparation of a transcript (statement of facts) of the hearing upon the written request of any party. The board may pay the cost of the transcript or assess the cost to one or more parties.

(3) In the event a final decision of the board is appealed to the district court wherein the board is required to transmit to the reviewing court a copy of the record of the hearing proceeding, or any part thereof, the board may require the appealing party to pay all or part of the cost of preparations of the original or a certified copy of the record of the board proceedings that is required to be transmitted to the reviewing court.

(e) Disposition of case. Unless precluded by law, informal disposition may be made of any contested case by agreed settlement order or default order.

(f) Agreements in writing. No stipulation or agreement between the parties with regard to any matter involved in any proceeding shall be enforced unless it shall have been reduced to writing and signed by the parties or their authorized representatives, dictated into the record during the course of a hearing, or incorporated in an order bearing their written approval. This rule does not limit a party's ability to waive, modify, or stipulate away any right or privilege afforded by these sections.

(g) Final orders or decisions.

(1) The final order or decision will be rendered by the board. The board is not required to adopt the recommendation of the Administrative Law Judge and may take action as it deems appropriate and lawful.

(2) All final orders or decisions shall be in writing and shall set forth the findings of fact and conclusions required by law.

(3) All final orders shall be signed by the executive secretary and the chairman of the board; however, interim orders may be issued by the Administrative Law Judge.

(4) A copy of all final orders and decisions shall be timely provided to all parties as required by law.

(h) Motion for rehearing. A motion for rehearing shall be governed by APA, Texas Government Code, §2001.146, and shall be addressed to the board and filed with the executive secretary.

(i) Appeals. All appeals from final board orders or decisions shall be governed by APA, Subchapter G, Texas Government Code, and communications regarding any appeal shall be submitted to the executive secretary.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2000.

TRD-200008027
Patricia Mayers Krug
Chair
Texas State Board of Examiners of Dietitians
Effective date: December 7, 2000
Proposal publication date: May 26, 2000
For further information, please call: (512) 458-7236

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 295. OCCUPATIONAL HEALTH

SUBCHAPTER H. HAZARDOUS CHEMICAL RIGHT-TO-KNOW

25 TAC §§295.181-295.183

The Texas Department of Health (department) adopts amendments to §§295.181- 295.183, concerning the requirements for facility operators to provide information on hazardous chemicals at their facilities to the department, local fire departments, and local emergency planning committees (LEPCs) for the purposes of emergency planning and response and the public's right to know about hazardous chemicals in their communities. These amendments are adopted without changes to the proposed text as published in the September 22, 2000, issue of the *Texas Register* (25 Tex Reg 9409), and therefore the sections will not be republished.

Amended §§295.181-295.183 establish standards for filing fees and reporting facility information on hazardous chemical inventory reports (Tier Two forms) that are required to be submitted to the department under both the federal Emergency Planning and Community Right-to-Know Act (EPCRA) and the Health and Safety Code, Chapters 505 (Manufacturing Facility Community Right-to-Know Act), 506 (Public Employer Community Right-to-Know Act), and 507 (Nonmanufacturing Facilities Community Right-to-Know Act).

Amended §§295.181-295.183 each provide an amended definition for "facility" and a new definition for "latitude and longitude." Amended §§295.181(d)(17)(C), 295.182(d)(17)(C) and 295.183(d)(17)(C) specify standards for reporting latitude and longitude. Amended §295.182(h)(3)(D) and §295.183(g)(3)(D) remove expiration dates on provisions that established "consolidation caps," which are the maximum number of required submissions that may be consolidated under a single filing fee. As a result of amended §295.182 and §295.183, the consolidation cap of seven required submissions per single filing fee will continue to apply to both public employers and nonmanufacturers, respectively.

No comments were received regarding the proposal during the comment period.

The amendments are adopted under the Health and Safety Code, §§505.016, 506.017, and 507.013, which provide the Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapters 505, 506, and 507; and the Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2000.

TRD-200008097
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: December 10, 2000
Proposal publication date: September 22, 2000
For further information, please call: (512) 458-7236

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PART 8. INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

CHAPTER 621. EARLY CHILDHOOD INTERVENTION

SUBCHAPTER B. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

25 TAC §621.22

The Interagency Council on Early Childhood Intervention (ECI) adopts an amendment to §621.22, concerning Definitions, without changes to the proposed text as published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7462) and will not be republished .

This section amends the definition for "Parent". In review of the Texas Interagency Council on Early Childhood Intervention annual application for funding, the United States Department of Education, Office of Special Education Programs required immediate changes in ECI Rule and policies and procedures.

Elsewhere in this issue of the *Texas Register*, the ECI contemporaneously publishes a renewal of effectiveness for the emergency amendment to §621.22. The emergency was previously published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7443). The renewal is for a period of 20 days at which point this adoption will supercede the emergency.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Chapter 73, which authorizes the Interagency Council on Early Childhood Intervention to establish rules regarding services provided for children with developmental delays.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2000.

TRD-200008088
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Effective date: December 10, 2000
Proposal publication date: August 11, 2000
For further information, please call: (512) 424-6750

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SUBCHAPTER C. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

25 TAC §621.42

The Interagency Council on Early Childhood Intervention (ECI) adopts an amendment to §621.42, concerning Early Childhood Intervention Council Procedures for Resolving Complaints without changes to the proposed text as published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7464) and will not be republished.

This section amends §621.42(d)(6) by adding the following new language: "In resolving a complaint in which it finds a failure to provide appropriate services, the executive director will remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and appropriate future provision of services for all infants and toddlers with disabilities and their families". Current §621.42(d)(6) was renumbered to new paragraph (7).

Elsewhere in this issue of the *Texas Register*, the ECI contemporaneously publishes a renewal of effectiveness for the emergency amendment to §621.42. The emergency was previously published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7445). The renewal is for a period of 20 days at which point this adoption will supercede the emergency.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Chapter 73, which authorizes the Interagency Council on Early Childhood Intervention to establish rules regarding services provided for children with developmental delays.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 2000.

TRD-200008089
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Effective date: December 10, 2000
Proposal publication date: August 11, 2000
For further information, please call: (512) 424-6750

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER N. RESIDENTIAL PROPERTY INSURANCE MARKET ASSISTANCE PROGRAM

DIVISION 2. PLAN OF OPERATION

28 TAC §5.9416

The Commissioner of Insurance adopts amendments to §5.9416 concerning forms promulgated for use in the Residential Property Insurance Market Assistance Program (MAP). The amendments to §5.9416 are adopted without changes to the text published in the September 29, 2000, issue of the *Texas Register* (25 TexReg 9860) and will not be republished.

Article 21.49-12 was enacted by the Texas Legislature in 1995 to require the Commissioner to establish a voluntary market assistance program to assist consumers in obtaining residential property insurance coverage in underserved areas that are determined and designated by the Commissioner. The purpose of the MAP is to provide a fair, efficient, and economical voluntary mechanism to assist Texas consumers in obtaining residential property insurance in designated underserved areas of the state, including rural areas. Form TMAP-10, which is adopted by reference in §5.9416, is used in applying for homeowners and dwelling coverage. The adopted amendments to Form TMAP-10 are necessary to delete the applicant's authorization because the confidentiality requirements in Article 21.49-12 §5 were repealed by Senate Bill 324, to change the reference from "key rate" as a rating factor to "public protection classification codes", and to delete references to farm and ranch and farm and ranch owners policies because of statutory changes enacted by Senate Bill 323. The amendments to §5.9416 also adopted new Form TMAP-10A that is to be used for applicants who are applying for coverage through the MAP for mobile homes. The new form is necessary to provide participating insurers with needed information for determining the proper quote on a mobile home risk.

Applicant's Authorization. Article 21.49-12, §2(b) of the Insurance Code requires the use of applications for assistance to apply for coverage through the MAP. The department amends Form TMAP-10 to delete the applicant's authorization because the confidentiality requirements have been repealed. Under new procedures that became effective June 26, 2000, the MAP application process can now be handled directly by department staff without requiring MAP applications to be submitted through an originating agent. The applicant's authorization on the application form is no longer necessary because the confidentiality requirements in Article 21.49-12, §5, which provided that the department shall maintain as confidential all application files and related documents received under Article 21.49-12, except to certain specified persons and entities was repealed by S.B. 324. The confidentiality requirements in Article 21.49-12 were repealed because such requirements greatly impeded the department staff's efforts to assist applicants with completion of their applications over the phone.

Farm and Ranch Coverage Not Included in Residential Property Insurance. Senate Bill 323 specifies that residential property insurance does not include farm and ranch and farm and ranch owners coverages and that MAP will no longer assist homeowners in underserved areas in obtaining farm and ranch coverages because they are now defined as commercial coverages. The department adopts amendments to Form TMAP-10 to delete the farm and ranch and farm and ranch owners policies.

New Form TMAP-10A--Supplement to Texas MAP Application is to be used for applicants who are applying for coverage through the MAP for mobile homes. The new form is necessary to implement Article 21.49-12 §2(b)(1)-(2). Article 21.49-12 §2(b) requires the use of applications for assistance to apply for coverage through the MAP. The adopted form will make it easier and more efficient for participating insurers to obtain needed information for determining the proper quote on a mobile home risk. Currently, the MAP application form does not request information that is specifically tailored for the quoting of mobile home risks. The new form requests information on the stationary status of the mobile home; the year, size, model, identification number, purchase price, and manufacturer of the mobile home; whether there is protective siding; and whether the mobile home is parked inside a mobile home park. The new form also requests information on the types of structures attached to the mobile home (i.e., porch, carport, and additions such as living area, bedroom, bathroom and other) and the length and width of these attached structures.

No position: Texas Manufactured Housing Association.

Comment: A commenter expressed concern that manufactured housing might not be eligible for the MAP. This concern arose from the fact that Form TMAP-10A uses the term "mobile home" and makes no reference to manufactured housing.

Staff's Response to Comment: Staff wishes to clarify that manufactured housing is eligible for the MAP and that it was Staff's intent that the term mobile home be defined to include manufactured housing.

The amendments are adopted pursuant to the Insurance Code Article 21.49-12 and §36.001. Article 21.49-12, §1(a) provides that residential property insurance shall be provided through the MAP under a homeowners policy and a residential fire and allied lines policy. Article 21.49-12, §2(b)(1)-(2) requires the use of applications for assistance to apply for coverage through the MAP. Article 21.49-12, §2(b)(4) provides that each insurer has the option of providing a premium quote to MAP applicants using the insurer's own underwriting guidelines and rates determined in accordance with the provisions of the Insurance Code applicable to each insurer. Article 21.49-12, §8 authorizes the Commissioner to adopt rules in addition to the plan of operation that are appropriate to accomplish the purposes of Article 21.49-12. Section 36.001 authorizes the Commissioner of Insurance to adopt rules for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by statute.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2000.

TRD-200008013
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 6, 2000
Proposal publication date: September 29, 2000
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 39. PUBLIC NOTICE

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §39.15, Public Notice Not Required for Certain Types of Applications; §39.251, Application for Injection Well Permit; and §39.651, Application for Injection Well Permit. Sections 39.15, 39.251, and 39.651 are adopted *without changes* to the proposed text as published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7485) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On September 29, 1999, the executive director received a petition for rulemaking from the Texas Chemical Council (TCC) requesting a change to §39.251 that would amend the mailed notice requirement for new permits, major amendments, renewal applications, and public hearings to owners of mineral rights near permitted Class I underground injection wells. The petition requested that the current notice requirement for mailed notice to mineral rights owners within the cone of influence be changed to require mailed notice only to those persons who own mineral rights which underlie the existing or proposed injection well facility and which underlie the tracts of land adjacent to the well facility. In addition to §39.251, staff identified two additional sections, §39.15 and §39.651, that would require conforming modification.

In response to this petition, the commission's staff held two stakeholder meetings to receive input regarding how to best amend §§39.15, 39.251, and 39.651. Representatives from industry, environmental organizations, and the commission's office of Public Interest Counsel were invited to participate. As a result of the input received during this process, the adopted rules will change not only the mailed notice requirements but also the published notice requirements for Class I underground injection wells. The adopted amendments do not apply to mailed or published notice requirements for Class III injection wells or for permitted Class V injection wells.

The existing rules for Class I underground injection wells require notice to be mailed to mineral rights owners who own mineral rights within the cone of influence of an injection well. The adopted rules will require notice of applications for new permits, major amendments, renewal applications, and public hearings to mineral rights owners beneath the injection well site and beneath the adjacent properties near permitted Class I underground injection wells. The adopted rules clarify and make explicit the existing requirement that mailed notice be sent to owners of the property on which the injection well is located, if different from the applicant, as well as to owners of land adjacent to the property on which the injection well is located. The existing notice requirements for Class I underground injection control (UIC) permit applications do not specify the size of the notices or the location of the notices in the newspaper. The adopted provisions require that the notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and be located in the section of the newspaper containing state or local news items.

Chapter 39, Public Notice, provides the procedural requirements for issuance of public notice of environmental permitting actions pending before the commission. The adopted amendments alter the mailed and published notice requirements to mineral rights

owners for Class I underground injection well permit applications and hearings. The previously existing rules require the commission's chief clerk to mail notice of UIC permit applications and hearings to mineral rights owners within the cone of influence of the injection well. When the current rules were originally adopted (See 21 TexReg 12550, December 27, 1996) it was the first time that the cone of influence definition was used in the rules in the context of determining what mineral rights might be impaired by an injection well.

An injection well is used for the subsurface emplacement of fluids. The cone of influence is defined as the potentiometric surface area around the injection well within which increased injection zone pressures caused by injection of wastes would be sufficient to drive fluids into an underground source of drinking water (USDW) or freshwater aquifer. The Texas Water Code (TWC), §27.015 provides extensive procedures to assure that known oil or gas reserves are not endangered and that water supplies are not contaminated by the operation of an injection well.

Depending on the geology of the subsurface injection zone and the volume of waste to be injected, the cone of influence may extend several miles from the well bore. The commission now believes that the term was improperly applied and created too great of a financial burden on the commission and on the regulated community in cases where there are large cones of influence. It was not evident at the time of enactment of the previously existing rules that the provision had the potential to require that notice be mailed to thousands of individuals within the cone of influence of an injection well. The adopted rules are more effective in providing notice to the mineral interests most likely to be affected by an injection well; that is, mineral interests underlying or adjacent to the injection well facility.

There is no requirement to provide notice to mineral rights owners near the injection wells under federal law. However, there are state law requirements under TWC, §27.018 and §27.051, which provide notice to persons affected by underground injection disposal wells. This would include mineral rights owners if their mineral rights would be impaired. Notice by publication is a more efficient method of notifying thousands of potentially affected persons of a permit application.

Providing mailed notice to all mineral rights owners within the cone of influence has presented a financial burden for some applicants where a large cone of influence is associated with the injection well. The applicant must currently research the deed records for every land owner adjacent to the injection well facility and every mineral rights owner within the cone of influence of the injection well. The applicant must then provide the landowner and mineral rights owner lists to the commission for each new UIC permit application, major amendment, permit renewal application, or public hearing. For injection well applicants with a large cone of influence associated with the injection well, applicants have reported costs ranging from $20,000 to $110,000 to research and identify mineral rights owners within the cone of influence of their injection wells. Applicants for UIC permits have reported finding up to 20,000 mineral rights owners requiring notification for a single injection well facility.

The commission's UIC permitting program and the chief clerk's office are also burdened when thousands of people are to receive mailed notice. The UIC permitting program must assure that the mailing lists are correctly formatted, that is, each name and address must be typed in a format that meets the United States Postal Service requirements for machine readability. Additionally, the chief clerk is required to process the mailings. The $50 notice fee received from the applicant is often grossly inadequate to cover the commission's expenses for processing and mailing the notice required under the existing rules.

For an injection well applicant where there is a small cone of influence associated with the injection well, the adopted rules may require the applicant to research and identify more mineral rights owners than required under the existing rules. In this case, the commission would have to process more notices than are currently required. The commission adopts the rule amendments because they are a good compromise between the injection well applications involving large and small cones of influence, and are still protective of human health and safety and the environment. Overall, the amended rules, as adopted, will still provide adequate notice to interested persons while reducing the administrative and financial burden on the regulated community and the commission.

The commission may not issue underground injection well permits unless the Railroad Commission of Texas (RRC) has determined that the well will not impair oil and gas interests. Texas Water Code, §27.015, requires an applicant to obtain a letter from the RRC stating that drilling or using the disposal well and injecting industrial and municipal waste into the subsurface stratum will not endanger or injure any known oil or gas reservoir. The executive director does not declare an application to be technically complete until the RRC letter has been filed.

This rulemaking is not intended to decrease the opportunity for public participation. The adopted rules require more visible and accessible published notices. For hazardous waste facilities, the current rules require notice by radio broadcast as well. These methods of providing notice to very large numbers of people are considered to be more efficient and economical for the regulated community and for the commission. The adopted rules specify an enhanced newspaper publication of notice which requires the applicant to publish notice that is at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and in the section of the newspaper containing state or local news items. This enhanced publication requirement will significantly increase the visibility of the notice, thereby providing a better opportunity for public participation.

Under the Chapter 39 amendments adopted recently to implement House Bill 801, 76th Texas Legislature, 1999, which was effective September 1, 1999, applicants are required to publish an additional notice earlier in the application process which was not previously required. Additionally, any person may ask to be added to the mailing list for a permit application. Any person may also request to be placed on a county-wide mailing list to receive notice of any permit application in a particular county.

SECTION BY SECTION DISCUSSION

Section 39.15, Public Notice Not Required for Certain Types of Applications, is amended. These adopted amendments provide that for voluntary transfers of Class I UIC permits, the chief clerk shall mail notice to persons who own mineral rights underlying the existing or proposed injection well facility and underlying the tracts of land adjacent to the property on which the injection well facility is located, rather than to all mineral rights owners within the cone of influence. The adopted rules also clarify and make explicit the existing requirement that mailed notice be sent to owners of the property on which the injection well is located, if different from the applicant, as well as to owners of land adjacent to the property on which the injection well is located.

Section 39.251, Application for Injection Well Permit, is amended. In §39.251(a), the word "well" is adopted to be substituted for "will" to correct a typographical error. Subsections (d), (e), and (g) concern notices regarding administratively complete applications, draft permits, and hearings. These adopted amendments provide that for Class I underground injection wells, the chief clerk shall mail notice to persons who own mineral rights underlying the existing or proposed injection well facility, and underlying the tracts of land adjacent to the property on which the injection well facility is or will be located, rather than to all mineral rights owners within the cone of influence. Additionally, the adopted rules clarify and make explicit the existing requirement that mailed notice be sent to owners of the property on which the injection well is located, if different from the applicant, as well as to owners of land adjacent to the property on which the injection well is located. Section 39.251(e) and (g) is also amended to specify that the published notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and that the notice appear in the section of the newspaper containing state or local news items. The amended language includes appropriate grammatical changes. In addition, §39.251 is amended to clarify existing requirements that published notices must be in a form approved by the executive director and that approval must be obtained prior to the publication.

Section 39.651, Application for Injection Well Permit, is amended. Subsections (c), (d), and (f) concern notices regarding receipt of application and intent to obtain permit, application and preliminary decision, and notice of contested case hearing. These amendments provide that for Class I underground injection wells, the chief clerk shall mail notice to persons who own mineral rights underlying the existing or proposed injection well facility, and underlying the tracts of land adjacent to the property on which the injection well facility is or will be located, rather than to all mineral rights owners within the cone of influence. Additionally, the adopted rules clarify and make explicit the existing requirement that mailed notice be sent to owners of the property on which the injection well is located, if different from the applicant, as well as to owners of land adjacent to the property on which the injection well is located. New §39.651(c)(6) is added, and subsections (d)(1) and (f)(2) are amended to specify that, in addition to existing notice requirements, for Class I wells, the published notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and that the notice appear in the section of the newspaper containing state or local news items. Subsection (f)(2)(A) is also amended to specify that this subsection concerns facilities other than hazardous waste facilities. In addition, §39.651 is amended to clarify existing requirements that published notices must be in a form approved by the executive director and that approval must be obtained prior to the publication.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rules change the cost of providing notice, increasing the cost to some applicants and reducing the cost to others. The adopted amendments are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs in the state or a sector of the state. In addition, §2001.0225 applies only to a major environmental rule, the result of which is to exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking does not meet any of these four applicability requirements of Texas Government Code, §2001.0225(a)(1) - (4). There is a state law requirement to provide notice to persons affected by underground injection disposal wells. This would include mineral rights owners if their mineral rights would be impaired. The adopted amendments do not exceed a standard set by federal law nor exceed an express requirement of state law. There is no requirement to provide notice to mineral rights owners near the injection wells under federal law. There is a state law requirement to provide notice to persons affected by underground injection disposal wells. However, the adopted rules do not exceed this state requirement. In addition, the adopted amendments do not exceed a requirement of a delegation agreement nor are the rules proposed solely under the general powers of the agency, rather they implement TWC, §§27.018(b), 27.019, and 27.051.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. This action does not create a burden on private real property. The specific purpose of the rules is to change mailed notice requirements that have proven to be burdensome and unworkable both to the commission and to the regulated community. The existing requirement to mail notice to mineral rights owners within the cone of influence of an injection well is not based on any federal requirement. However, state statute TWC, §27.018, requires affected persons to be notified and this could include mineral rights owners if their mineral rights would be impaired. Texas Water Code, §27.051(a)(2), also requires that mineral rights not be impaired. The commission adopts amendments to §§39.15, 39.251, and 39.651. This will modify the mailed and published notice requirements for UIC permit applications and mailed notice of hearings. The adopted provisions will require mailed notice to persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant, land owners adjacent to the property on which the existing or proposed injection well facility is or will be located, persons who own mineral rights underlying the existing or proposed injection well facility, and persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

The adopted notice amendments require that the published notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and be located in the section of the newspaper containing state

or local news items. The existing published notice requirements for UIC applications do not specify the size and location of the notice, therefore, the adopted rules will likely result in more potentially affected persons receiving notice.

Promulgation and enforcement of these rules will not burden private real property because the adopted rules only involve changes to notice requirements. The adopted amendments change the notice requirements but the result is not less stringent because the proposed provisions sometimes increase and sometimes decrease the number of mineral rights owners who receive mailed notice. The existing requirement to mail notice to mineral rights owners within the cone of influence of an injection well is not based on any federal requirement. However, state statute requires mineral rights not be impaired by injection well operations. No other exemption in Private Real Property Rights Preservation Act under Texas Government Code, Chapter 2007, applies to this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that the rules are not identified in Coastal Coordination Act, Texas Natural Resources Code, §33.2053(f). Therefore, the rulemaking is not subject to the Texas Coastal Management Program.

PUBLIC HEARING AND COMMENTERS

A public hearing on the proposed amendments was scheduled for September 6, 2000 and the opportunity to present an oral statement was afforded on that date. However, no one requested to make a statement and the hearing was not convened. The comment period for this rulemaking was closed on September 11, 2000.

The following commenters submitted written comments in general support of this rulemaking: B P Amoco, Huntsman Polymers Corporation, International Specialty Products, Sterling Chemicals, Subsurface Technology Inc., TCC, and the United States Environmental Protection Agency (EPA).

ANALYSIS OF TESTIMONY

B P Amoco, Huntsman Polymers Corporation, International Specialty Products, Sterling Chemicals, Subsurface Technology Inc., and the TCC were all in general support of these rule amendments.

The commission appreciates the general support shown for these amendments by the regulated community. No changes to the rules were proposed by these commenters. No changes were made to the rules based on these comments.

The EPA commented that the rule amendments will not reduce public participation requirements below those required by federal regulation and would constitute a nonsubstantial revision to the approved UIC program.

The commission appreciates the comments by the EPA. No changes were made to the rules based on these comments.

SUBCHAPTER A. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.15

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission 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 authorizes the commission to establish and approve all general policy of the commission by rule; §27.018(b), which requires the commission by rule to provide notice of the opportunity to request a public hearing on an injection well permit application which includes defining who is an "affected person"; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.051, which requires the commission, when issuing an injection well permit, to find that no existing rights including, but not limited to, mineral rights be impaired; and Texas Health and Safety Code, §361.024, which provides the commission the authority to adopt rules and establish minimum standards of operation for the management and control of solid waste under this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2000.

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-4712

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SUBCHAPTER E. PUBLIC NOTICE OF OTHER SPECIFIC APPLICATIONS

30 TAC §39.251

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission 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 authorizes the commission to establish and approve all general policy of the commission by rule; §27.018(b), which requires the commission by rule to provide notice of the opportunity to request a public hearing on an injection well permit application which includes defining who is an "affected person"; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.051, which requires the commission, when issuing an injection well permit, to find that no existing rights including, but not limited to, mineral rights be impaired.

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SUBCHAPTER L. PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

30 TAC §39.651

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission 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 authorizes the commission to establish and approve all general policy of the commission by rule; §27.018(b), which requires the commission by rule to provide notice of the opportunity to request a public hearing on an injection well permit application which includes defining who is an "affected person"; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.051, which requires the commission, when issuing an injection well permit, to find that no existing rights, including but not limited to, mineral rights be impaired.

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 311. WATERSHED PROTECTION

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §311.6, Allowable Storm Water Runoff and Certain Non-Storm Water Discharges; §311.16, Allowable Storm Water Runoff and Certain Non-Storm Water Discharges; and §311.56, Allowable Storm Water Runoff and Certain Non-Storm Water Discharges. Sections 311.6, 311.16, and 311.56 are adopted *with changes* to the proposed text as published in the August 25, 2000, issue of the *Texas Register* (25 TexReg 8322).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Chapter 311 provides that the disposal of wastewater within defined watersheds, or water quality areas, is either prohibited or is allowed only under certain conditions. Current Subchapters A and B prohibit all discharges within the Lakes Travis and Austin Water Quality Areas and Lakes Inks and Buchanan Water Quality Areas, respectively, except for discharges from sewage treatment facilities that meet a defined level of effluent quality. Current Subchapter F prohibits discharges into or adjacent to water in the state within the Lakes Lyndon B. Johnson and Marble Falls Water Quality Areas except for discharges from treatment facilities that meet a defined level of effluent quality.

The commission received authority from the United States Environmental Protection Agency (EPA) to administer the Texas pollutant discharge elimination system (TPDES) program on September 14, 1998. Although the commission has not previously operated a separate state storm water permitting program, the current requirements in Subchapters A, B, and F could be interpreted to restrict the development and issuance of TPDES storm water permits within these watersheds. The commission is adopting revisions to these subchapters to allow the discharge of storm water runoff and certain other non-storm water discharges if authorized by a TPDES permit. The TPDES discharge permits are currently being developed to authorize storm water and certain non-storm water discharges throughout the state. The adopted new sections would allow the issuance of these permits within the specified watersheds. The commission is also adopting revisions to the new sections which recognize that these rules do not prohibit these same discharges within the specific watersheds under a federal national pollutant discharge elimination system (NPDES) permit.

The discharge of storm water runoff and certain other non-storm water discharges are currently authorized in the federal NPDES storm water permit program. The commission could choose to be more stringent in the TPDES program than the EPA is in the NPDES program, by imposing a blanket prohibition on all such discharges. However, the commission's opinion is that it is environmentally appropriate and economically sound to allow the discharges to continue. These point source storm water and other discharges have been authorized under the NPDES program for several years, and they existed before they were regulated. Continuing the discharges under a regulatory program of individual and general permits is appropriate to ensure that the discharges do not cause an environmental problem. The commission will carefully consider the necessary terms and conditions of each proposed permit before it is issued.

Conversely, to now entirely prohibit these discharges would cause serious economic disruption. Businesses that rely on being able to discharge their storm water and other discharges would have to either find another means of disposing of the water, or shut down their business. Because of the volume of storm water, methods other than discharge would likely be prohibitively expensive. The EPA has issued permits for these discharges based on EPA's finding that the permit conditions maintain water quality. The TPDES program will continue to regulate these discharges to ensure that they do not have an adverse environmental impact. Therefore, the adoption of these rules to enable the commission to continue the NPDES policy authorizing these discharges is appropriate.

SECTION BY SECTION DISCUSSION

Adopted new §§311.6, 311.16, and 311.56 (Allowable Storm Water Runoff and Certain Non-Storm Water Discharges) allow the commission to issue TPDES permits to regulate the discharge of storm water runoff from industrial facilities, municipal separate storm sewer systems, and construction activities into the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson,

and Marble Falls Water Quality Areas. The new rules also allow the commission to issue TPDES permits to regulate the discharge of the following 11 non-storm water discharges into these water quality areas: fire-fighting activities; fire hydrant flushings; potable water sources, including drinking fountain water and water line flushings; uncontaminated air conditioning or compressor condensate; lawn watering and similar irrigation drainage; pavement washdown without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed); routine external building wash down that does not use detergents or other compounds; uncontaminated ground water or spring water; foundation or footing drains where flows are not contaminated with process materials such as solvents; spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and storm water or ground water seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

New §§311.6(a) and (b), 311.16(a) and (b), and 311.56(a) and (b) have been revised from the proposal to clarify that permittees authorized under a federal NPDES permit for the discharges listed in §§311.6(a) and (b), 311.16(a) and (b), and 311.56(a) and (b) may also be allowed to discharge into the specified water quality areas.

New §§311.6(b)(11), 311.16(b)(11), and 311.56(b)(11) have been modified from the proposal to clarify that either discharges of storm water *or* groundwater seepage (rather than storm water *and* groundwater seepage) from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities may be allowed under these rules.

New §§311.6(c), 311.16(c), and 311.56(c) were added since the proposal to clarify that these rules do not restrict the powers of other governmental entities to adopt and enforce local pollution control ordinances.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has made a determination that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Government Code. Comments were solicited on the draft regulatory impact analysis determination; however, no comments were received.

The specific intent of the adopted new sections is to protect the environment by clarifying that, when allowed under a permit or other authorization, these rules do not prohibit storm water and certain non-storm water discharges into the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas. The new sections, however, do not adversely affect 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; therefore, the new sections do not constitute a major environmental rule.

The adopted rules do not adversely affect the economy or a sector of the economy. In actuality, the rules will result in an overall economic savings because without these adopted new sections, these rules could be interpreted to require that all covered discharges would have to be collected and disposed of in some other manner. Any alternative discharge method would be very expensive, and would thus result in an adverse economic impact.

The adopted new sections will not adversely affect productivity because the changes clarify that the discharge of storm water directly into the lakes in the affected water quality areas may be authorized. If the rules were not amended, however, there could be an adverse affect on productivity, competition, and jobs because the rules could be interpreted to require the affected industries to contain and dispose of storm water in some other manner than discharging to water in the state.

The adopted new sections will not aversely affect jobs because the affected industries will be able to discharge storm water in a way that is both economically practical and environmentally safe. If the rules were not amended, there could be a negative impact on jobs because the rules could be interpreted to require the impacted industries to spend resources on collecting and disposing of storm water. If the affected industries were required to collect and treat storm water, there would necessarily be less money to spend on other areas of the business; thus, jobs could be affected.

Additionally, the adopted new sections will not adversely affect competition; in fact, if the rule were not amended, there could be a significant adverse impact on competition. Industries that do not discharge into the affected water quality areas could have a definite competitive advantage over those that do discharge into the water quality areas. Because industries that do not discharge into one of the affected water quality areas will not be required to collect storm water, but the rules could be interpreted to require the same industries that do discharge into affected water quality areas to collect the storm water; those industries that do not discharge into the affected water quality areas could have a definite competitive advantage.

Furthermore, the adopted rules will not adversely affect the environment for two reasons. First, the discharges described in the rules will not add significant concentrations of pollutants to the lakes because the quality of storm water and the certain other non-storm water discharges will be maintained through the TPDES permit or other authorization. Second, storm water is currently being discharged into the affected lakes, under the terms of existing authorizations from the EPA. Under federal law, Texas permits must be at least as stringent as the expiring NPDES permit; thus, these adopted new sections will not degrade the affected water bodies.

The public health and safety of the state will not be adversely affected by the adopted new sections because the new sections only give the agency the authority to authorize storm water discharges. The adopted new sections do not authorize any specific discharge; thus, the new sections will not have an impact on public health and safety.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a final Takings Impact Assessment for these adopted rules under Texas Government Code, §2007.043. The specific purpose of the adopted new sections is to authorize the discharge of storm water and certain types of non-storm water into the water quality areas of Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls.

Promulgation and enforcement of these adopted rules will not affect private real property which is the subject of the rules because the new sections will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in

the market value of the property. First, the new sections enable the commission to authorize discharges of storm water, and certain other kinds of non- storm water, which might otherwise not be authorized. Thus, property owners' use of their property will not be restricted.

Secondly, property values will not be decreased because the new sections will not limit the use of the property. Conversely, if the rules were not amended, property values could decrease because the rules could be interpreted to require industries that discharge into the affected water quality areas to collect and dispose of storm water, and the other authorized non-storm water discharges. The collection and treatment cost would render the property less valuable, thus reducing the property value. Thus, these rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither 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, nor will they affect any action or authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

HEARING AND COMMENTERS

A public hearing on this proposal was scheduled for September 11, 2000 in Austin. No one appeared at the hearing to provide oral testimony. The public comment period closed on September 25, 2000. Three commenters provided written comments on the proposal. The Lower Colorado River Authority (LCRA); Chemical Lime, Ltd. (Chemical Lime); and the City of Houston all provided general comments in support of the proposed revisions. The LCRA and Chemical Lime provided comments that included suggested changes to the rules. These suggested changes are addressed in the Analysis of Testimony section.

ANALYSIS OF TESTIMONY

The LCRA commented that it strongly supports most of the proposed rules along with the stated intent to protect the environment through storm water regulations in the subject water quality areas. Chemical Lime commented that with a few minor exceptions, they strongly support the proposed revisions to Chapter 311. The City of Houston commented that it supports the proposed revisions and strongly agrees with limiting the revisions to Chapter 311 to those subchapters that currently prohibit the permitting of storm water discharges into certain watersheds.

The commission appreciates the support expressed for the proposed changes to Chapter 311.

Chemical Lime commented that §311.6(b)(11) should be revised to be consistent with the language in the EPA's storm water multi-sector general permit for mineral mining and processing facilities that was published in the *Federal Register* on September 29, 1995. Specifically, Chemical Lime commented that §311.6(b)(11) should be revised from "(11) discharges of storm water and groundwater seepage ..." to "(11) discharges of storm water or groundwater seepage..."

The commission agrees with the comment and has made the recommended change in §311.6(b)(11). Additionally, §311.16(b)(11) and §311.56(b)(11), which include the same language, have been changed for consistency.

Chemical Lime commented that the proposed language in both §311.6(a) and (b) should be revised to reference NPDES permits. Chemical Lime requests the revisions to clarify that permittees authorized under an NPDES permit for the discharges listed in §311.6(a) and (b) are allowed to discharge into water quality areas, between the date the proposed rule becomes effective, and the date that the TPDES storm water multi-sector general permit becomes effective.

The commission agrees with the comment and has changed §311.6(a) and (b). The commission has also changed §311.16(a) and (b), and §311.56(a) and (b), which contain the same language, for consistency. The commission determined that the revisions are needed to clarify that if a discharge is authorized under an NPDES permit, and is defined in §§311.6(a), 311.6(b), 311.16(a), 331.16(b), 311.56(a) or 311.56(b), these rules will not prohibit the discharge within the water quality area.

The LCRA commented that it agreed that the rule should be amended to allow discharges from the activities listed in the proposed rules, and that adequate water quality protection for the Highland Lakes would be provided by statewide general permits for 12 of the 14 listed activities. However, LCRA recommended that discharges of storm water runoff from industrial and construction sites should be authorized by a regional general permit. The regional permit would be consistent with compliance standards set out in either the TNRCC's Edwards Aquifer Rules, or LCRA's Lake Travis Nonpoint Source Pollution Control Ordinance. The City of Houston commented that they support the proposed amendments that will authorize the TNRCC to permit storm water discharges and certain non-storm water discharges, and that it is not appropriate to specify discharge parameters. Discharge parameters should be delineated in the permits for those types of discharges, within the chapter.

The commission has not modified the rule based on the LCRA's comments. The proposed rules simply clarify that the discharge of certain types of storm water and non-storm water into the various water quality areas is not prohibited by these rules. The proposed rules do not authorize any specific discharges, nor are the rules a general permit for discharge of any substance.

The LCRA commented that language should be added to the current draft language to ensure that the new Chapter 311 rules will not prevent the enforcement of existing regional storm water runoff ordinances or preempt adoption and enforcement of new water quality regulations. The LCRA suggested that the following language should be added to Subchapter A, §§311.6, 311.16, and 311.56: "(c) Any permits authorized by the TNRCC pursuant to (a) or (b) shall be subject to any ordinances, resolutions or authorizations issued by local governments or political subdivision, including municipalities, counties and river authorities."

The commission agrees with the intent of LCRA's suggestion, that these rules should not be interpreted to supercede any local pollution control measures. Therefore, using slightly different language, the commission has amended §§311.6(c), 311.16(c), and 311.56(c) to clarify that these rules do not restrict the powers of other governmental entities to adopt and enforce local pollution control ordinances.

SUBCHAPTER A. LAKES TRAVIS AND AUSTIN WATER QUALITY

30 TAC §311.6

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103 and §26.011, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code or other laws of this state. Section 26.011 also gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

§311.6. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.

(a) The following discharges of storm water runoff may be authorized by a Texas pollutant discharge elimination system (TPDES) permit or a national pollutant discharge elimination system (NPDES) permit:

(1) storm water runoff from industrial facilities;

(2) storm water runoff from municipal separate storm sewer systems; and

(3) storm water runoff from construction activities.

(b) The following non-storm water discharges may be authorized by a TPDES permit or a NPDES permit:

(1) discharges from fire fighting activities;

(2) discharges from fire hydrant flushings;

(3) discharges from potable water sources, including drinking fountain water and water line flushings;

(4) discharges from uncontaminated air conditioning or compressor condensate;

(5) discharges from lawn watering and similar irrigation drainage;

(6) discharges from pavement wash down without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(7) discharges from a routine external building wash down that do not use detergents or other compounds;

(8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water or groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

(c) Nothing in this subchapter is intended to restrict the powers of the commission or any other governmental entity to prevent, correct, or curtail activities that result or may result in pollution in the water quality area. In addition to the rules of the commission, a TPDES permit applicant may also be required to comply with local pollution control ordinances and regulations.

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. LAKES INKS AND BUCHANAN WATER QUALITY

30 TAC §311.16

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103 and §26.011, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties the Texas Water Code or other laws of this state. Section 26.011 also gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

§311.16. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.

(a) The following discharges of storm water runoff may be authorized by a Texas pollutant discharge elimination system (TPDES) permit or a national pollutant discharge elimination system (NPDES) permit:

(1) storm water runoff from industrial facilities;

(2) storm water runoff from municipal separate storm sewer systems; and

(3) storm water runoff from construction activities.

(b) The following non-storm water discharges may be authorized by a TPDES permit or a NPDES permit:

(1) discharges from fire fighting activities;

(2) discharges from fire hydrant flushings;

(3) discharges from potable water sources, including drinking fountain water and water line flushings;

(4) discharges from uncontaminated air conditioning or compressor condensate;

(5) discharges from lawn watering and similar irrigation drainage;

(6) discharges from pavement wash down without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(7) discharges from a routine external building wash down that do not use detergents or other compounds;

(8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water or groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

(c) Nothing in this subchapter is intended to restrict the powers of the commission or any other governmental entity to prevent, correct, or curtail activities that result or may result in pollution in the water quality area. In addition to the rules of the commission, a TPDES permit applicant may also be required to comply with local pollution control ordinances.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2000.

TRD-200008040
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 7, 2000
Proposal publication date: August 25, 2000
For further information, please call: (512) 239-5017

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SUBCHAPTER F. LAKES LYNDON B. JOHNSON AND MARBLE FALLS WATER QUALITY

30 TAC §311.56

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103 and §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code or other laws of this state. Section 26.011 also gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

§311.56. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.

(a) The following discharges of storm water runoff into or adjacent to water in the state may be authorized by a Texas pollutant discharge elimination system (TPDES) permit or a national pollutant discharge elimination system (NPDES) permit:

(1) storm water runoff from industrial facilities;

(2) storm water runoff from municipal separate storm sewer systems; and

(3) storm water runoff from construction activities.

(b) The following non-storm water discharges into or adjacent to water in the state may be authorized by a TPDES permit or a NPDES permit:

(1) discharges from fire fighting activities;

(2) discharges from fire hydrant flushings;

(3) discharges from potable water sources, including drinking fountain water and water line flushings;

(4) discharges from uncontaminated air conditioning or compressor condensate;

(5) discharges from lawn watering and similar irrigation drainage;

(6) discharges from pavement wash down without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(7) discharges from a routine external building wash down that do not use detergents or other compounds;

(8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water or groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

(c) Nothing in this subchapter is intended to restrict the powers of the commission or any other governmental entity to prevent, correct, or curtail activities that result or may result in pollution in the water quality area. In addition to the rules of the commission, a TPDES permit applicant may also be required to comply with local pollution control ordinances and regulations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2000.

TRD-200008041
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 7, 2000
Proposal publication date: August 25, 2000
For further information, please call: (512) 239-5017

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS
SUBCHAPTER E. ECONOMICALLY DISTRESSED AREAS PROGRAM

31 TAC §363.506

The Texas Water Development Board (board) adopts an amendment to 31 TAC §363.506 concerning calculation of financial assistance for projects funded through the Economically Distressed Areas Program (EDAP) without changes to the proposed text as published in the October 6, 2000, issue of the *Texas Register* (25 TexReg 10123) and will not be republished. The amendment is adopted to specify the amount of EDAP grant assistance that will be available to applicants seeking EDAP assistance when the Texas Department of Health (TDH) has made a finding that there is no nuisance dangerous to the public health and safety in the project area.

Pursuant to Water Code, §17.933(b), the board may not provide grant funds in excess of 50% of the total project costs unless TDH has determined that the existing water or sewer service is creating nuisance conditions dangerous to the public health and safety. Currently, §363.506(a) requires that the applicant for EDAP financial assistance assume a loan that is calculated by determining the portion of the existing rates (or a regional benchmark rate for new utilities) which is applied to the existing debt of the utility service. This capital component is multiplied by the number of new connections the project will create to determine the revenue available to repay a loan and the political subdivision is required to assume the amount of debt that the new customers will support. The remaining portion of the financial assistance from EDAP is provided as a grant. For all projects receiving EDAP funding to date, since TDH has determined that there was a nuisance condition dangerous to the public health in the project areas, the amount of grant funds provided under this methodology has exceeded 50% of the total project costs.

It appears, however, that there may be projects presented to the board which are otherwise eligible for financial assistance from EDAP but for which there may be a finding by TDH that there is no nuisance dangerous to the public health and safety in the project area. In these instances, the board may be able to determine that the water or sewer systems are inadequate according to state minimum standards and that the residents lack adequate financial resources to obtain adequate services. The grant funds as determined under the existing methodology, however, cannot be provided by the board if the amount of the grant provided will exceed 50% of the EDAP financial assistance. The board has concluded that the amount of grant in these circumstances should be determined as 50% of the total amount of financial assistance requested from EDAP. This approach provides consistency and predictability in its implementation, is easily understood by applicants seeking this assistance, and complies with the express language of the Water Code.

No comments were received on the proposed amendment.

The amendment is adopted under the authority of the Texas Water Code, §6.101.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2000.

TRD-200007996
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 5, 2000
Proposal publication date: October 6, 2000
For further information, please call: (512) 463-7981

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND
SUBCHAPTER B. PROGRAM REQUIREMENTS

31 TAC §§371.19, 371.25, 371.26

The Texas Water Development Board (board) adopts amendments to 31 TAC §§371.19, 371.25, and 371.26 concerning the Drinking Water State Revolving Fund (DWSRF) without changes to the proposed text as published in the October 6, 2000, issue of the *Texas Register* (25 TexReg 10124) and will not be republished. The amendments are adopted to bring uniformity to the process of ranking identical scores for projects. Previously, the rules for the ranking of projects provided for three different means of ranking identical scores, depending upon the category to which the project belonged. One of the methods of tie breakers appeared to give too much emphasis to low median household income, and the other method did not take into consideration any special considerations of the DWSRF program, but ranked projects with tie scores alphabetically. The third method gave advantage to projects that served smaller communities.

Since one of the goals of the DWSRF program is to encourage funding to small communities, the method for addressing tie scores which gives advantage to projects serving smaller total populations is proposed as the first method for breaking ties, to be applied to all projects that have identical rating scores. If tie scores persist, it is proposed that projects be ranked according to alphabetical order. The alphabetical method has the advantage of being objective, easily understood by applicants, and reliable as a tie breaker.

Section 371.19, relating to Rating Process, states the tie breaker procedure that applies to projects of the mainstream DWSRF program. Advantage is given to those projects that serves smaller populations. This section is amended to add that if tie scores persist, projects will then be ranked in alphabetical order.

Section 371.25, relating to Criteria and Methods for Distribution of Funds for Disadvantaged Communities, is amended to delete the provision that describes a method of ranking projects with identical scores by a factor of adjusted median annual household income.

Section 371.26, relating to Criteria and Methods for Distribution of Funds from Community/Noncommunity Water Systems Financial Assistance Account, is amended to delete the provision that describes a method of ranking projects with identical scores by using alphabetical order. The section is further amended to delete the procedure for ranking of private or nonprofit, noncommunity applicants over non-disadvantaged communities.

There were no comments on the proposed amendments.

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2000.

TRD-200007995
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 5, 2000
Proposal publication date: October 6, 2000
For further information, please call: (512) 463-7981

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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 §3.302

The Comptroller of Public Accounts adopts an amendment to §3.302, concerning accounting methods, credit sales, bad debt deductions, repossessions, interest on sales tax, and trade-ins, without changes to the proposed text as published in the September 15, 2000, issue of the *Texas Register* (25 TexReg 9190).

Subsection (e) is amended to allow for bad debts on private label credit agreements, as directed by §2.24 of House Bill 3211, 76th Legislature, 1999. The amendment renumbers subsections accordingly. The amendment applies to accounts deemed to be worthless and actually charged off for federal income tax purposes on or after October 1, 1999.

Subsection (a)(2) clarifies that subsection (a)(1) does not apply to the reporting of sales tax on rentals and leases. Subsection (b)(1) clarifies the type of sales by a retailer that are considered credit sales and provides that a credit sale also includes a sale by a retailer where another person extends credit to the purchaser under a private label credit agreement.

Additionally, subsection (d) is amended to allow persons who extend credit to purchasers under retailers' private label credit agreements or their assignees or affiliates to also claim a credit or deduction for tax-paid accounts written off as bad debts. The amendment also sets out the records required for a retailer or other person to claim a bad debt deduction and allows for persons whose volume and character of uncollectible accounts warrants an alternative method of substantiating a reimbursement or credit for uncollectible accounts. Subsection (e) is amended to allow a person who extends credit to a purchaser under a retailer's private label credit agreement, or an assignee or affiliate to also claim a credit or deduction for tax paid but not collected on repossessions. Subsection (h) is added to direct readers to §3.325 of this title (relating to Refunds, Interest, and Payments Under Protest), for information on interest on tax erroneously paid, as directed under Senate Bill 1321, 76th Legislature, 1999. Various subsections are amended to correct grammar usage and sentence construction, and to make the section easier to read and understand.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§151.005, 151.007, 151.008, and 151.426.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2000.

TRD-200007925
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Effective date: December 4, 2000
Proposal publication date: September 15, 2000
For further information, please call: (512) 463-3699

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 11. TEXAS COMMISSION ON HUMAN RIGHTS

CHAPTER 323. COMMISSION

40 TAC §323.6

The Commissioners of the Texas Commission on Human Rights (TCHR) adopts an amendment to §323.6, concerning civilian workforce composition. This rule is adopted without changes to the proposed text as published in the September 8, 2000, issue of the *Texas Register* (25 TexReg 8836) and will not be republished.

The adoption of this section is necessary to correct the rule as originally adopted which inaccurately reflected where the TCHR receives statistical information upon which it relies to report workforce composition. The original rule indicated that the statistical data came from the Equal Employment Opportunity Commission, while in actuality the data comes from the United States Department of Labor.

The purpose and objective of this adoption is to identify the proper agency from which the TCHR receives data in order to issue statewide workforce composition reports.

Comments--The Texas Department of Public Safety (DPS) made comments against the rule. The DPS expressed concerns about changing the source materials for the Civilian Workforce Composition Report from the Equal Employment Opportunity Commission (EEOC) to the U.S. Department of Labor (DOL). The commenter states that TCHR's new source of information does not accurately reflect to state agencies the availability of persons of various racial or gender groups in the various occupational categories. The commenter is also concerned that the DOL figures do not collect race and ethnicity in the same manner as it is collected by the EEOC.

The Commission disagrees that changing the source materials for the Civilian Workforce Composition Report from the EEOC to the DOL will not accurately reflect availability to state agencies of persons of various racial or gender groups in the various occupational categories. In fact, the Commission believes that the numbers received from DOL will better reflect the composition of the state workers as it relates to job categories. Additionally, this amendment is technical in nature and is in accordance with the intent and proper interpretation of Chapter 21 of the Texas Labor Code.

This section is adopted under the Texas Labor Code, Chapter 21, Sections 21.0035 and 21.003, and the Texas Administrative Code, Chapter 321, Section 321.4, and Chapter 323, Section 323.5. The Texas Labor Code, Section 21.0035, provides that the commission shall promulgate rules as are necessary and proper to execute its functions and duties. The Texas Labor Code, Section 21.003, and the Texas Administrative Code, Sections 321.4 and 323.5, grant the commission authority to adopt rules necessary to implement the Texas Commission on Human Rights Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2000.

TRD-200007986
William M. Hale
Executive Director
Texas Commission on Human Rights
Effective date: December 5, 2000
Proposal publication date: September 8, 2000
For further information, please call: (512) 437-3457

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40 TAC §323.9

The Commissioners of the Texas Commission on Human Rights adopts new §323.9, concerning minimum standards for required compliance training for state agencies. This rule is adopted without changes to the proposed text as published in the September 8, 2000, issue of the *Texas Register* (25 TexReg 8837) and will not be republished.

The adoption of this section is necessary to address issues concerning how a state agency, other than the Commission, may provide a comprehensive equal employment opportunity training program to appropriate supervisory and managerial employees once a state agency has received three or more complaints of employment discrimination in a fiscal year, other than complaints determined to be without merit.

The purpose and objective of this adoption is to clarify the minimum content and the minimum standards of delivery required for a training program to be approved by the Commission in addition to any costs that may be associated with delivering or receiving required compliance training.

No comments were received regarding adoption of the new section.

This section is adopted under the Texas Labor Code, Chapter 21, Sections 21.556 and 21.003, and Texas Administrative Code Chapter 321, Section 321.4 and Chapter 323, Section 323.5. The Texas Labor Code, Section 21.556, provides that the Commission shall promulgate rules as are necessary and proper to execute its duties and functions. The Texas Labor Code, Section 21.003, and the Texas Administrative Code, Sections 321.4 and 323.5, grant the Commission authority to adopt procedural rules to carry out the purposes and policies of Texas Commission on Human Rights Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2000.

TRD-200007987
William M. Hale
Executive Director
Texas Commission on Human Rights
Effective date: December 5, 2000
Proposal publication date: September 8, 2000
For further information, please call: (512) 437-3457

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by 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 Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) files this notice of intention to review and proposes the readoption of Chapter 330, Subchapters A-L, Municipal Solid Waste. This review of Chapter 330, Subchapters A-L, is proposed in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. Subchapters M-V, Y, and Z of Chapter 330 were previously reviewed and readopted by the commission on August 11, 1999, under Rule Log Number 1998-056-330-WS and will not be included in this review. The commission does not currently have a Subchapter W or X in Chapter 330.

CHAPTER SUMMARY

Chapter 330 implements state and federal statutory requirements and federal regulatory requirements for the management of municipal solid waste so as to protect public health and the environment. Subchapter A concerns General Information; Subchapter B concerns Municipal Solid Waste Storage; Subchapter C concerns Municipal Solid Waste Collection and Transportation; Subchapter D concerns Classification of Municipal Solid Waste Facilities; Subchapter E concerns Permit Procedures; Subchapter F concerns Operational Standards for Solid Waste Land Disposal Sites; Subchapter G concerns Operational Standards for Solid Waste Processing and Experimental Sites; Subchapter H concerns Groundwater Protection Design and Operation; Subchapter I concerns Groundwater Monitoring and Corrective Action; Subchapter J concerns Closure and Post-Closure; Subchapter K concerns Closure, Post-Closure, and Corrective Action; and Subchapter L concerns Location Restrictions.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 330 continue to exist. The rules are needed to comply with state and federal statutory requirements and federal regulatory requirements. The state Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361, assigns responsibility to the commission for the management of municipal solid waste and authorizes the commission to adopt rules consistent with the Act and establish minimum standards of operation for the management and control of solid waste under the Act. The federal Solid Waste Disposal Act, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), directed the states to implement permit programs or other systems of prior approval to assure that each solid waste management facility which may receive hazardous household waste or conditionally-exempt hazardous waste from small quantity generators is protective of human health and the environment, incorporating criteria to be developed by the United States Environmental Protection Agency (EPA). Additionally, HSWA directed the EPA to evaluate the state permit programs to determine if they had adequately implemented the EPA criteria, and in any state which did not adopt an adequate program the EPA was to use its statutory authority to enforce the criteria. The EPA developed the criteria and promulgated them in 40 Code of Federal Regulations Part 258, Criteria for Municipal Solid Waste Landfills, addressing a variety of standards including location restrictions, groundwater monitoring, corrective action requirements, and financial assurance. These requirements were incorporated into Chapter 330, which was evaluated by the EPA and found to be adequate. Therefore, a need continues to exist to maintain a state regulatory program that meets the state statutory requirements and the federal adequacy standards.

The commission's review of Chapter 330 has also revealed the need for a number of changes, which the commission intends to propose in another rulemaking in the future.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999. The commission invites public comment on whether the reasons for the rules in Chapter 330 continue to exist. Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1998-060-330-WS. Comments must be received in writing by 5:00 p.m., January 2, 2001. For further information or questions concerning this proposal, please contact Hector H. Mendieta, Policy and Regulations Division, at (512) 239-6694.

TRD-200008113
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 21, 2000

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Texas State Board of Plumbing Examiners

Title 22, Part 17

The Texas State Board of Plumbing Examiners proposes to review the following sections from Chapter 363, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167:

Elsewhere in this issue of the *Texas Register* the Texas State Board of Plumbing Examiners is contemporaneously proposing the review of Chapter 363 with changes to §363.2, §363.4, §363.5, §363.8, §363.9, §363.11. The proposed review of Chapter 363 also includes the review of §363.1, §363.3, §363.6, §363.7 and §363.10 as contained in Title 22 of the Texas Administrative Code without changes. The reason for re-adopting §363.1, §363.3, §363.6, §363.7 and §363.10 still exists.

Comments on the proposed review may be submitted to Robert L. Maxwell, Administrator, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, TX, 78765-4200.

TRD-200008032
Robert L. Maxwell
Administrator
Texas State Board of Plumbing Examiners
Filed: November 17, 2000

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Telecommunications Infrastructure Fund Board

Title 1, Part 18

The Telecommunications Infrastructure Fund Board (TIFB) proposes to review the following sections from Chapter 471, concerning Operating Rules of the Telecommunications Infrastructure Fund Board, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167:

471.1. General Powers.

471.3. Number, Terms of Office and Qualifications.

471.5. Chairman.

471.7. Vice-Chairman.

471.9. Compensation of Board Members.

471.11. Place of TIF Board Meetings.

471.13. Regular Meetings.

471.15. Emergency Meetings.

471.17. Executive Sessions.

471.19. Quorum, Manner of Acting and Adjournment.

471.30. Finance and Audit Committee.

471.31. Other Committees.

471.32. Advisory Committees.

471.33. Committee Procedure.

471.50. Contracts and Appointments of Agents.

471.60. Rules Governing Acceptance of Gifts, Grants and Donations.

471.70. Standard of Conduct and Conflict of Interest Provisions.

471.80. Private Interest in Measure or Decision.

471.90. Fiscal Year.

471.91. Books and Records.

471.92. Effective Date of Rules.

471.100. Amendments to the Rules.

As a result of the rule review process, the TIFB is contemporaneously proposing the repeal of §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30-471.33, 471.50, 471.60, 471.70, 471.80, 471.90-471.92, 471.100 and new §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30-471.33, 471.50 and 471.60, concerning Operating Rules of the Telecommunications Infrastructure Fund Board. The repeal and replacement is published elsewhere in this issue of the *Texas Register*.

Comments on the proposal may be submitted to Michelle Pundt, Telecommunications Infrastructure Fund Board, P.O. Box 12876, Austin, Texas 78711 or be email at: mpundt@tifb.state.tx.us.

TRD-200008094
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Filed: November 20, 2000

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Texas Department of Transportation

Title 43, Part 1

Notice of Intention to Review: In accordance with the General Appropriations Act of 1999, House Bill 1, Section 10.13, Article IX, and Government Code, §2001.039, as added by Senate Bill 178, 76th Legislature, the Texas Department of Transportation (department) files this notice of intention to review Title 43 TAC, Part I, Chapter 17, Vehicle Titles and Registration.

The department will accept comments regarding whether the reasons for adopting these rules continue to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comment or questions regarding this rule review may be submitted in writing to Jerry L. Dike, Director, Vehicle Titles and Registration Division, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483, or by phone at (512) 465-7570.

TRD-200008071
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: November 20, 2000

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Adopted Rule Reviews

Texas Higher Education Coordinating Board

Title 19, Part 1

The Texas Higher Education Coordinating Board adopts without changes, Chapter 13, Financial Planning, in accordance with Section 2001.039 Texas Government Code. The proposed rule review was filed on August 22, 2000 and published in the September 1, 2000, issue of the *Texas Register* (25 TexReg 8746).

No comments were received regarding the review.

TRD-200008006
Gary Prevost
Acting Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Filed: November 16, 2000

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The Texas Higher Education Coordinating Board adopts without changes, Chapter 17, Campus Planning, in accordance with Section 2001.039 Texas Government Code. The proposed rule review was filed on August 22, 2000 and published in the September 1, 2000, issue of the *Texas Register* (25 TexReg 8746).

No comments were received regarding the review.

TRD-200008007
Gary Prevost
Acting Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Filed: November 16, 2000

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Texas State Library and Archives Commission

Title 13, Part 1

The Texas State Library and Archives Commission has completed the review of the rules in Title 13, Chapter 1, concerning library development and administering the Library Systems Act, as noticed in the October 6, 2000, issue of the *Texas Register* (25 TexReg 10197). The commission readopts this chapter in accordance with Texas Government Code §2001.039, and the General Appropriations Act, Article IX, §§9-10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years.

The commission received no comments on the review of Chapter 1.

The sections in Chapter 1 are adopted under Texas Government Code §441.006 that provides the commission with authority to govern the Texas State Library, §441.009 that provides the commission with authority to adopt a state plan for library services, §441.0091 which provides the commission with authority to adopt rules on various subjects, §441.136 that provides the Texas State Library and Archives Commission with authority to adopt rules for administration of the Library Systems Act, and §441.138 that provide the Texas State Library and Archives Commission to use funds appropriated by the legislature for administrative expenses.

The adopted sections affect Government Code §§441.121-441.139.

TRD-200008023
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Filed: November 17, 2000

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The Texas State Library and Archives Commission has completed the review of the rules in Title 13, Chapter 4, Subchapter A, §§4.1-4.7, concerning standards and guidelines for school library programs, as noticed in the October 6, 2000, issue of the *Texas Register* (25 TexReg 10198). The commission readopts this chapter in accordance with Texas Administrative Code §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999 and finds that the need for school library program standards and guidelines continues to exist.

The commission received no comments on the review of Chapter 4.

The sections in Chapter 4 are adopted under Education Code §33.021 which requires the Texas State Library and Archives Commission to adopt standards for school library services in consultation with the State Board of Education, and Government Code §441.006(a)(1-2) which authorizes the Commission to govern the Texas State Library and adopt rules to aid and encourage libraries.

The adopted sections affect Education Code §33.02.

TRD-200008024
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Filed: November 17, 2000

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TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is 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.

Graphic Material will not be reproduced in the Acrobat version of this issue of the *Texas Register* due to the large volume. To obtain a copy of the material please contact the Texas Register office at (512) 463-5561 or (800) 226-7199.

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, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Office of the Attorney General

Notice

Pursuant to Texas Government Code, Chapter 552, Sections 552.001, *et seq*:

The Chief Administrative Office of the Office of the Attorney General has designated Amanda E. Crawford, Assistant Attorney General, as the recipient of all public information requests which come to the Office of the Attorney General by electronic mail or facsimile transmission.

Public information requests sent to the OAG in writing must be sent to:

Amanda E. Crawford

Assistant Attorney General

Public Information Coordinator

Office of the Attorney General

P.O. Box 12548

Austin, Texas 78711-2548

Public information requests sent to the OAG by electronic mail must be sent to: amanda.crawford@oag.state.tx.us

Public information requests sent to the OAG by facsimile transmission must be sent to: (512) 494-8017

TRD-200008130
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: November 21, 2000

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were received for the following projects(s) during the period of November 9, 2000, through November 16, 2000. The public comment period for these projects will close at 5:00 p.m. on December 24, 2000.

FEDERAL AGENCY ACTIONS:

Applicant: Swift Group, LLC; Location: The project is located on East Union Bayou, near the Gulf Intracoastal Waterway, Freeport. CCC Project Number: 00-0409-F1; Description of Proposed Action: The applicant proposes to extend the time to conduct hydraulic maintenance dredging and amend the permit to include two wharves. An estimated 9,680 cubic yards of material would be hydraulically removed from an approximate 2-acre area. The wharves are 18 x 300 feet and 18 x 340 feet. Type of Application: U.S.A.C.E. permit application #15551(03) under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Trans Texas Gas Corporation; Location: The project site is located in State Tract 331 in Galveston Bay, Galveston County. CCC Project Number: 00-0411-F1; Description of Proposed Action: The applicant proposes to change the location of a previously permitted oil field specific activity under Permit #20643(01)/004 for the drilling and maintenance of a well and installation of a well protector. The new location is 259 feet closer to their existing State Tract 331 well #1 and production platform locations. Type of Application: U.S.A.C.E. permit application #20643(04)/018 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review. Further information for the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary,

Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at (512) 475-0680.

TRD-200008148
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: November 21, 2000

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Comptroller of Public Accounts

Notice of Suspension of the "Tax Credit For Incremental Production Techniques"

The Comptroller of Public Accounts, administering agency for the Tax Credit for Incremental Production Techniques, has determined that the average price of crude oil, as determined under Tax Code, §202.057(c), has reached $25 per barrel, adjusted to 1997 dollars, for the months of May, June and July 2000.

Pursuant to the Tax Code, §202.057(c), the comptroller hereby provides notice of the suspension of the Tax Credit for Incremental Production Techniques effective December 1, 2000.

One hundred percent of the taxes shall be collected on the properties eligible for this tax credit beginning December 1, 2000, and will continue to be collected until notice of the reinstatement of the tax credit is given.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas, 78711-3528.

TRD-200008131
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Filed: November 21, 2000

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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, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 11/27/00 - 12/03/00 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 11/27/00 - 12/03/00 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 12/01/00 - 12/31/00 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 12/01/00 - 12/31/00 is 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200008118
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: November 21, 2000

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Court Reporters Certification Board

Certification of Court Reporters

Following the examination of applicants on October 27, 2000, the Texas Court Reporters Certification Board certified to the Supreme Court of Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

MACHINE SHORTHAND: RUBY ANN AVILA- HOUSTON TX; SONYA BELINDA BRITT- GRAPEVINE TX; MIREYA BARBA- ALVIN TX; DIANA J. BARLOW- EL PASO TX; ANGELINA MICHELLE BUYAJIAN- PEARLAND TX; GWEN K CUMMINS- MCKINNEY TX; SAMANTHA LEE DENNIS- HOCKLEY TX; BRENDA ROXANN DIMAS- SAN ANTONIO TX ; K ANNETTE FOSTER- GARLAND TX; KIMBERLY GARZA- NEEDVILLE TX; ESTEVAN GONZALES- EL PASO TX; JENNIFER DIANNE HOLMES- MESQUITE TX; RICHELLE LEE HOLMES- DIANA TX; KERI JENSEN- LAS VEGAS NV; ESTER JIMENEZ- CHANNELVIEW TX; DEMETRIA STEWART MALLARD- KATY TX; DELIA ORDONEZ- HOUSTON TX; KIMBERLY J POWELL- DALLAS TX; STACEY QUINTANA- IRVING TX; SHERRI MICHELLE ROBERT- BEDFORD TX; ARLINDA RODRIGUEZ- SAN ANTONIO TX; JODI YVONNE SIMMONS- AUSTIN TX; TANDY SWEEZY PRICE- ROUND ROCK TX; VERONICA ANNE VILLARREAL- ARANSAS PASS TX; DIANNA LYNN WHITE- HOUSTON TX; JENNIFER SUE YARNOLD- HOUSTON TX

TRD-200008073
Sheryl Jones
Director of Administration
Court Reporters Certification Board
Filed: November 20, 2000

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Deep East Texas Council of Governments

Request for Qualifications

Request for Qualifications (RFQ) for Children Health Insurance Program (CHIP) Consultant Services.

The Deep East Texas Council of Governments (DETCOG) is requesting qualifications submittals for CHIP Outreach Assistant and Consultant Services.

Services required are: Consultant Services to market CHIP outreach application enrollment for the 12 county DETCOG region. Public outreach to Hospitals, Human Resources, Rehabilitation Facilities, Mentally Challenged Facilities, Medical Clinics and other medical facilities.

Qualifications statements are due December 11, 2000 promptly at 4:00 pm. One (1) original and one (1) copy, bound/stapled and signed are required. All copies should be submitted to the attention of Walter G. Diggles, Executive Director, DETCOG, 274 East Lamar Street, Jasper, Texas 75951.

TRD-200008162

Walter G. Diggles
Executive Director
Deep East Texas Council of Governments
Filed: November 22, 2000

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Texas Council for Developmental Disabilities

Notice of Intent to Award

The Developmental Disabilities Assistance and Bill of Rights Act, Amendments of 1994 (Public Law 103-230), authorizes funds to be provided for studies, analysis, development of model policies, and technical assistance to providers with respect to "priority area activities" adopted by the Council, and information dissemination to local, state and federal policy makers. Consistent with that authorization, the Texas Council for Developmental Disabilities announces its intention to award grant funds to Advocacy Incorporated, to continue providing staff and other support for the Disability Policy Consortium.

Description of Project: This project will continue to maintain advocacy efforts by implementing second-generation activities that will support and increase grass root efforts and provide training for persons with disabilities, their families and friends in self -advocacy.

Terms and funding: The project will be funded for up to four years. The initial budget period will be December 1, 2000 through November 30, 2001. Funding for years one through four is not to exceed $200,000. Continuation of this activity is not automatic, and will be based on annual review of performance and the availability of funds.

TRD-200008070
Roger A. Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: November 20, 2000

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Texas Education Agency

Request for Applications Concerning Open-Enrollment Charter Guidelines and Application

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-01-004 from eligible entities to operate open-enrollment charter schools. Eligible entities include public institutions of higher education, private or independent institutions of higher education, organizations exempt from taxation under the Internal Revenue Code of 1986 (26 United States Code, §501(c)(3)), or governmental entities. Each prospective applicant is requested to send notice in writing of its intent to submit an application. The notice of intent must be sent to the Division of Charter Schools, Room 6-124, TEA, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701-1494. Failure to notify TEA of intent to apply does not disqualify an applicant from submitting an application for an open-enrollment charter.

Description. The purpose of an open-enrollment charter is to provide an alternative avenue for restructuring schools. An open-enrollment charter offers flexibility and choice for educators, parents, and students. An approved open-enrollment charter school may be located in a facility of a commercial or nonprofit entity or in a school district facility. If the open-enrollment charter school is to be located in a school district facility, it must be operated under the terms established by the board of trustees or governing body of the school district in an agreement governing the relationship between the school and the district.

An open-enrollment charter school will provide instruction to students at one or more elementary or secondary grade levels as provided by the charter. It is governed under the specifications of the charter and retains authority to operate for the term of the charter contingent on satisfactory student performance as defined by the state accountability system. An open-enrollment charter school does not have the authority to impose taxes.

An open-enrollment charter school is subject to federal laws and certain state laws governing public schools, including laws and rules relating to a criminal offense, requirements relating to the Public Education Information Management System (PEIMS), criminal history records, high school graduation, special education programs, bilingual education, prekindergarten programs, extracurricular activities, health and safety provisions, and public school accountability. An open-enrollment charter school is immune from liability to the same extent as a school district, and its employees and volunteers are immune from liability to the same extent as school district employees and volunteers. An employee of an open-enrollment charter school who qualifies for membership in the Teacher Retirement System of Texas shall be covered under the system to the same extent a qualified employee of a school district is covered.

Project Amount. For each student enrolled in an open-enrollment charter school, Texas Education Code (TEC), §12.106(b), requires the commissioner of education to distribute to the school an amount equal to the following: the amount provided for the student under the specific Foundation School Program for which the school is chartered, plus the transportation allotment for which the student would be entitled; less an amount equal to the sum of the school's tuition receipts, plus the school's distribution from the Available School Fund. An open-enrollment charter school is entitled to receive local funds from the school district in which a student attending the school resides and may not charge tuition. An open-enrollment charter shall not discriminate in admission policy on the basis of sex, national origin, ethnicity, religion, disability, academic or athletic ability, or the district the child would otherwise attend. An open-enrollment charter school may deny admission to a student with a criminal record or documented discipline problems.

Selection Criteria. A complete description of selection criteria is included in the RFA.

The State Board of Education (SBOE) may approve open-enrollment charter schools as provided in TEC, §12.101, and §12.1011. TEC, §12.1011(a)(1), authorizes the SBOE to grant charters for open-enrollment charter schools that adopt an express policy providing for the admission of students eligible for a public education grant under TEC, Chapter 29, Subchapter G. Additionally, TEC, §12.1011(a)(2), authorizes the SBOE to grant an unspecified number of charters for open-enrollment charter schools for which at least 75% of the prospective student population, as specified in the proposed charter, will be students who have dropped out of school or are at risk of dropping out of school as defined by TEC, §29.081. The SBOE has approved 168 charter schools to date. There is no cap on the number of 75% rule charters that can be granted to serve at-risk populations. There are currently several standard open-enrollment charters available.

An application for an open-enrollment charter must state whether it is being submitted for consideration under TEC, §12.1011(a)(1), or TEC, §12.1011(a)(2). Applications submitted under TEC, §12.1011(a)(1), will be considered separately from those submitted under TEC, §12.1011(a)(2). The SBOE may approve applicants to ensure representation of urban, suburban, and rural communities; various instructional settings; innovative programs; diverse student populations and geographic regions; and various eligible entities. The SBOE will consider Statements of Impact from any school district whose

enrollment is likely to be affected by the open-enrollment charter school. The SBOE may also consider the history of the sponsoring entity and the credentials and background of its board members.

Requesting the Application. An application must be submitted under SBOE guidelines to be considered. A complete copy of the publication "Open-Enrollment Charter Guidelines and Application" (RFA #701-01-004), which includes an application and procedures, may be obtained by writing the: Division of Charter Schools, Room 6-124, TEA, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701-1494, or by calling (512) 463-9575.

Deadline for Receipt of Applications. An application must be received in the Document Control Center, Room 6-108, TEA, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, by 5:00 p.m. (Central Time), Thursday, February 15, 2001, to be considered.

Further Information. For clarifying information about the open-enrollment charter school application, contact Mary Perry, Division of Charter Schools, TEA, (512) 463-9575 or by e-mail at mperry@tmail.tea.state.tx.us.

TRD-200008164
Criss Cloudt
Associate Commissioner, Accountability Reporting and Research
Texas Education Agency
Filed: November 22, 2000

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Golden Crescent Workforce Development Board

Request For Bids Notice

POLICY & PROCEDURE WRITER

The Golden Crescent Workforce Development Board will release its Request for Bids for the writing of policies and procedures on November 27, 2000. A bidders' conference will be held at 9:30 a.m., on December 5, 2000. The deadline for response to this procurement is 5 p.m., December 29, 2000.

A complete set of specifications may be obtained at:

120 South Main, Suite 501

Victoria, Texas 77901

P. O. Box 1936

Victoria, TX 77902

Phone: (361) 576-5872

Fax: (361) 573-0225

email: sandy.heiermann@twc.state.tx.us

TRD-200007999
Isabel Simmons
Administrative Clerk
Golden Crescent Workforce Development Board
Filed: November 15, 2000

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Texas Department of Health

Licensing Actions for Radioactive Materials

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

graphic

[graphic]

graphic

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In issuing new licenses and amending and renewing existing licenses, the Texas Department of Health, Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with Title 25 Texas Administrative Code (TAC) Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the

license(s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or "person affected" within 30 days of the date of publication of this notice. A "person affected" is defined as a person who is a resident of a county, or a county adjacent to the county, in which the radioactive materials are or will be located, including any person who is doing business or who has a legal interest in land in the county or adjacent county, and any local government in the county; and who can demonstrate that he has suffered or will suffer actual injury or economic damage. A licensee, applicant, or "person affected" may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200008157
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 22, 2000

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Notice of Intent to Revoke the Certificate of Registration of The Foot Specialist, P.C.

Pursuant to 25 Texas Administrative Code §289.205, the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed a complaint against the following registrant: The Foot Specialist, P.C., Mission, R19294.

The department intends to revoke the certificate of registration; order the registrant to cease and desist use of radiation machine(s); order the registrant to divest himself of such equipment; and order the registrant to present evidence satisfactory to the bureau that he has complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid and the items in the complaint are corrected within 30 days of the date of the complaint, the department will not issue an order.

This notice affords the opportunity to the registrant for a hearing to show cause why the certificate of registration should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid or if the items in the complaint are not corrected, the certificate of registration will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200008156
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 22, 2000

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Notice of Public Hearing Regarding the 2001 Ryan White Title II Plan

The Texas Department of Health (department) will hold a public hearing to receive comments on the 2001 plan for funding the eleventh year of the Ryan White Comprehensive Acquired Immunodeficiency Syndrome Resource Emergency (CARE) Act/Title II activities in Texas.

The hearing will be held Monday, December 18, 2000, from 11:00 a.m. to 12:00 p.m., at the Texas Department of Health, Moreton Building, Room M-739, 1100 West 49th Street, Austin, Texas. To request an accommodation under the Americans with Disabilities Act, please contact Suzzanna Cortez-Currier, ADA Coordinator in the Office of Civil Rights, Texas Department of Health, at (512) 458-7627 or TDD (512) 458-7708, at least four days prior to the meeting.

Copies of the proposed plan for distribution of Title II funds to Human Immunodeficiency Virus (HIV) service delivery areas through administrative agencies will be mailed to all Ryan White Title I, II, IIIb, IV and Part F grantees, Title II consortia chairs, and Title II subcontractors prior to the public hearing. Interested persons may request to view the plan and information on the revised funding formula at any of the above entities' locations. Copies of the plan may also be obtained by contacting Ms. Laura Ramos, (512) 490-2525, or by E-mail at: laura.ramos@tdh.state.tx.us. Finally, the plan may be reviewed at the Bureau of HIV/STD Prevention Web site: http://www.tdh.state.tx.us/hivstd/grants.

Written comments on the proposed plan should be addressed to Mr. Casey S. Blass, Director, HIV/STD Health Resources Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Comments must be received on or before 5:00 p.m., Central Standard Time, on Friday, December 29, 2000.

The department will make copies of the Title II Grant Application to the Health Resources Service Administration (HRSA) available for review at the administrative agencies and at the department's funding information center after submission to HRSA on February 2, 2001. All written comments on the grant application must be submitted to Casey S. Blass at the address listed in the previous paragraph of this notice, on or before Thursday, May 31, 2001.

TRD-200008154
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 22, 2000

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Notice of Uranium By-Product Material License Amendment Issued to Rio Grande Resource Corporation

The Texas Department of Health (department) gives notice that it has amended uranium by- product material license L02402 issued to Rio Grande Resources Corporation located three miles northwest of Panna Maria, Texas, in Karnes County, north of FM 81. Amendment number four will amend two closure milestone dates to later dates due to inclement weather conditions.

The department's Bureau of Radiation Control, Division of Licensing, Registration and Standards has determined, pursuant to 25 Texas Administrative Code (TAC) Chapter 289, that the licensee has met the standards appropriate to this amendment.

This notice affords the opportunity for a public hearing upon written request by a person affected by the amendment to the license. A written hearing request must be received, from a person affected, within 30 days from the date of publication of this notice in the *Texas Register*.

A person affected is defined as a person who demonstrates that the person has suffered or will suffer injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756- 3189. Any request for a hearing must contain the name and address of the person who considers himself affected by agency action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is to be represented by an attorney, the name and address of the attorney also must be stated. Should no request for a public hearing be timely filed, the license will remain in effect.

Copies of all relevant material are available for public inspection and copying at the Bureau of Radiation Control, Texas Department of Health, 8407 Wall Street, Austin, Texas. Information relative to the amendment of this specific radioactive material license may be obtained by contacting Chrissie Toungate Custodian of Records, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, by calling (512) 834- 6688, or by visiting 8407 Wall Street, Austin, Texas.

TRD-200008155
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 22, 2000

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Texas Health and Human Services Commission

State Medicaid Office Public Notice

The Health and Human Services Commission State Medicaid Office has received approval from the Health Care Financing Administration to amend the Title XIX Medical Assistance Plan by Transmittal Number 00-17, Amendment Number 582.

The amendment establishes bonus payments to nursing homes that achieve superior performance. Providers qualify to receive the bonus payments based on demonstrated regulatory compliance and specific performance criteria. The amendment is effective September 1, 2000.

If additional information is needed, please contact Lillian Reyes Gates, Texas Department Human Services, at (512) 438-2603.

TRD-200008050
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: November 17, 2000

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Texas Department of Housing and Community Affairs

Community Services Section Notice of Application Availability

Emergency Shelter Grants Program

The Texas Department of Housing and Community Affairs (TDHCA) anticipates the availability Emergency Shelter Grants Program (ESGP) funding through the U.S. Department of Housing and Urban Development in the amount of $4,535,000 for FY 2001. ESGP is authorized by the Stewart B. McKinney Homeless Assistance Act of 1987 (42 U.S.C. 11371 *et. seq.*). The Department has administered this program since 1987. ESGP funds are awarded on a competitive basis.

Activities eligible to be funded with ESGP funds include: rehabilitation or conversion of facilities to use as emergency shelters for the homeless; payment of maintenance and certain operating costs; certain essential (support) services; and homelessness prevention activities. To be eligible to apply for ESGP funding through TDHCA, an organization must provide services to the homeless population and must document: 1) their status as either a private nonprofit organization or as a unit of general local government; 2) a provision for the participation of a homeless or formerly homeless individual on it's board of directors. Other requirements are included in the application packet.

Applications will be available after December 8, 2000 and will be provided upon request. The application will also be accessible through the TDHCA website: www.tdhca.state.tx.us, or you may contact the Texas Department of Housing a Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941, attention Dyna C. Lang to request an application. The FY 2001 ESGP application deadline is February 21, 2001.

TRD-200008111
Daisy Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: November 20, 2000

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Texas Department of Insurance

Insurer Services

Application for admission to the State of Texas by DEVELOPERS SURETY AND INDEMNITY COMPANY, a foreign fire and casualty company. The home office is in West Des Moines, Iowa.

Application for admission to the State of Texas by GMAC DIRECT INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Hazelwood, Missouri.

Application to change the name of ROYAL SPECIAL RISKS INSURANCE COMPANY to HOMESITE INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Hartford, Connecticut.

Application to change the name of LINCOLN MUTUAL LIFE INSURANCE COMPANY to LINCOLN DIRECT LIFE INSURANCE COMPANY, a foreign life company. The home office is in Lincoln, Nebraska.

Application to change the name of THE VIRGINIA INSURANCE RECIPROCAL to RECIPROCAL OF AMERICA, a foreign reciprocal company. The home office is in Glen Allen, Virginia.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200008168
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: November 22, 2000

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Notice of Applications by Small Employer Carriers to be Risk-Assuming Carriers

Notice is given to the public of the application of the listed small employers carrier to be a risk-assuming carrier under Texas Insurance Code Article 26.52. A small employer carrier is defined by Chapter 26 of the Texas Insurance Code as a health insurance carrier that offers, delivers or issues for delivery, or renews small employer health benefit plans subject to the chapter. A risk-assuming carrier is defined by Chapter 26 of the Texas Insurance Code as a small employer carrier that elects not to participate in the Texas Health Reinsurance System. The following small employer carrier has applied to be a risk-assuming carrier:

Emphesys Insurance Company

The application is subject to public inspection at the offices of the Texas Department of Insurance, Financial Monitoring Unit, 333 Guadalupe, Hobby Tower 3, 3rd Floor, Austin, Texas.

If you wish to comment on this application to be a risk-assuming carrier, you must submit your written comments within 60 days after publication of this notice in the Texas Register to Lynda H. Nesenholtz, Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-91204. An additional copy of the comments must be submitted to Mike Boerner, Managing Actuary, Actuarial Division of the Financial Program, Mail Code 304-3A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the application, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the application to be a risk-assuming carrier.

TRD-200008099
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: November 20, 2000

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Texas Lottery Commission

Instant Game Number 224--"Jingle Bucks"

1.0 Name and Style of Game.

A. The name of Instant Game Number 224 is "JINGLE BUCKS". The play style of Game 1 is "Get 3 like amounts, win that amount." The play style of Game 2 is "Get 3 like amounts, win that amount." The play style of Game 3 is "If the total of YOUR NUMBERS equals 7 or 11 within a game, win prize shown." The play style of Game 4 is "Get a tree symbol and win $20 automatically. Get a jingle bell symbol and win $50 automatically." The play style of Game 5 is "IF YOUR SYMBOLS match within a game, win prize shown." The play style of Game 6 is "Find 3 gift symbols in any one row, column, or diagonal and win prize shown." The play style of Game 7 is "Find the word "DOUBLE" in the BONUS and DOUBLE YOUR TOTAL WINNINGS on this ticket." The play style of Game 8 is "If YOUR NUMBER is higher than THEIR NUMBER within a game, win prize shown." The play style of Game 9 is "If YOUR NUMBER is higher than THEIR NUMBER within a game, win prize shown." The play style of Game 10 is "If the total of YOUR NUMBERS equals 7 or 11 within a game, win prize shown."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game Number 224 shall be $10.00 per ticket.

1.2 Definitions in Instant Game Number 224.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, Fire Symbol, Cookie Symbol, Holly Symbol, Snowman Symbol, Jingle Bell Symbol, Tree Symbol, Mittens Symbol, Cap Symbol, Drum Symbol, Sack Symbol, Candy Cane Symbol, Light Symbol, Muffs Symbol, Wreath Symbol, Horn Symbol, Deer Symbol, Sleigh Symbol, Star Symbol, Gift Box Symbol, Snow Flake Symbol, Ball Symbol, Angel Symbol, Stocking Symbol, Candle Symbol, Single Symbol, and Double Symbol, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $250, $500, $1,000, $10,000, and $100,000.

D. Play Symbol Caption--the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: 16 TAC GAME NUMBER 224-1.2D

graphic

[graphic]

graphic

[graphic]

Figure 2: 16 TAC GAME NUMBER 224-1.2E

E. Retailer Validation Code--Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

graphic

[graphic]

Low-tier winning tickets use the required codes listed in Figure 2: 16 TAC GAME NUMBER 224-1.2E. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2: 16 TAC GAME NUMBER 224-1.2E with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize--A prize of $10.00, $15.00, $20.00.

H. Mid-Tier Prize--A prize of $50.00, $100, $250 or $500.

I. High-Tier Prize--A prize of $1,000, $10,000 or $100,000.

J. Bar Code--A 22 character interleaved two of five bar code which will include a three digit game ID, the seven digit pack number, the three digit ticket number and the nine digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 digit number consisting of the three digit game number (224), a seven digit pack number and a three digit ticket number. Ticket numbers start with 000 and end with 74 within each pack. The format will be: 224-0000001-000.

L. Pack--A pack of "JINGLE BUCKS" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one. Ticket 000 will be on the top page and ticket 001 will be on the next page and so forth with ticket 074 on the last page.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "JINGLE BUCKS" Instant Game Number 224 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "JINGLE BUCKS" Instant Game is determined once the latex on the ticket is scratched off to expose 60 play symbols. In Game 1, Get 3 like amounts, win that amount. In Game 2, Get 3 like amounts, win that amount. In Game 3, If the total of YOUR NUMBERS equals 7 or 11 within a game, win prize show. In Game 4, Get a tree symbol and win $20 automatically. Get a jingle bell symbol and win $50 automatically. In Game 5, If YOUR SYMBOLS match within a game, win prize shown. In Game 6, Find 3 Gift Box Symbols in any one row, column, or diagonal and win prize shown. In Game 7, Find the word "DOUBLE" in the BONUS and DOUBLE YOUR TOTAL WINNINGS on this ticket. In Game 8, If YOUR NUMBER is higher than THEIR NUMBER within a game, win prize shown. In Game 9, If YOUR NUMBER is higher than THEIR NUMBER within a game, win prize shown. In Game 10, if the total of YOUR NUMBERS equals 7 or 11 within a game, win prize shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 60 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 60 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 60 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 60 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Although not all prize symbols may be won in each prize symbol location, they may appear randomly throughout the locations on non-winning locations.

C. In Games 1 and 2, no 4 or more like symbols in a game.

D. In Games 1 and 2, no three or more pairs in a game.

E. In Games 3 and 10, no duplicate non-winning games on a ticket (symbols in either order).

F. In Game 4, the tree and jingle bell symbol will only appear as dictated by the prize structure.

G. In Game 5, no duplicate non-winning games on a ticket.

H. In Game 6, the gift box symbol will only appear in a line, diagonal or row as dictated by the prize structure.

I. In Game 6, the Gift Box Symbol will be the ONLY symbol to appear in a line, diagonal or row.

J. In Game 7, the DOUBLE symbol will only appear as dictated by the prize structure.

K. In Game 8 and 9, no duplicate non-winning games on a ticket. (This means all 4 games within 8 and 9 combined.)

L. In Game 8 and 9, no ties within a game.

2.3 Procedure for Claiming Prizes.

A. To claim a "JINGLE BUCKS" Instant Game prize of $10.00, $15.00, $20.00, $50.00, $100, $250, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, $250 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "JINGLE BUCKS" Instant Game prize of $1,000, $10,000, or $100,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "JINGLE BUCKS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "JINGLE BUCKS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "JINGLE BUCKS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game Number 224. The expected number and value of prizes in the game are as follows:

Figure 3: 16 TAC GAME NUMBER 224-4.0

graphic

[graphic]

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game Number 224 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game Number 224, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200008150
Ridgely C. Bennett
Deputy General Counsel
Texas Lottery Commission
Filed: November 21, 2000

♦ ♦ ♦

Instant Game Number 228--"Break the Bank"

1.0 Name and Style of Game.

A. The name of Instant Game Number 228 is "BREAK THE BANK." The play style is "If any of Your Numbers match one of the 3 Lucky Numbers, win prize shown for that number. Get a "money stack" symbol and win that prize automatically."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game Number 228 shall be $2.00 per ticket.

1.2 Definitions in Instant Game Number 228.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, money stack, $1.00, $2.00, $4.00, $6.00, $10.00, $20.00, $50.00, $200, $1,000, $3,000, and $30,000.

D. Play Symbol Caption--the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: 16 TAC GAME NUMBER 228-1.2D

graphic

[graphic]

Figure 2: 16 TAC GAME NUMBER 228-1.2E

E. Retailer Validation Code--Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

graphic

[graphic]

Low-tier winning tickets use the required codes listed in Figure 2: 16 TAC GAME NUMBER 228-1.2E. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2: 16 TAC GAME NUMBER 228-1.2E with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize--A prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00.

H. Mid-Tier Prize--A prize of $50.00 or $200.

I. High-Tier Prize--A prize of $1,000, $3,000, or $30,000.

J. Bar Code--A 19 character interleaved two of five bar code which will include a three digit game ID, the seven digit pack number, the three digit ticket number and the nine digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 digit number consisting of the three digit game number (228), a seven digit pack number and a three digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 228-0000001-000.

L. Pack--A pack of "BREAK THE BANK" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two. Tickets 000 and 001 will be on the top page and ticket 002 and 003 will be on the next page and so forth with ticket 248 and 249 on the last page.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "BREAK THE BANK" Instant Game Number 228 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "BREAK THE BANK" Instant Game is determined once the latex on the ticket is scratched off to expose nineteen (19) play symbols. If any of "Your Numbers" match one of the 3 "Lucky Numbers," the player wins prize shown for that number. If the player gets a "money stack" symbol, the player wins that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 19 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 19 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 19 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 19 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Non-winning prize symbols will not match a winning prize symbol on a ticket.

C. No duplicate Lucky Numbers on a ticket.

D. There will be no correlation between the matching symbols and the prize amount.

E. The auto win symbol will never appear more than once on a ticket.

F. No duplicate non-winning play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "BREAK THE BANK" Instant Game prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00, $50.00 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "BREAK THE BANK" Instant Game prize of $1,000, $3,000 or $30,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "BREAK THE BANK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "BREAK THE BANK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "BREAK THE BANK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 50,160,000 tickets in the Instant Game Number 228. The expected number and value of prizes in the game are as follows:

Figure 3: 16 TAC GAME NUMBER 228-4.0

graphic

[graphic]

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game Number 228 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game Number 228, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200008149
Ridgely C. Bennett
Deputy General Counsel
Texas Lottery Commission
Filed: November 21, 2000

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Instant Game Number 231--"Triple 3"

1.0 Name and Style of Game.

A. The name of Instant Game Number 231 is "TRIPLE 3". The play style of the game is "get three 3's in any one row, column, or diagonal and win prize shown in prize box. Get three 3's in any row, column, or diagonal and a 3X symbol in the bonus area and win triple the prize shown in the prize box."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game Number 231 shall be $1.00 per ticket.

1.2 Definitions in Instant Game Number 231.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--One of the symbols that appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible Play Symbols are:1, 2, 3, 4, 5, 6, 7, 8, 9, $1.00, $2.00, $3.00, $6.00, $9.00, $18.00, $27.00, $100, $1,000, $3,000, 1X and 3X symbol.

D. Play Symbol Caption--the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: 16 TAC GAME NUMBER 231-1.2D

graphic

[graphic]

Figure 2: 16 TAC GAME NUMBER 231-1.2E

E. Retailer Validation Code--Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

graphic

[graphic]

Low-tier winning tickets use the required codes listed in Figure 2: 16 TAC GAME NUMBER 231-1.2E . Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2: 16 TAC GAME NUMBER 231-1.2E with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize--A prize of $1.00, $3.00, $6.00, $9.00, or $18.00

H. Mid-Tier Prize--A prize of $27.00, $100 or $300

I. High-Tier Prize--A prize of $3,000

J. Bar Code--A 22 character interleaved two of five bar code which will include a three digit game ID, the seven digit pack number, the three (3) digit ticket number and the nine digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 digit number consisting of the three digit game number (231), a seven digit pack number and a three digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be : 231-0000001-000.

L. Pack--A pack of "TRIPLE 3" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five. Ticket 000 to 004 will be on the top page. Tickets 005 to 009 will be on the next page and so forth with tickets 245 to 249 on the last page.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "TRIPLE 3" Instant Game Number 231 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TRIPLE 3" Instant Game is determined once the latex on the ticket is scratched off to expose 11 play symbols. If a player gets three 3's in any one row, column, or diagonal, player wins prize shown in prize box. If a player gets three 3's in any row, column, or diagonal and a 3X symbol in the bonus area, player wins triple the prize shown in the prize box. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 11 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 11 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 11 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 11 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No ticket will contain 3 or more of a kind other than the "3" symbol.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE 3" Instant Game prize of $1.00, $3.00, $6.00, $9.00, $18.00, $27.00, $100 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $100 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "TRIPLE 3" Instant Game prize of $3,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE 3" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TRIPLE 3" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TRIPLE 3" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 30,000,000 tickets in the Instant Game Number 231. The expected number and value of prizes in the game are as follows:

Figure 3: 16 TAC GAME NUMBER 231-4.0

graphic

[graphic]

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game Number 231 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game Number 231, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200008152
Ridgely C. Bennett
Deputy General Counsel
Texas Lottery Commission
Filed: November 21, 2000

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Instant Game Number 234--"Pot O' Gold"

1.0 Name and Style of Game.

A. The name of Instant Game Number 234 is "POT O' GOLD." The play style is "If any of Your Numbers match either Lucky Number, win prize shown for that number. Reveal a clover symbol, win that prize automatically."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game Number 234 shall be $2.00 per ticket.

1.2 Definitions in Instant Game Number 234.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, clover symbol, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $200, $2,000, and $20,000.

D. Play Symbol Caption--the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one

of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: 16 TAC GAME NUMBER 234-1.2D

graphic

[graphic]

Figure 2: 16 TAC GAME NUMBER 234-1.2E

E. Retailer Validation Code--Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

graphic

[graphic]

Low-tier winning tickets use the required codes listed in Figure 2: 16 TAC GAME NUMBER 234-1.2E. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2: 16 TAC GAME NUMBER 234-1.2E with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize--A prize of $2.00, $4.00, $5.00, $10.00, $12.00, $20.00 or $24.00.

H. Mid-Tier Prize--A prize of $50.00 or $200.

I. High-Tier Prize--A prize of $2,000 or $20,000.

J. Bar Code--A 19 character interleaved two of five bar code which will include a three digit game ID, the seven digit pack number, the three (3) digit ticket number and the nine digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 digit number consisting of the three digit game number (234), a seven digit pack number and a three digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 234-0000001-000.

L. Pack--A pack of "POT O' GOLD" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two. Tickets 000 and 001 will be on the top page and ticket 002 and 003 will be on the next page and so forth with ticket 248 and 249 on the last page.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "POT O' GOLD" Instant Game Number 234 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "POT O' GOLD" Instant Game is determined once the latex on the ticket is scratched off to expose twenty-two (22) play symbols. If any of Your Numbers match either Lucky Number, the player wins prize shown for that number. If the player reveals a clover symbol, that prize is won automatically." No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 22 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. No duplicate non-winning Your Number play symbols on a ticket.

B. No duplicate non-winning prize symbols on a ticket.

C. Consecutive non-winning tickets will not have identical play data, spot for spot.

D. No duplicate Lucky Number symbols on a ticket.

E The auto win symbol will never appear more than once on a ticket.

F. There will be no correlation between the Your Numbers play symbols and the prize symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "POT O' GOLD" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $12.00, $20.00, $24.00, $50.00 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "POT O' GOLD" Instant Game prize of $2,000 or $20,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "POT O' GOLD" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "POT O' GOLD" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "POT O' GOLD" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,040,000 tickets in the Instant Game Number 234. The expected number and value of prizes in the game are as follows:

Figure 3: 16 TAC GAME NUMBER 234-4.0

graphic

[graphic]

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game Number 234 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game Number 234, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200008151
Ridgely C. Bennett
Deputy General Counsel
Texas Lottery Commission
Filed: November 21, 2000

♦ ♦ ♦

Texas Natural Resource Conservation Commission

Correction of Error

The Texas Natural Resource Conservation Commission adopted new 30 TAC Chapter 37, Subchapter I, concerning Financial Assurance for Petroleum Underground Storage Tank System. The rules appeared in the November 17, 2000, issue of the *Texas Register* (25 TexReg 11399). Due to errors submitted in the Commission's preamble, corrections are noted as follows.

In the preamble, 13th paragraph following the subheading, "ANALYSIS OF TESTIMONY SPECIFIC COMMENTS" on page 11405, (top of second column), the sentence as published reads, "The commission will adopt the concept, but will revise the language to be compatible with §37.825(b)." The sentence should have read as follows.

"The commission adopted the concept, but with revised language to be compatible with §37.825(b)."

A comma was inadvertently omitted following the word "availability". This error occurred in paragraphs 2, 5,7,10, 14 and 16 under the subheading "ANALYSIS OF TESTIMONY". The sentence should have read as follows.

"The proposed changes would likely impact the cost of the policy and the availability, which would impact the regulated community; therefore, the regulated community should be able to comment."

TRD-200008173

♦ ♦ ♦

Correction of Error

The Texas Natural Resource Conservation adopted 30 TAC §37.825, concerning Financial Test of Self-Insurance. The rule contained graphic Figure: 30 TAC §37.825(d), which appeared in the Tables and Graphics Section of the November 17, 2000, issue of the *Texas Register* (25 TexReg 11537).

The column containing dollar amounts in the figure does not line up properly, and the heading, "LETTER FROM CHIEF FINANCIAL OFFICER", should be centered.

TRD-200008174

♦ ♦ ♦

Correction of Error

The Texas Natural Resource Conservation Commission adopted the repeal of 30 TAC §§290.27-290.37, concerning Public Drinking Water, in order to move these rules and make modifications to Chapter 325. The adoption appeared in the November 17, 2000, issue of the *Texas Register* (25 TexReg 11408).

Due to errors in the Commission's submission, corrections are noted as follows.

In the preamble, second paragraph, page 11408, the second sentence reads, "Until June 1, 2001, public water system certified operators and public water system operations companies will follow the requirements in Chapter 290, Subchapter B." This sentence should be deleted in its entirety.

In the fourth paragraph, same page, the third sentence reads, "On June 1, 2001, water operators, water operations companies, and public water systems in Texas will be required to comply with the adopted rules in Chapter 325, Subchapters A and B." The reference to Subchapter B should be deleted. The sentence should read as follows.

"On June 1, 2001, water operators, water operations companies, and public water systems in Texas will be required to comply with the adopted rules in Chapter 325, Subchapter A."

TRD-200008171

♦ ♦ ♦

Correction of Error

The Texas Natural Resource Conservation Commission submitted a notice to adopt the review of Chapter 290, Subchapter B. The notice appeared in the Review of Agency Rules Section of the November 17, 2000, issue of the *Texas Register* (25 TexReg 11530).

Under the subheading "CHAPTER SUMMARY", fourth paragraph, third sentence the reference to "Chapter 325, Subchapters A and B" is incorrect. It should read, "Chapter 325, Subchapters A and D."

Under the subheading "ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST", second paragraph, first sentence, the reference to "Chapter 325, Subchapters B and C" is incorrect. It should read, "Chapter 325, Subchapters B and D.

TRD-200008172

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Notice of Public Hearing (Agreements with American Airlines, City of Fort Worth, and Dallas/Fort Worth International Airport)

The Texas Natural Resource Conservation Commission (commission) will conduct a public hearing to receive testimony concerning agreements with American Airlines, City of Fort Worth, and Dallas/Fort Worth (DFW) International Airport and corresponding revisions to the state implementation plan (SIP) under the requirements of 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The commission proposed agreements with American Airlines, the City of Fort Worth, and DFW International Airport, as revisions to the SIP for ozone control. The agreements and revised SIP would make federally enforceable certain ozone precursor emission reductions of nitrogen oxides from sources at DFW International Airport, Dallas Love Field, Fort Worth Alliance Airport, and Fort Worth Meacham International Airport in the DFW nonattainment area.

The commission is also proposing to incorporate the following text into Chapter 7 of the DFW Attainment Demonstration SIP:

The commission commits to perform new mobile source modeling, using MOBILE6, within 24 months of the model's release. In addition, if a transportation conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, transportation conformity will not be determined until Texas submits a motor vehicle emissions budget (MVEB) which is developed using MOBILE6 and which the EPA finds adequate. The North Central Texas Council of Government (NCTCOG) and the Department of Transportation have been informed of these commitments.

A public hearing on this proposal will be held in Arlington at 1:30 p.m. on January 4, 2001 at the NCTCOG, 3rd Floor Transportation Board Room, located at 616 Six Flags Drive. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 1999- 055-SIP-AI, and must be received by 5:00 p.m., January 4, 2001. For further information, please contact Bill Jordan, Strategic Assessment Division, (512) 239-2583.

TRD-200008047

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Filed: November 17, 2000

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Notice of Public Hearing (Chapters 101 and 117)

The Texas Natural Resource Conservation Commission (commission) will conduct public hearings to receive testimony concerning revisions to 30 TAC Chapters 101 and 117 and to the State Implementation Plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency regulations concerning SIPs. The revisions to Chapters 101 and 117 are proposed as revisions to the SIP.

Under rules adopted by the commission on April 19, 2000, which were published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 4101 and 4140), electric generating facilities (EGFs) in the Dallas/Fort Worth nonattainment area and the attainment counties of east and central Texas may voluntarily participate in a program where individual sources may transfer nitrogen oxides (NO_x) emissions allowances among each other. These EGFs must be under common ownership or control and the total emissions among the participating sources cannot exceed a predetermined maximum referred to as a system cap. This proposal would allow the system cap to be exceeded, provided surplus emissions allowances can be obtained on the same day as the exceedence occurs from any other EGF participating in a system cap. An additional option would allow a system cap to be exceeded on a 30-day rolling average, provided sufficient surplus allowances are obtained from another system for the identical time period. The proposal would allow EGFs in the attainment counties an additional option of exceeding the system cap provided surplus allowances are obtained for that calendar year.

Public hearings on this proposal will be held in Irving on January 3, 2001 at 6:00 p.m. at the City of Irving Public Library Auditorium, located at 801 West Irving Boulevard, and in Austin on January 4, 2001 at 2:00 p.m., at the Texas Natural Resource Conservation Commission, Building B, Room 201A, located at 12100 Park 35 Circle. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should

reference Rule Log Number 2000- 046-101-AI, and must be received by 5:00 p.m., January 5, 2001. For further information, please contact Beecher Cameron, Policy and Regulations Division, (512) 239-1495.

TRD-200008045
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 17, 2000

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Notice of Request for Public Comment and a Non-Adjudicatory Public Hearing for Total Maximum Daily Loads and Update to the State Water Quality Management Plan

Notice is hereby given that pursuant to the requirements of the Federal Clean Water Act, Texas Water Code, Chapter 26, and Part 25 of Title 40 of the Code of Federal Regulations, the Texas Natural Resource Conservation Commission (TNRCC or commission) has made available for public comment draft Total Maximum Daily Loads (TMDLs) concerning 1,2-dichloroethane and 1,1,2-trichloroethane in Clear Creek in Harris, Galveston, and Fort Bend Counties. The TNRCC will also conduct a non-adjudicatory public hearing to complete the public comment period. This announcement constitutes notice that a change to the State Water Quality Management Plan will occur upon approval of these TMDLs by the United States Environmental Protection Agency (EPA).

Texas is required to develop TMDLs for impaired water bodies under the 1972 Federal Clean Water Act, §303(d). A TMDL is a detailed water quality assessment that provides the scientific foundation to allocate pollutant loads in a certain body of water to restore and maintain designated uses.

The TNRCC will conduct a non-adjudicatory public hearing on these TMDLs concerning 1,2- dichloroethane and 1,1,2-trichloroethane in Clear Creek. The purpose of the public hearing is to provide the public an opportunity to comment on these proposed TMDLs. These water bodies are also listed for the presence of carbon disulfide in fish tissue. TMDLs are not being prepared for this pollutant because through additional assessment it is apparent that carbon disulfide measured in fish tissue samples was an artifact of tissue degradation during laboratory analysis. TNRCC does not deem it necessary or appropriate to establish a TMDL for carbon disulfide in Clear Creek and will propose to remove this pollutant from the next §303(d) list. The commission requests comment on each of the six major components of the TMDL: Problem Definition, Endpoint Identification, Source Analysis, Linkage Between Sources and Receiving Waters, Margin of Safety, and Loading Allocations. After the public comment period, TNRCC staff may revise the TMDLs, if appropriate. The final TMDLs will then be brought to the commission for approval. Upon approval of the TMDL by the commissioners, the final TMDL and a response to all comments will be made available on the TNRCC web site referenced below. These TMDLs will then be submitted to the EPA Region 6 for approval as an update to the State of Texas Water Quality Management Plan.

A non-adjudicatory public hearing will be held in Webster, Texas, on January 9, 2001, beginning at 7:00 p.m., at the Challenger 7 Memorial Park, located at 2301 NASA Boulevard. Agency staff will be available 6:30 p.m. - 7:30 p.m. for discussion or to answer any questions. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing. Agency staff member will be available again after the public hearing for discussion or to answer questions.

Comments should be submitted to Angela Slupe, Texas Natural Resource Conservation Commission, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments must be received by 5:00 p.m., January 12, 2001, and should reference Docket Number 2000-1285-TML. For further information regarding these proposed TMDLs, please contact Kirk Dean, Office of Environmental Policy, Analysis, and Assessment, (512) 239- 3667. Copies of the document summarizing these proposed TMDLs can be obtained via the commission's Web Site at *www.tnrcc.state.tx.us/water/quality/tmdl*, or by calling Angela Slupe at (512) 239-4712.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-200008117
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 21, 2000

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Notice of Water District Applications

The Texas Natural Resource Conservation Commission (TNRCC) will conduct a hearing on a petition for dissolution of GALVESTON COUNTY MUNICIPAL UTILITY DISTRICT NO. 9 (District) The petition was signed by Stephen T. Clark, President of Cypress Realty, Inc., a Texas corporation, being the owner of a majority of property located within the District (Petitioner). The TNRCC will conduct this hearing under the authority of Chapters 49 and 54 of the Texas Water Code, 30 Texas Administrative Code Chapter 293 and the procedural rules of the TNRCC. The TNRCC will conduct the hearing at: 9:30 a.m., Wednesday, January 24, 2000 Building E, Room 201S 12100 Park 35 Circle Austin, Texas. On January 20, 1982, the Texas Water Commission created the District. It operates under Texas Water Code Chapters 49 and 54 as a municipal utility district. The petition states the District: (1) has performed none of the functions for which it was created for five consecutive years preceding the date of the petition, (2) is financially dormant, and (3) has no outstanding bonded indebtedness. Certified copies of the Annual Financial Dormancy and Filing Affidavits for the years 1994 through 1998 are on file. An affidavit from the State Comptroller of Public Accounts has been included in the petition, certifying that the District has no bonded indebtedness. If the request for dissolution is approved, the District's assets, if any, will escheat to the State of Texas and will be administered by the State Comptroller of Public Accounts and disposed of in the manner provided by Chapter 74, Property Code.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days after the newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this 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 applicant and the TNRCC Internal Control Number; (3) the statement "I/we request a contested case hearing"; and (4) a brief description of how you would be affected by the granting of the request in a way not common to the general public. You may also submit your proposed adjustments to the application which would satisfy your concerns. Requests for a contested case hearing must be submitted

in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not approve the application and will forward the application and hearing request to the TNRCC 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, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning hearing process, contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687- 4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us. Persons with disabilities who plan to attend this hearing and who need special accommodations at the hearing should call the Office of Public Assistance at 1-800-687-4040 or 1-800-RELAY-TX (TDD), at least one week prior to the hearing.

TRD-200008126
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: November 21, 2000

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Notice of Water Quality Applications

The following notices were issued during the period of October 10, 2000 through October 16, 2000.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

CITY OF ANSON has applied for a renewal of Permit No. 10500-002, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 275,000 gallons per day via surface irrigation of 75 acres of agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located approximately 4,500 feet east northeast of the intersection of U.S. Highway 83 and U.S. Highway 180 in Jones County, Texas. The effluent disposal site is located approximately 2 miles east northeast of the intersection of U.S. Highway 83 and U.S. Highway 180 in Jones County, Texas. The disposal area is located in the drainage basin of Lake Stamford in Segment No. 1235 of the Brazos River Basin.

BWO ACQUISITION, LTD has applied for a renewal of Permit No. 13922-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 10,600 gallons per day via subsurface drainfields. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located approximately 5,000 feet southeast of the intersection of Loop 360 (Capital of Texas Highway) and Bee Caves Road (Farm-to-Market Road 2244) on the south side of Bee Caves Road, in and adjacent to the City of West Lake Hills in Travis County, Texas.

CITY OF BLUM has applied for a renewal of TNRCC Permit No. 10820-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 62,000 gallons per day. The facility is located on the east side of Farm-to-Market Road 933, approximately 1,200 feet southeast of the intersection of Farm-to-Market Road 933 and the Molan River in Hill County, Texas.

CANUTILLO INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. 11561-003, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 9,000 gallons per day via soil absorption trenches with a minimum area of 11,700 ft2. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located between Hemley Road and Chicken Farm Road, and Doniphan Drive and Kiely Road, approximately 0.5 mile southeast of the City of Vinton and 2.0 miles north of the City of Canutillo in El Paso County, Texas.

CITY OF CHILDRESS has applied for a renewal of TNRCC Permit No. 10076-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 495,000 gallons per day. The facility is located approximately 1/2 mile south of U.S. Highway 287 and approximately 1 mile east of Farm-to-Market Road 2530 in Childress County, Texas.

DENTON COUNTY FRESH WATER SUPPLY DISTRICT NO. 4 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14170-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility is located approximately 8,000 feet southwest of the intersection of State Highway 423 and State Highway 24 in Denton County, Texas.

EMERALD POINT MARINA PARTNERS, LTD has applied for a renewal of Permit No. 13825-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day via low pressure dosed subsurface drainfield with a minimum area of 31,250 square feet. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located at 5973 HiLine Road, on the west side of HiLine Road off of Hudson Bend Road approximately 1/4 mile north-northwest of the intersection of R.M. 620 and Hudson Bend Road in Travis County, Texas.

CITY OF GEORGE WEST has applied for a renewal of TNRCC Permit No. 10455-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 539,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of two 30-acre parcels of agricultural land. The facility is located on the north side of Timon Creek 500 feet east-southeast of the intersection of U.S. Highway 59 (By-Pass) and the Missouri Pacific Railroad, and approximately 3,000 feet northeast of the intersection of U.S. Highway 59 (By-Pass) and U.S. Highway 281 in Live Oak County, Texas. The irrigation sites are located between the plant site and U.S. Highway 59 (By-Pass) and between the plant site and the Missouri Pacific Railroad tracks in Live Oak County, Texas.

GUADALUPE - BLANCO RIVER AUTHORITY has applied for a renewal of TNRCC Permit No. 11078-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 9,600,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 9,600,000 gallons per day . The facility is located on the east bank of the Guadalupe River, immediately north of U.S. Highway 59 in Victoria County, Texas.

HARRIS COUNTY has applied for a renewal of TNRCC Permit No. 12852-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day.

Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 12852-001 will replace the existing NPDES Permit No. TX0099023 issued on March 17, 1994 and TNRCC Permit No. 12852-001. The facility is located approximately 500 feet east of Aldine-Westfield Road and 1,500 feet south of Cypress Creek in Harris County, Texas.

CITY OF HEREFORD has applied for a renewal of Permit No. 10186-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 2,000,000 gallons per day via surface irrigation of 2,500 acres of nonpublic access farmland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located 250 feet southwest of the intersection of Progressive and Dairy Roads, and approximately 3,000 feet south of U.S. Highway 60, east of the City of Hereford in Deaf Smith County, Texas.

CITY OF INDUSTRY has applied for a renewal of TNRCC Permit No. 13897-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 70,000 gallons per day. The facility is located approximately 6,500 feet northwest of the intersection of State Highway 159 and Farm-to-Market Road 109 in Austin County, Texas.

CITY OF ITALY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14195-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 228,000 gallons per day. The facility is located approximately 0.75 mile south of State Highway 34 and 0.5 mile east of Farm-to-Market Road 667 in Ellis County, Texas.

CITY OF JOURDANTON has applied for a renewal of TNRCC Permit No. 10418-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 330,000 gallons per day. The facility is located approximately 0.5 mile southwest of the intersection of State Highways 16 and 97 and approximately 1 mile west of the intersection of State Highway.

CITY OF KNOX has applied for a renewal of TNRCC Permit No. 10416-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 0.5 mile north of the intersection of Farm-to-Market Road 143 and State Highway 6, on the eastern bank of China Branch in Knox County, Texas.

CITY OF LA WARD has applied for a renewal of TNRCC Permit No. 13479-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 13,000 gallons per day. The facility is located on the west side of Sam Houston Avenue, approximately 200 feet northeast of the intersection of Palacios Street and Rio Grande Street in the City of La Ward in Jackson County, Texas.

CITY OF LEFORS has applied for a renewal of TNRCC Permit No. 10411-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located approximately 1300 feet south of State Highway 273, 2.5 miles west of the intersection of Farm- to -Market Road 291and State Highway 273 south of the City of Lefors in Gray County, Texas.

CITY OF LITTLEFIELD has applied for a renewal of Permit No. 10207-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 1,250,000 gallons per day via surface irrigation of 500 acres of land located adjacent to the plant site. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 2,500 feet east of the intersection of U.S. Highway 84 and Farm-to-Market Road 54,and south of Farm-to-Market Road 54 in Lamb County, Texas

MATHEWS BLUFF, LTD has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14107-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 240,000 gallons per day. The plant site is located approximately 1,000 feet northwest of the intersection of County Road 3405 and County Road 3406 in Hunt County, Texas.

MIRANDO CITY WATER SUPPLY CORPORATION has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14207-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 125,000 gallons per day. The facility is located due south of the Tex-Mex Railroad and 3,000 feet due west of the intersection of State Highway 359 and Farm-to-Market Road 2895 in Webb County, Texas.

CITY OF MORGAN has applied for a renewal of TNRCC Permit No. 12217-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located approximately 0.5 mile south of the intersection of Farm-to- Market Road 927 and State Highway 174 on State Highway 174 in Bosque County, Texas.

CITY OF SILVERTON has applied for a renewal of Permit No. 10803-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 90,000 gallons per day via evaporation on approximately 36 acres of playa lake and via irrigation of 70 acres of nonpublic access native grassland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located 0.75 mile west of State Highway 207 and 1 mile south of State Highway 86 in Briscoe County, Texas.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE has applied for a renewal of TNRCC Permit No. 11475-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 315,000 gallons per day. The facility is located on the north bank of Oyster Creek, approximately 3 miles upstream of Farm-to-Market Road 1464 crossing Oyster Creek in Fort Bend County, Texas.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of Permit No. 11246-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 4,200 gallons per day via surface irrigation of 1.9 acres of nonpublic access pastureland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located near the confluence of the Paluxy River and Opossum Branch within Dinosaur Valley State Park, approximately 1.2 miles northwest of the intersection of State Highway 205 and State Highway-Park Road 21 and approximately 4 miles west- northwest of the intersection (in the City of Glen Rose) of U.S. Highway 67 and Farm-to-Market Road 201 in Somervell County, Texas.

TEXAS YOUTH COMMISSION has applied for a renewal of Permit No. 11121-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day via surface irrigation of 20.37 acres of nonpublic access grassland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal area are located approximately 5,000 feet due south of the intersection of Interstate Highway 20 and Farm-to-Market Road 1927, south of the City of Pyote in Ward County, Texas.

TWINWOOD (U.S.) INC has applied to for a renewal of TNRCC Permit No. 13089-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located between Guyler Road and Brundreff Road, approximately 1.5 miles southwest of the City of Simonton and the intersection of Farm-to-Market Roads 1093 and 1489 in Fort Bend County, Texas.

VICTORIA COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 has applied for a renewal of TNRCC Permit No. 10513-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located northwest of and adjacent to the Missouri Pacific Railroad right-of-way approximately 3,000 feet northeast, along the Missouri Pacific Railroad from its intersection with State Highway 185 in the City of Bloomington in Victoria County, Texas.

TRD-200008125
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: November 21, 2000

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Notice of Water Rights Applications

Notice is given that applicant, JAMES R. HATCHETT, 6606 Moss Oak Road, San Antonio, Texas 78229, seeks an amendment to Water Use Permit No. 5344, pursuant to §11.122, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§ 295.1, et seq. Application No. 5344A, by James R. Hatchett, was received on July 6, 2000, and was declared administratively complete on October 10, 2000. The Executive Director recommends that public notice of the application be given pursuant to 30 TAC §295.152. Pursuant to 30 TAC §295.153 (c)(1), this notice is being mailed to all downstream water right holders of record in the Nueces River Basin. Water Use Permit No. 5344 currently authorizes applicant to divert and use 132 acre-feet of water per annum from the a reservoir exempt from the requirements of a permit by §11.142, Texas water Code, on Fort Ewell Creek, tributary of Chacon Creek; and also from Chacon Creek, tributary of San Miguel Creek, tributary of the Frio River, tributary of the Nueces River, Nueces River Basin, in Medina County; at a maximum combined rate of 1.1 cfs (500 gpm) to irrigate 66 acres of out of two tracts totalling 66.285 acres of land located in the Robert Atkinson Survey No. 5, Abstract No. 3, approximately 21 miles southeast of Hondo, Medina County, Texas. Water Use Permit No. 5344 has a time priority of January 28, 1991, and includes a special condition that it would expire and become null and void on December 31, 2001, unless prior to such date, the permittee applied for an extension and it was subsequently granted. James R. Hatchett seeks to amend the permit to remove or extend the termination date included in the permit by ten years. No other changes are requested in the application.

LESLIE W. HUDGINS, P. O. Box 307, Hungerford, Texas 77448, applicant, seeks a Water Use Permit pursuant to §11.121, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§ 295.1, et seq. The applicant seeks authorization to divert not to exceed 217 acre-feet of water per annum from West Bernard Creek, tributary of the San Bernard River, Brazos-Colorado Coastal Basin for irrigation of 100 acres out of a 275 acre-tract in the Alexander Jackson Survey, Abstract No, 34, Wharton County, approximately 2 miles Northwest of Hungerford, Texas. Ownership of the land to be irrigated by applicants is evidenced by General Warranty Deed recorded in Volume 479, Page 538, in the Official Records of Wharton County, Texas. The water will be diverted from West Bernard Creek at a maximum rate of 4.011 cfs (1800 gpm) at a point S 64.75° W, 13,700 feet from the east corner of Alexander Jackson Survey, Abstract No, 34, Wharton County, also being at 29.415° N Latitude and 96.104° W Longitude. Water diverted but not consumed will be returned to West Bernard Creek downstream of the proposed diversion point. The return point is located at a point on the creek that is S 67.5° W, 12,500 feet from the aforesaid survey corner, also being at 29.421° N Latitude and 96.101° W Longitude. The estimate annual amount of return flow to this point is 32 acre-feet of water.

Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after newspaper publication of this 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) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions to the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

CITY OF PEARLAND, Texas, c/o City Engineer, 3519 Liberty Drive, Texas 777581, applicant seeks a permit pursuant to §§11.121 and 11.042 of the Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§ 295.1, et seq. The application was received on August 16, 2000 and additional information and fees were received on October 27, 2000. The application was declared administratively complete on October 27, 2000. The Executive Director recommends that mailed public notice of the application be given pursuant to 30 TAC §295.161 to the Texas Parks and Wildlife Department and the TNRCC Public Interest Counsel. The City of Pearland, applicant seeks authorization to use approximately 17,000 feet of the bed and banks of Mary's Creek, tributary of Clear Creek, tributary of Galveston Bay, San Jacinto-Brazos Coastal Basin to convey its privately-developed ground-water-based-effluent from the Southwest Environmental Center (SWEC) wastewater treatment plant to three diversion points downstream of the plant on Mary's Creek for irrigation purposes. Applicant will discharge a maximum of 2240 acre-feet of ground-water-based-effluent annually at a maximum rate of 1.5 cfs (673 gpm) into a detention basin at the SWEC facility and

from the basin into Mary's Creek, San Jacinto-Brazos Coastal Basin, Brazoria County, at a point authorized by applicant's TPDES Permit No. 10134-007, 0.25 mile east and 1 mile north of the intersection of County Roads 101 and 103 in the City of Pearland, Texas. This point is located at 29.55° N Latitude and 95.31°W Longitude, also being S 28.70°W, 12,979.96 feet from USC&GS Benchmark No. M-456 located at 29.58°N Latitude and 95.29°W Longitude. Applicant will apply to amend TPDES Permit No. 10134-007 to add an additional discharge point on Mary's Creek at 29.55° N Latitude, 95.31°W Longitude, also being S 22.73°W, 12,246.45 feet from USC&GS Benchmark No. M-456. Applicant seeks to divert a total of 120.8 acre-feet of ground-water-based-effluent per annum from three points on Mary's Creek as follows: Point 1- 29.55° N Latitude, 95.31°W Longitude, also being S 22.73°W, 12,246.45 feet from USC&GS Benchmark No. M-456, all "diversion" is by evapotranspiration losses only, estimated to be 5.9 acre-feet per annum. Point 2 -29.55° N Latitude, 95.30°W Longitude, also being S 5.55°W, 10,001.55 feet from USC&GS Benchmark No. M-456, 39.1 acre-feet per annum at 200 gpm (0.45 cfs). Point 3 - 29.55° N Latitude, 95.26°W Longitude, also being S 38.79°E, 14,042.30 feet from USC&GS Benchmark No. M-456, 70.7 acre-feet per annum at 360 gpm (0.80 cfs). The applicant has estimated a carriage loss in the approximately 17,000 foot stretch of Mary's Creek between the discharge point and most down stream diversion point to be approximately 5.1 acre-feet per annum.

Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by December 7, 2000. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by December 7, 2000. The Executive Director can consider an approval of the application unless a written request for a contested case hearing is filed by December 7, 2000. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit any proposed conditions to the requested amendment which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the requested amendment and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103 at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200008127

LaDonna Castañuela

Chief Clerk

Texas Natural Resource Conservation Commission

Filed: November 21, 2000

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Public Utility Commission of Texas

Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on November 14, 2000, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Shell Energy Services Company, L.L.C. for Retail Electric Provider (REP) certification, Docket Number 23279 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire state of Texas.

Persons who wish to 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 no later than December 8, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200008015

Rhonda Dempsey

Rules Coordinator

Public Utility Commission of Texas

Filed: November 16, 2000

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on November 16, 2000, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Reliant Energy Solutions, LLC for Retail Electric Provider (REP) certification, Docket Number 23289 before the Public Utility Commission of Texas.

Applicant's requested service area is the geographic area of the entire state of Texas.

Persons who wish to 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 no later than December 8, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200008075

Rhonda Dempsey

Rules Coordinator

Public Utility Commission of Texas

Filed: November 20, 2000

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on November 16, 2000, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Reliant Energy Retail Services, LLC for Retail Electric Provider (REP) certification, Docket Number 23291 before the Public Utility Commission of Texas.

Applicant's requested service area includes the entire state of Texas.

Persons who wish to 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 no later than December 8, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200008076
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2000

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Notice of Application for Amendment to Certificate of Operating Authority

On November 10, 2000, Verizon Select Services, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its certificate of operating authority (COA) granted in COA Certificate Number 50014. Applicant intends to discontinue competitive local exchange services to consumers and small business customers in Southwestern Bell Telephone Company and former GTE Southwest, Inc. service areas.

The Application: Application of Verizon Select Services, Inc. to Discontinue Services, Docket Number 23271.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 no later than December 6, 2000. You may contact the commission's Customer Protection Division at (512) 936-7120. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 23271.

TRD-200008014
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 16, 2000

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On November 20, 2000, VarTec Telecom, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60252. Applicant intends to remove the resale-only restriction.

The Application: Application of VarTec Telecom, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 23298.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 no later than December 6, 2000. You may contact the commission's Customer Protection Division at (512) 936-7120. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 23298.

TRD-200008120
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2000

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Notice of Application for Designation as an Eligible Telecommunications Carrier under 47 U.S.C. §214(e)

Notice is given to the public of an application filed with the Public Utility Commission of Texas, on November 14, 2000, for designation as an eligible telecommunications carrier under 47 U.S.C. §214(e).

Docket Title and Number: Application of W.T. Services, Inc. for Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to 47 U.S.C. §214(e) and P.U.C. Substantive Rule §26.418. Docket Number 23280.

The Application: Under 47 U.S.C. §214(e), a common carrier designated as an ETC in accordance with that subsection shall be eligible to receive federal universal service support under 47 U.S.C. §254. W.T. Services, Inc. is requesting ETC designation in order to be eligible to receive federal universal service support in the Bovina exchange in the state of Texas. W.T. Services holds Certificate of Operating Authority Number 50013.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by December 16, 2000. Requests for further information should be mailed to the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136, or use Relay Texas (800) 735- 2989 to reach the commission's toll free number (888) 782-8477. The deadline for comment is December 16, 2000, and all correspondence should refer to Docket Number 23280.

TRD-200008109
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2000

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Notice of Application for Designation as an Eligible Telecommunications Provider Pursuant to P.U.C. Substantive Rule §26.417

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on November 14, 2000, for designation as an eligible telecommunications provider pursuant to P.U.C. Substantive Rule §26.417.

Docket Title and Number: Application of W.T. Services, Inc. for Designation as an Eligible Telecommunications Provider (ETP) Pursuant to P.U.C. Substantive Rule §26.417. Docket Number 23278.

The Application: W.T. Services, Inc. (W.T. Services or the company) filed an application for designation as an eligible telecommunications provider (ETP) pursuant to P.U.C. Substantive Rule §26.417. W.T. Services is requesting ETP designation in order to be eligible to receive funds from the Texas Universal Service Fund (TUSF) under the Texas High Cost Universal Service Plan (THCUSP). W.T. Services seeks ETP designation in the Bovina exchange in the state of Texas. W.T. Services holds Certificate of Operating Authority Number 50013.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by December 16, 2000. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. The deadline for comment is December 16, 2000, and all correspondence should refer to Docket Number 23278.

TRD-200008108
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2000

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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 (commission) of an application on November 16, 2000, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Arbros Communications Licensing Company Texas, L.L.C. for a Service Provider Certificate of Operating Authority, Docket Number 23294 before the Public Utility Commission of Texas.

Applicant intends to provide resale, data, and facilities-based telecommunications, specifically, high-speed data transmission 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, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than December 6, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200008077
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2000

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.54(b)(3)

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on November 10, 2000, for waiver of the requirements of P.U.C. Substantive Rule §26.54(b)(3), One-Party Line Service and Voice Band Data.

Docket Title and Number: Application of Southwest Texas Telephone Company for Waiver of Requirements in P.U.C. Substantive Rule §26.54(b)(3). Docket Number 23268.

The Application: Southwest Texas Telephone Company (STTC or the company) seeks waiver of the requirement that by the end of 2002 it shall provide all subscribers a minimum transmission speed of at least 14,400 bits of data per second (14.4 kbps) on all switched voice circuits when connected through an industry standard modem or facsimile machine. STTC requests the commission waive the 14.4 kbps requirement for ninety to ninety-five access lines within the Vinegarroon Exchange. STTC will deploy a point-to-multipoint wireless local loop system in the Vinegarroon Exchange that will comply with §26.54(b)(3) well before the end of 2002. However, with an estimated marginal cost of $1,815 to add each new subscriber to such a system, the company believes that there is no public benefit to be gained by requiring the replacement of all equipment if a subscriber has no intention of using the service for data transmission.

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 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. All comments should reference Docket Number 23268.

TRD-200008129
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2000

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.54(b)(3)

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on November 10, 2000, for waiver of the requirements of P.U.C. Substantive Rule §26.54(b)(3), One-Party Line Service and Voice Band Data.

Docket Title and Number: Application of GTE Southwest Incorporated doing business as Verizon Southwest for Waiver of Requirements in P.U.C. Substantive Rule §26.54(b)(3). Docket Number 23270.

The Application: GTE Southwest Incorporated doing business as Verizon Southwest (Verizon Southwest or the company) seeks waiver of the requirement that by the end of 2002 it shall provide all subscribers a minimum transmission speed of at least 14,400 bits of data per second (14.4 kbps) on all switched voice circuits when connected through an industry standard modem or facsimile machine. Verizon Southwest seeks the waiver solely for its exchange in Ozona, Texas. The company intends to upgrade the Ozona, Texas exchange to comply with §26.54(b)(3). However, both the limited availability of vendor personnel and the problems that have been encountered in the trial installations of the ECI device suggest that it is unlikely that Verizon Southwest will be able to complete installation by December 31, 2002.

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 call the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission

at (512) 936-7136. All comments should reference Docket Number 23270.

TRD-200008107
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2000

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.54(b)(3)

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on November 10, 2000, for waiver of the requirements of P.U.C. Substantive Rule §26.54(b)(3), One-Party Line Service and Voice Band Data.

Docket Title and Number: Application of Dell Telephone Cooperative, Inc. for Waiver of Requirements in P.U.C. Substantive Rule §26.54(b)(3). Docket Number 23286.

The Application: Dell Telephone Cooperative, Inc. (Dell or the company) seeks waiver of the requirement that by the end of 2002 it shall provide all subscribers a minimum transmission speed of at least 14,400 bits of data per second (14.4 kbps) on all switched voice circuits when connected through an industry standard modem or facsimile machine. The company has a total of 1,121 local exchange access lines. Dell requests the commission waive the 14.4 kbps requirement for 63 customers served through equipment which does not meet the data speed required under P.U.C. Substantive Rule §26.54(b). The estimated average upgrade cost per remaining subscriber is $12,325 per customer.

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 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. All comments should reference Docket Number 23286.

TRD-200008110
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2000

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.54(b)(3) and §26.54(b)(4)(C)

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on November 10, 2000, for waiver of the requirements of P.U.C. Substantive Rule §26.54(b)(3), One-Party Line Service and Voice Band Data.

Docket Title and Number: Application of Border to Border Communications, Inc. for Waiver of Requirements in P.U.C. Substantive Rule §26.54(b)(3) and §26.54(b)(4)(C). Docket Number 23267.

The Application: Border to Border Communications Inc. (BTBC or the company) seeks waiver of the requirement that by the end of 2002 it shall provide all subscribers a minimum transmission speed of at least 14,400 bits of data per second (14.4 kbps) on all switched voice circuits when connected through an industry standard modem or facsimile machine. BTBC requests the commission waive the 14.4 kbps requirement for 67 customers served through equipment which does not meet the data speed required until an economically feasible alternative technology is available to meet the 14.4 kbps requirement. The estimated average upgrade cost per remaining subscriber is $39,971 per subscriber. The company requests also an additional good cause waiver from the requirements imposed under P.U.C. Substantive Rule §26.54(b)(4)(C), requiring the company upon request to upgrade a customer's service to 14.4 kbps.

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 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. All comments should reference Docket Number 23267.

TRD-200008128
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2000

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.54(b)(3) and §26.54(b)(4)(C)

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on November 10, 2000, for waiver of the requirements of P.U.C. Substantive Rule §26.54(b)(3), One-Party Line Service and Voice Band Data.

Docket Title and Number: Application of Big Bend Telephone Company, Inc. for Waiver of Requirements in P.U.C. Substantive Rule §26.54(b)(3) and §26.54(b)(4)(C). Docket Number 23269.

The Application: Big Bend Telephone Company, Inc. (Big Bend or the company) seeks waiver of the requirement that by the end of 2002 it shall provide all subscribers a minimum transmission speed of at least 14,400 bits of data per second (14.4 kbps) on all switched voice circuits when connected through an industry standard modem or facsimile machine. Big Bend requests the commission to waive the 14.4 kbps requirement for 655 customers served through equipment which does not meet the data speed required until an economically feasible alternative technology is available to meet the 14.4 kbps requirement. The estimated average upgrade cost per remaining subscriber is $256,796 per subscriber. The company requests also an additional good cause waiver from the requirements imposed under P.U.C. Substantive Rule §26.54(b)(4)(C), requiring the company upon request to upgrade a customer's service to 14.4 kbps.

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 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. All comments should reference Docket Number 23269.

TRD-200008106
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2000

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Public Notice of Amendment to Interconnection Agreement

On November 14, 2000, Southwestern Bell Telephone Company and Choctaw Communications, Inc. doing business as Smoke Signal Communications, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 23277. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 23277. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by December 14, 2000, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may 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. All correspondence should refer to Docket Number 23277.

TRD-200008122
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2000

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Public Notice of Amendment to Interconnection Agreement

On November 14, 2000, Southwestern Bell Telephone Company and U.S. Metro Line Services, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 23281. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 23281. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by December 14, 2000, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may 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. All correspondence should refer to Docket Number 23281.

TRD-200008121
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2000

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Public Notice of Interconnection Agreement

On November 13, 2000, United Telephone Company of Texas doing business as Sprint, Central Telephone Company of Texas doing business as Sprint, and Koyote Telephone, Inc., collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 23274. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 23274. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by December 14, 2000, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may 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. All correspondence should refer to Docket Number 23274.

TRD-200008123

Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2000

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Public Notice of Workshop and Request for Comments

The Public Utility Commission of Texas (commission) will host a workshop on rules pertaining to terms and conditions under which telecommunications services are made available for resale on Thursday, December 14, 2000 beginning at 1:00 p.m. in the Commissioners' Hearing Room located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 23227, *PUC Rulemaking to Establish the Terms and Conditions Under Which Telecommunications Services are Made Available for Resale*, has been established for this proceeding. The purpose of the workshop is to provide interested persons an opportunity to comment on the first draft of new Substantive Rule §26.277 relating to Resale. The first draft will be filed with the commission's filing clerk under Project Number 23227 no later than Friday, December 1, 2000. Comments from interested persons will assist the commission staff in formulating a cohesive policy that harmonizes federal and state requirements pertaining to resale.

While not required, written comments may be filed by any person interested in commenting on the first draft of Substantive Rule §26.277, by filing 16 copies with the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, no later than Tuesday, December 12, 2000. Additionally, written comments may be distributed electronically by any person registered on the listserver for Project Number 23227. To register with the Project Number 23227 listserver so that you can send and receive information electronically, visit the 'Mailing Lists' page on the commission's website at http://puclist.puc.state.tx.us/Scripts/telesubscribe.asp. All comments, whether filed with the commission's filing clerk or distributed electronically, should reference Project Number 23227.

An agenda will be distributed at the workshop. Questions about the workshop or this notice should be referred to Lynne LeMon, Telecommunications Division, at (512) 936-7382. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200008105
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2000

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Questions for Comment and Notice of Workshop, Rulemaking to Address the Provision of Advanced Services by Electing Companies, COA or SPCOA Holders in Rural Service Areas

On February 1, 2001, the Public Utility Commission of Texas (commission) will host a workshop in Project Number 21175, *Rulemaking to Address the Provision of Advanced Services by Electing Companies, COA or SPCOA Holders in Rural Service Areas*. The project and the workshop will address the implementation of the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated, §55.014, Provision of Advanced Telecommunications Services (Vernon 1998, Supplement 2000). On or before January 26, 2001, commission staff will file a

strawman rule and an agenda for the workshop, which will be available in Central Records under Project Number 21175. Copies will also be available at the workshop.

The workshop will begin at 9:00 a.m. on Thursday, February 1, 2001, in the Commissioners' Hearing Room located on the seventh floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701.

No later than January 2, 2001, the commission requests that interested persons file written comments addressing the following questions regarding PURA §55.014:

A. *Terms and definitions*

1. What services are included in the definition of "advanced services" provided in subsection (a)?

2. What is the appropriate measure of a geographic area?

3. What are the appropriate measures for "urban area" and "rural area?"

4. What standards should be used to determine "reasonably comparable?"

a. Is satellite service "reasonably comparable" to digital subscriber line (DSL) service?

b. What other advanced telecommunications services are "reasonably comparable" to DSL service?

5. What is the standard for determining when advanced telecommunications services are similar?

6. What advanced services are similar?

7. What constitutes a "bona fide retail request?"

B. *Application and Implementation*

1. If a company is subject to subsection (c) or (d) or both, is the company's obligation to provide similar advanced telecommunications services ongoing?

2. Who is responsible for similar service if the subject company sells any rural or urban exchange?

3. Does subsection (e)(1) affect the provision of advanced telecommunications services by affiliates or strategic alliances? If so, how?

4. After a bona fide request is made under subsections (c) and (d) and the 15-month deadline has passed, should the company be expected to make available the requested services to all individuals in the same geographic area in which the bona fide request originated?

5. Once the 15-month deadline has passed, when should the company be expected to make available the requested services to subsequent bona fide requestors in the same geographic area?

C. *Draft Language*

Interested parties may file draft rule language to implement PURA §55.014.

Comments may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711 no later than January 2, 2001. All comments should reference Project Number 21175.

Questions concerning this notice should be referred to Don Ballard, Policy Development Division at (512) 936-7244 or don.ballard@puc.state.tx.us, or Melanie Malone, Policy Development Division at (512) 936-7247 or melanie.malone@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200008048
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 17, 2000

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Sam Houston State University

Consultant Proposal Request

This request for consulting services is filed under the provisions of Texas Civil Statutes, Article 6252-11c. Sam Houston State University (SHSU) seeks written proposals from qualified consulting firms based in Washington, D.C. to represent and assist the University in developing projects deemed important to the University. Important considerations in the award of the proposed contract will be the years of experience in securing funding assistance for university programs and facilities, a strong bipartisan presence within the firm with considerable experience working with legislative staffs, and a record of substantial success in dealing with the Congress and the Executive Agencies. Excellent skills in university grant and contract awards are necessary. Substantial experience in the development of strategies for corporate participation in university-sponsored development projects especially those relating to environmental and telecommunication issues. Interested parties are invited to express their interest and describe their capabilities on or before December 30, 2000. The consulting services desired are a continuation of a service previously performed by a private consultant. This contract represents a renewal and will be awarded to the previous consultant unless a better offer is received. The term of the contract is to be from date of award for a twelve (12) month period with options to renew. Further technical information can be obtained from Dr. Richard H. Payne at (409) 294-3621. Deadline for receipt of proposals is 4:00 p.m. December 30, 2000. Date and time will be stamped on the proposals by the Office of Research and Sponsored Programs. Proposals received later than this date and time will not be considered. All proposals must be specific and must be responsive to the criteria set forth in this request.

I. GENERAL INSTRUCTIONS

Submit one (1) copy of your proposal in a sealed envelope to: Office of Research and Sponsored Programs, P.O. Box 2448, Sam Houston State University, Huntsville, Texas, 77341-2448 before 4:00 p.m., December 30, 2000. Proposals may be modified or withdrawn prior to the established due date.

II. DISCUSSIONS WITH OFFERERS AND AWARD

The University reserves the right to conduct discussions with any or all offerers, or to make an award of a contract without such discussions based only on evaluation of the written proposals. The University also reserves the right to designate a review committee in evaluating the proposals according to the criteria set forth under Section III entitled "Scope of Work." The Associate Vice President for Research and Graduate Studies shall make a written determination showing the basis upon which the award was made and such determination shall be kept on file.

III. SCOPE OF WORK

1. Representation and assistance in developing projects deemed important to the University.

2. Assistance in obtaining funding for University projects.

3. Consulting and representation as directed by Sam Houston State University.

IV. EVALUATION

A. Criteria for Evaluation of Proposals:

Firms will be evaluated on time and quality of experience in representing and assisting universities in developing projects. Equal consideration will be given to past performance, writing skills, and the effectiveness of the firm's strategies.

B. Your proposal should include costs for all related expenses.

V. TERMINATION

This Request for Proposal (RFP) in no manner obligates SHSU to the eventual purchase of any services described, implied or which may be proposed until confirmed by a written contract. Progress towards this end is solely at the discretion of SHSU and may be terminated without penalty or obligation at any time prior to the signing of a contract. SHSU reserves the right to cancel this RFP at any time, for any reason and to reject any or all proposals. SHSU requires that the responses to this RFP must state that the proposed terms will remain in effect for at least forty-five (45) days after the scheduled response opening.

TRD-200008049
B.K. Marks
President
Sam Houston State University
Filed: November 17, 2000

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San Antonio-Bexar County Metropolitan Planning Organization

Request For Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to develop an Incident (Freeway) Management Plan.

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Senior Transportation Planner, at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Wednesday, December 20, 2000 at the MPO office:

Janet A. Kennison, Administrator Metropolitan Planning Organization 1021 San Pedro, Suite 2200 San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Steering Committee based on the recommendation of the project's consultant selection committee. The Incident Management Plan Consultant Selection Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $75,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200008005
Janet A. Kennison
Administrator
San Antonio-Bexar County Metropolitan Planning Organization
Filed: November 15, 2000

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Texas Savings and Loan Department

Notice of Application for Change of Control of a Savings Bank

Notice is hereby given that on November 10, 2000, application was filed with the Savings and Loan Commissioner of Texas for rebuttal of control of Shelby Savings Bank, S.S.B., Center, Texas by: Gail Cuculic, Donald Monroe and Fred Wulf.

This application is filed pursuant to 7 TAC §§75.121-127 of the Rules and Regulations Applicable to Texas Savings Banks. These Rules are on file with 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-200008057
James L. Pledger
Commissioner
Texas Savings and Loan Department
Filed: November 17, 2000

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Stephen F. Austin State University

Notice of Consultant Contract Amendment

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of amendment to the University's contract with consultant Harold Webb Associates, Ltd., 6532 Lost Horizon, Suite 201, Austin, Texas 78759. The original contract award was published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5501). The original contract was in the sum of $65,000.00. The contract was amended in an additional sum not to exceed $14,500.00 to raise the expense cap.

No documents, films, recording, or reports of intangible results will be required to be presented by the consultant. Services are provided on an as-needed basis.

For further information, please call (936) 468-4305.

TRD-200008058
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: November 17, 2000

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Texas Department of Transportation

Public Notice

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.dot.state.tx.us - click on Aviation, click on Aviation Public Hearing. Or, contact Karon Wiedemann, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4520 or 800 68 PILOT.

TRD-200008112
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: November 21, 2000

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How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 24 (1999) is cited as follows: 24 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 "23 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 23 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code*** (***TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), LOIS, Inc. (1-800-364-2512 ext. 152), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 8, April 9, July 9, and October 8, 1999). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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