This month's front cover artwork:

Artist: *Trista Doss*
12th Grade
Blanket High School

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

We will display artwork on the cover of each *Texas Register*. The artwork featured on the front cover is chosen at random.

The artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*. The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register*.

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WITHDRAWN RULES

ADOPTED RULES

Open Meetings

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

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

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

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

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

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

THE GOVERNOR

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

Executive Order

RP 11

Relating to the Governor's Task Force for Economic Growth.

WHEREAS, Texas has enjoyed a period of tremendous economic prosperity in recent years, leading the nation in net job creation and maintaining a robust and vibrant economy;

WHEREAS, because Texas leaders have placed a strong emphasis on improving public and higher education and creating a sound climate for job growth, Texas is well positioned to mitigate the effects associated with a cooling national economy;

WHEREAS, due to the unwavering spirit of Texas' independent entrepreneurs and business leaders, the Texas economy is diversified and dynamic;

WHEREAS, although Texas' economy is faring better than many other states, the state can and should assess the status of job creation and the Texas economy, evaluate different policy alternatives, and propose recommendations for consideration by the Governor and other state policy-makers; and

WHEREAS, Texas' continued economic strength lies, in part, in its ability to develop a long-range plan for job growth;

NOW, THEREFORE, I, Rick Perry, Governor of the State of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following:

1. Creation of Task Force. A Governor's Task Force for Economic Growth ("Task Force") is hereby created to advise the Governor on matters related to the state economy.

2. Composition and Terms. The Task Force shall consist of members appointed by the Governor.

The Governor will appoint one member to serve as chair and one member to serve as vice-chair.

The Governor may fill any vacancy that may occur and may appoint other voting or ex officio, non-voting members as needed.

Any state or local officers or employees appointed to serve on the Task Force shall do so in addition to the regular duties of their respective office or position.

All appointees serve at the pleasure of the Governor.

3. Duties. The Task Force, through its advisory efforts, shall develop and present recommendations, including fiscal impact assessments, to:

a. actively recruit businesses to the state, foster and promote free competitive enterprise, diversify Texas' employment base, develop high wage job opportunities, and maintain employment, production, and purchasing power;

b. assist and advise the Governor in responding to fluctuations and cycles within the state economy; and,

c. enhance the ability of the executive branch of government to respond to economic downturns.

4. Coordination. The Task Force through its advisory efforts should coordinate with national, state, and local entities and communicate with neighboring states and Mexico to address similar issues.

5. Report. The Task Force shall make a report to the Governor.

6. Meetings. Subject to the approval of the Governor, the Task Force shall meet at times and locations determined by the chair.

7. Administrative Support. The Office of the Governor and other appropriate state agencies shall provide administrative support for the Task Force.

8. Other Provisions. The Task Force shall adhere to guidelines and procedures prescribed by the Office of the Governor. All members of the Task Force shall serve without compensation. Necessary expenses may be reimbursed when such expenses are incurred in direct performance of official duties of the Task Force.

9. Effective Date. This order shall take effect immediately.

This executive order supersedes all previous related orders and shall remain in effect and in full force unless modified, amended, rescinded, or superseded by me.

Given under my hand this the 26th day of February, 2002.

Rick Perry, Governor

TRD-200201253

♦ ♦ ♦

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 No. JC-0465

Mr. F. Lawrence Oaks, Executive Director, Texas Historical Commission, 1511 Colorado Street, Austin, Texas 78711-2276

Re: Whether the state owns artifacts removed from state lands prior to the adoption of the Antiquities Code in 1969, and related questions (RQ-0416-JC)

S U M M A R Y

Whether the state owns artifacts removed from state lands prior to the adoption of the Antiquities Code in1969 depends on the particular artifacts and where they were found. With respect to artifacts found on submerged state lands, the state, as owner of the land, would own artifacts found buried in the soil or over which the state had constructive possession; otherwise, the artifacts would belong to the person who had found them. With respect to artifacts found on unsubmerged state lands, the state, as owner of the land, would own artifacts classified as "mislaid" property; however, artifacts classified as "lost" property would belong to the person who had found them. The state would not own artifacts removed prior to 1969 from lands owned by political subdivisions of the state unless the artifacts were determined to be "lost" property and the state had "found" them. Under the Antiquities Code, the state owns artifacts removed subsequent to its effective date from lands belonging to political subdivisions of the state. Additionally, the Texas Historical Commission is the legal custodian of artifacts removed from state public land prior to 1969 to the extent they are recovered and retained by the state. Finally, former articles 147a, 147b, 147b-1, and 147b-2 of the Penal Code did not, as a matter of law, confer to the state ownership of artifacts removed from state lands prior to 1969.

Opinion No. JC-0466

The Honorable Jeri Yenne, Brazoria County Criminal District Attorney, Brazoria County Courthouse, 111 East Locust Street, Suite 408A, Angleton, Texas 77515

Re: Whether peace officers serving as off-duty security guards on casino boats have authority to make arrests and related questions (RQ-0422-JC)

S U M M A R Y

The seaward boundary of the State of Texas and its coastal counties extends three marine leagues into the Gulf of Mexico. The state and its coastal counties may exercise criminal jurisdiction on the state's territorial waters, provided that there is no conflict with federal law or the rights of foreign nations. Texas peace officers acting as security guards on casino boats have the authority to make arrests under state law within the state's territorial waters. The extent of that authority depends upon the type of peace officer and whether he or she is within his or her jurisdiction.

Once a casino boat sails beyond the state's seaward boundary, a Texas peace officer no longer has the authority to make arrests under the law of the State of Texas. Within the jurisdiction of the United States, federal law may authorize a peace officer to make an arrest under certain circumstances. On the high seas, beyond the jurisdiction of both the State of Texas and the United States, the law of the ship's flag state and international law may be relevant to a Texas peace officer's authority to keep order on the ship and to detain passengers.

Opinion No. JC-0467

The Honorable Bobby Lockhart, Bowie County Criminal District Attorney, P.O. Box 3030, 601 Main, Texarkana, Texas 75504

Re: When a constable is required to furnish evidence that he has been issued a permanent peace officer's license (RQ-0431-JC)

S U M M A R Y

The constable of precinct three of Bowie County had 270 days from the date he was sworn in to office for his elective term January 1, 2001, to furnish to the Commissioners Court of Bowie County the evidence of licensure required by subsection 86.0021(b) of the Local Government Code.

Opinion No. JC-0468

The Honorable Chris D. Prentice, Hale County Attorney, 500 Broadway, Suite 80, Plainview, Texas 79072-8050

Re: Whether the designated representative of an authorized agent of the Texas Natural Resource Conservation Commission is a peace officer for purposes of sections 7.193 and 26.215 of the Texas Water Code (RQ-0438-JC)

S U M M A R Y

The designated representative of an authorized agent of the Texas Natural Resource Conservation Commission under chapter 366, Texas Health and Safety Code, is not a peace officer for purposes of sections 7.193 and 26.215 of the Texas Water Code.

Opinion No. JC-0469

Mr. Jim Loyd, Executive Director, Texas Health Care Information Council, Two Commodore Plaza, 206 East Ninth Street, Suite 19.140, Austin, Texas 78701

Re: With respect to information requested from the Texas Health Care Information Council, whether the Council may charge fees under section 108.012 of the Health and Safety Code or section 552.262 of the Government Code, and related questions (RQ-0425-JC)

S U M M A R Y

The Texas Health Care Information Council, for which chapter 108 of the Health and Safety Code provides, see Tex. Health & Safety Code Ann. §108.001 (Vernon 2001), is required to collect information regarding health care across the state and to disseminate it for the benefit of employers, other consumers, and health-care providers. See id. §108.006(a). Chapter 108 provides in particular for collecting and disseminating two types of data: provider-quality data and public-use data. See id. §§108.010, .011. The legislature, in section 108.012(b), has specifically authorized the Council to charge a fee for the release of public-use or provider- quality data to any person requesting it. See id. § 108.012(b). Consequently, with respect to the release of public-use or provider-quality data, the Council need not comply with the fee provisions of chapter 552 of the Government Code and rules adopted under section 552.262 of the Government Code. The Council may determine a fee to release public-use and provider- quality data that, together with the Council's revenues from other sources, will be sufficient to raise revenues for the Council's operation.

In response to a request for a paper or electronic copy of the public-use data file that requires the Council to present the information in a customized form, section 108.012(b) authorizes the Council to set its own fees, assuming that the request is for the public-use or provider-quality data file. The Council may charge the same fee to a subsequent requestor of the customized information.

In setting its charges to produce public-use and provider-quality data under section 108.012(b), the Council need not request an exemption from the Texas Building and Procurement Commission under title 1, section 111.64 of the Texas Administrative Code.

Fees for the release of information other than public-use and provider-quality data must be set in accordance with chapter 552 of the Government Code and rules of the Texas Building and Procurement Commission.

Opinion No. JC-0470

The Honorable Mike Moncrief, Chairman, Committee on Health and Human Services, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068

Re: Meaning of "rehabilitation" for purposes of title 5 of the Texas Human Resources Code, which relates to services for the blind and visually handicapped (RQ-0429-JC)

S U M M A R Y

The Texas Commission for the Blind is charged by statute to provide vocational rehabilitation services, defined as those "necessary to compensate a blind disabled individual for an employment handicap so that the individual may engage in a remunerative occupation." Tex. Hum. Res. Code Ann. §91.051(6) (Vernon 2001). Whether the Commission has provided adequate services in a particular case requires determinations of matters of fact, and is therefore not a question which can be answered in an advisory legal opinion by the Office of the Attorney General.

Opinion No. JC-0471

The Honorable Leslie Poynter Dixon, Van Zandt County Criminal District Attorney, 202 North Capitol, Canton, Texas 75103

Re: Whether a county may fax the required written notice of an officer's proposed salary and expenses to the officer under section 152.013 of the Local Government Code, and related question (RQ-0435-JC)

S U M M A R Y

Section 152.013 of Local Government Code does not as a matter of law preclude a commissioners court from faxing its written notice to an elected officer. See Tex. Loc. Gov't Code Ann. §152.013(c) (Vernon 1999). A county may determine the method or methods it will use to deliver the required written notice to the elected officers entitled to notice.

An elected officer who as a matter of fact does not receive the written notice that section 152.013 requires is entitled to have five days after actually receiving the written notice in which to file his or her grievance under section 152.016. See id. §152.016(a)(2). Whether an officer actually received notice for the purposes of section 152.016 is a question of fact. Nevertheless, the allowable time period in which the officer may complain to the salary grievance committee does not extend beyond the start of the county's fiscal year.

Opinion No. JC-0472 The Honorable Tim Curry, Tarrant County Criminal District Attorney, Justice Center, 401 West Belknap, Fort Worth, Texas 76196-0201

Re: Whether recently enacted Occupations Code, section 1704.152(c)(2) excepts the relative of a deceased bail bond licensee from requirements of chapter 1704 other than work-experience and course-work eligibility requirements (RQ-0445-JC)

S U M M A R Y

Section 1704.152(a) of the Occupations Code establishes eligibility requirements for individuals who apply to obtain a bail bond license from a county bail bond board. Recently enacted subsection (c)(2) of section 1704.152 excepts the relative of a deceased bail bond licensee from the work-experience and course-work requirements of subsection (a)(4). The new provision does not except the relative of a deceased bail bond licensee from any other requirements of chapter 1704 of the Occupations Code. A bail bond board may not by rule extend this exception for the relatives of deceased licensees to other chapter 1704 requirements.

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

TRD-200201230
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: February 27, 2002

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 1. ADMINISTRATION

PART 10. DEPARTMENT OF INFORMATION RESOURCES

CHAPTER 210. TEXASONLINE

1 TAC §210.1, §210.2

The Department of Information Resources (department) adopts on an emergency basis for one hundred twenty days new §210.1 concerning TexasOnline definitions and new §210.2 concerning profiling fees to be collected by state agency licensing entities participating in the electronic profiling system established by §2054.2606, Government Code.

Emergency adoption of the rules is necessary to enable the department to establish profile system fees by rule as soon as possible after January 1, 2002, so that affected state agency licensing entities may adopt, as soon as possible after January 1, 2002, increased licensing fees to cover the cost of the profile system, as required by Section 11(b), SB 187, 77th Legislature.

On February 20, 2002, the department's board approved both proposed rules for comment as proposed rules and adopted both rules on an emergency basis for one hundred twenty days.

The rules are adopted on an emergency basis pursuant to §2054.052(a), Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, §2054.262(b), Government Code, which provides the department may adopt rules prepared by the TexasOnline Authority and §2054.2606(d), Government Code, which requires the TexasOnline Authority to prepare rules for adoption by the department to prescribe the amount of the fee to be collected by a state agency that establishes a profile system for its license holders pursuant to §2054.2606, Government Code. The new rules are also adopted on an emergency basis under §2001.034, Government Code, which provides for the adoption of administrative rules on an emergency basis without notice and comment.

§210.1. TexasOnline Definitions.

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

(1) Authority--the TexasOnline Authority created in Subchapter I, Chapter 2054, Texas Government Code.

(2) Board--the governing board of the Department of Information Resources.

(3) Department--the Department of Information Resources.

(4) Division--the TexasOnline division created by the department pursuant to §2054.264, Texas Government Code.

(5) License holder--individuals for whom and entities for which a profile system is required to be or may be established by state agency licensing entities.

(6) Licensing entity--a department, commission, board, office or other agency of the state or a political subdivision of the state that issues an occupational license.

(7) Occupational license--a license, certificate, registration or other form of authorization that a person must obtain to practice or engage in a particular business, occupation or profession.

(8) Profile system--an electronic system established by a licensing entity that is required by §2054.2606(a), Texas Government Code, or opts pursuant to § 2054.2602, Texas Government Code, to establish an electronic system containing at least the licensee information prescribed by §2054.2606(c), Texas Government Code.

(9) Profiling licensing entities--the state agencies listed in §2054.2606(a) and licensing entities that opt to provide a profile system pursuant to §2054.2606(b).

§210.2. TexasOnline License Holder Profile Fees.

(a) Each licensing entity identified in §2054.2606(a), Government Code that is required to establish a license holder profile system shall, by January 1, 2002, collect five dollars annually from license holders listed in §2054.2606(a), Government Code who are renewing a license. The five dollars per license holder renewal may be collected through increasing the license renewal fees by five dollars per license holder, by the licensing entity covering the five dollars per license holder renewal from other revenues rather than by increasing license renewal fees, or by a combination of increasing license renewal fees by less than five dollars per license holder and covering a portion of the five dollars per license holder from other revenues of the licensing entity. The money shall be transferred from the licensing entity to the department to cover the costs of providing the license holder profile system pursuant to guidelines established by the Office of the Comptroller of Public Accounts.

(b) Each state agency licensing entity that opts to establish a license holder profile system pursuant to §2054.2606(b), Government Code, shall collect five dollars annually per license renewal fee payable by each license holder about whom or which information is available through the profile system. The five dollar per year license renewal fee increases shall begin being collected by the licensing entity from

affected license holders as soon as reasonably possible after the licensing entity determines to provide the license holder profile system.

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

Filed with the Office of the Secretary of State on February 25, 2002.

TRD-200201149

Renee Mauzy
General Counsel
Department of Information Resources
Effective Date: February 25, 2002
Expiration Date: June 25, 2002
For further information, please call: (512) 475-4750

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 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 61. CRIME VICTIMS' COMPENSATION

1 TAC §§61.40 - 61.43

The Office of the Attorney General (OAG) proposes new to 1 TAC Chapter 61, Crime Victims' Compensation, §§61.40 - 61.43, relating to rules for the OAG's administration of reimbursement payments to a law enforcement agency for the reasonable costs associated with the medical examinations of a victim of an alleged sexual assault. Texas Code of Criminal Procedure article 56.06 (House Bill 131, 77th. Leg. Reg. Sess. 2001) permits a law enforcement agency to seek reimbursement from the OAG for the reasonable costs of a medical examination of a victim of an alleged sexual assault. If a law enforcement agency requests that an authorized individual perform a medical examination of a victim for use in the investigation and prosecution of an alleged sexual assault, then on application to the OAG, the law enforcement agency may be reimbursed the reasonable costs of the examination. Additionally, House Bill 131, codified at Tex. Code Crim. Proc., art. 56.54(k), provides that the OAG may use the Compensation to Victims of Crime fund to reimbursement the law enforcement agency of the reasonable costs of the medical examination.

Articles 56.06 and 56.54(k) reflect the legislature's intent that the OAG use the Compensation to Victims of Crime Fund to reimburse a law enforcement agency for the reasonable costs of a forensic sexual assault examination. The proposed rules are authorized by Tex. Code Crim. Proc, art. 56.33 which requires the OAG to adopt rules governing the administration of the Compensation to Victims of Crime Fund and by Texas Government Code, chapter 2001, which authorizes the OAG to adopt rules that interpret statutes, and implement or prescribe policies and procedures in a manner consistent with the legislation. The purpose of the regulatory scheme is to establish procedures for application and reimbursement and for the administration of the Compensation to Victims of Crime Fund.

Sections 61.40 - 61.43 (Reimbursement to Law Enforcement Agency for Forensic Sexual Assault Examination of a Victim)

Proposed §61.40 explains how the reimbursement provisions and criteria will be applied to eligible applicants, addresses general provisions, and explains exclusions. Proposed §61.41 defines terms and words as they pertain to the subchapter concerning reimbursement for forensic sexual assault examination of a victim. Proposed §61.42 delineates the procedures that the law enforcement agency must follow to be reimbursed the reasonable costs of the medical examination. Proposed §61.43 provides guidelines that the OAG will follow to determine reasonableness of costs.

Mr. John Green, Chief of the Crime Victims' Compensation Division of the OAG, has determined that for the first five year period in which the proposed rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering these sections.

Mr. Green has also determined that for the first five-year period in which the proposed rules are in effect, the proposed new sections will not have an adverse economic effect on small businesses because the new sections of these rules impose no additional burden on anyone. There is no anticipated economic cost to persons who are required to comply with these rules as proposed.

Mr. Green has determined that for the first five-year period in which the proposed rules are in effect, the anticipated public benefit is better investigation and prosecution of sexual assault crimes in the state by providing a funding mechanism to alleviate some of the financial burden of the investigation and prosecution on local communities without increased costs to the state.

Comments may be submitted, in writing, no later than 30 days from the date of this publication to John Green, Crime Victims' Compensation Division, Office of the Attorney General, P.O. Box 12198, Austin, Texas 78711-2198 or by telephone (512) 936-1237 or by e-mail to www.john.green@oag.state.tx.us.

The new rules are proposed under Texas Code of Criminal Procedure, article 56.33 which requires the OAG to adopt rules governing the administration of the Compensation to Victims of Crime Fund consistent with subchapter B and under Texas Government Code, chapter 2001 which authorizes the OAG to adopt rules that interpret statutes, or implement or prescribe policies and procedures.

The new rules affect Texas Code of Criminal Procedure, chapter 56, subchapters A and B.

§61.40. Applicability, General Provisions, and Exclusions.

(a) A law enforcement agency is entitled to reimbursement from the OAG for the reasonable costs associated with a forensic sexual assault examination of a victim consistent with the provisions and criteria of state law and of these administrative rules.

(b) The costs for multiple examinations of the same victim will not be reimbursed. The cost of only one forensic sexual assault examination per victim per alleged sexual assault will be considered a reimbursable cost.

(c) OAG has determined that expenses that comply with the Texas Workers' Compensation Commission medical fee guidelines, identified as Current Procedural Terminology (CPT) codes, are considered "reasonable expenses." If there is no specific CPT code under the medical fee guidelines for the medical service or procedure provided in the sexual assault examination, the OAG may accept from a physician or licensed nurse practitioner, a Revenue code, or the CPT code that most closely reflects that used in the sexual assault examination. Each cost identified in a descriptive itemized statement submitted by a sexual assault nurse examiner or sexual assault examiner will be assigned a CPT code by the OAG. In addition to the cost shown in the Texas Workers' Compensation Commission medical fee guidelines, the OAG has also determined that the costs listed in §61.43 (relating to Reasonable Costs) are also reasonable costs.

(d) The OAG will reimburse a law enforcement agency for the reasonable costs associated with a forensic sexual assault examination of a victim in an amount not to exceed $600.00 in the aggregate. The OAG has determined the reasonable costs for the services of the professional, the use of a facility, procedures, and materials. The list of allowable reimbursable costs is provided in §61.43 of this title.

(e) In the event there are multiple fees from separate service providers, the OAG will reimburse the law enforcement agency up to a maximum aggregate amount of $600.00 to be allocated among the service providers.

(f) A law enforcement agency is not required to pay any costs of treatment of diagnosis for the victim's injuries and the OAG will not reimburse the law enforcement agency for any costs associated with treatment or diagnosis.

(g) The OAG is not bound by any billing or contractual agreements made between a law enforcement agency and a service provider.

(h) All bills are subject to an individual audit and the OAG may request additional documentation at any time.

§61.41. Definitions.

For purposes of this subchapter, the following terms shall have the following meanings.

(1) Law enforcement agency is a governmental organization that employs commissioned peace officers as defined by Tex. Code Crim. Proc. article 2.12.

(2) Sexual assault is generally any act of sexual contact or intimacy performed upon one person by another without mutual consent, or with an inability of the victim to give consent due to age, or mental or physical incapacity. Sexual assault is specifically defined in Texas Penal Code, §§21.11, 22.011, 22.021, and 25.02.

(3) Forensic sexual assault examination is a medical examination of a victim of an alleged sexual assault for use in the investigation or prosecution of the offense.

(4) Sexual assault examiner is a person who uses a service-approved evidence collection kit and protocol to collect and preserve evidence of a sexual assault.

(5) Sexual assault nurse examiner is a registered nurse who has completed a service-approved examiner training course.

§61.42. Reimbursement Procedures.

The law enforcement agency seeking reimbursement for the reasonable costs of a forensic sexual assault examination must comply with the following:

(1) The forensic sexual assault examination must have been performed at the request of a law enforcement agency for use in the investigation and prosecution of an alleged sexual assault.

(2) A physician, a sexual assault examiner, or a sexual assault nurse examiner must have performed the forensic sexual assault examination. A sexual assault examiner or a sexual assault nurse examiner performing a forensic sexual assault examination must have medical directorship oversight.

(3) Payments will only be for reimbursement, therefore the law enforcement agency must have received and paid all bills associated with the forensic sexual assault examination before applying to the OAG for reimbursement. The law enforcement agency should attach all necessary supporting documentation to the Application for Reimbursement.

(4) The law enforcement agency must complete all sections of the OAG approved Application for Reimbursement. Incomplete applications will not be processed and will be returned to the law enforcement agency noting the reason the application is incomplete. The verification section of the Application for Reimbursement must be signed by an appropriate representative of the law enforcement agency who has knowledge of the facts stated in the application.

(5) All bills associated with the requested forensic sexual assault examination must be attached to the application, and only those expenses for the actual forensic sexual assault examination will be considered for reimbursement. All bills must be submitted at one time. No other bills submitted to the OAG will be processed after the Application for Reimbursement is received.

§61.43. Reasonable Costs.

In order to be considered for reimbursement, the law enforcement agency should provide copies of bills that comply with the following guidelines.

(1) Allowable reimbursable costs for services of a physician, licensed nurse practitioner, sexual assault examiner, or sexual assault nurse examiner.

(A) A physician or a licensed nurse practitioner should bill the law enforcement agency his or her usual and customary charge for the forensic sexual assault examination on a Health Care Financing Administration form (HCFA - 1500) or on his or her standard billing form. To be considered for reimbursement, the bill for service must

include the associated CPT code (99201-99137 or 99499) and an itemization of the service provided. The OAG will reimburse a law enforcement agency up to a maximum amount of $195.00 for the service of a physician or a licensed nurse practitioner.

(B) A sexual assault examiner or a sexual assault nurse examiner should not use CPT or Revenue codes, but should bill the law enforcement agency his or her usual and customary charge for the forensic sexual assault examination on his or her standard billing form. To be considered for reimbursement, the bill for service must include a descriptive itemized statement of the service provided and must be signed by a physician or a licensed nurse practitioner. The OAG will determine the appropriate CPT or Revenue codes. The OAG will reimburse a law enforcement agency up to a maximum amount of $195.00 for the service of a sexual assault examiner or a sexual assault nurse examiner.

(2) Allowable reimbursable costs for an accredited and licensed healthcare facility.

(A) The OAG will reimburse a law enforcement agency for the cost associated with a healthcare facility that is certified by Medicare or accredited by the Joint Commission Accreditation of Health Organizations, and that is licensed by the Texas Department of Health.

(B) To be considered for reimbursement, the bill from the healthcare facility must be on a Uniform Billing form (UB-92) or on the standard form used by the healthcare facility, and must have a descriptive itemized statement of the service provided. The licensed, accredited or certified healthcare facility may use Revenue code R-450 for a medical treatment room; or may use Revenue code R-760 for an emergency room. The OAG will reimburse a law enforcement agency for these healthcare facilities up to a maximum amount of $250.00.

(3) Allowable reimbursable costs for procedures and supplies.

(A) The bill for a colposcopy procedure must indicate CPT code 57452. The OAG will reimburse a law enforcement agency up to a maximum amount of $233.00 for this procedure. The bill for an office visit for a colposcopy procedure must indicate CPT code 99025. The OAG will reimburse a law enforcement agency up to a maximum amount of $26.00 for the office visit for this procedure. However, the cost of the colposcopy procedure includes the cost of the examination services of the professional and the OAG will not reimburse for both this procedure and the $195.00 fee in paragraph (1)(A) and (B) of this section.

(B) The bill for an anoscopy procedure must indicate CPT code 46600. The OAG will reimburse a law enforcement agency up to a maximum amount of $71.00 for this procedure.

(C) The bill for a venipuncture procedure must indicate CPT code 36415. The OAG will reimburse a law enforcement agency up to a maximum amount of $20.00 for this procedure.

(D) The bill for laboratory procedures must indicate CPT code 8000. The OAG will reimburse a law enforcement agency up to a maximum amount of $100.00 for laboratory work.

(E) The bill for the sexual assault examination kit must indicate CPT code R-270. The OAG will reimburse a law enforcement agency up to a maximum amount of $50.00 for the kit.

(F) The bill for supplies and materials must have a Documentation of Procedures and must indicate CPT code 99070. The OAG will reimburse a law enforcement agency up to a maximum amount of $100.00 for supplies and materials.

(G) The bill for the handling and/or conveyance of the specimen must indicate CPT code 99000. The OAG will reimburse a law enforcement agency up to a maximum amount of $20.00 for handling and conveyance.

(H) The maximum aggregate amount for which the OAG will reimburse a law enforcement agency for all costs associated with a forensic sexual assault examination of a victim will be $600.00. The OAG will not reimburse for any type of sexual assault examination of a suspected perpetrator. The OAG will not reimburse for the laboratory analysis of victim's clothing, or crime scene materials or objects, including weapons.

This 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 February 22, 2002.

TRD-200201125
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Earliest possible date of adoption: April 7, 2002
For information regarding this publication, please contact A.G. Younger, Agency Liaison, at (512) 463-2110.

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PART 10. DEPARTMENT OF INFORMATION RESOURCES

CHAPTER 201. PLANNING AND MANAGEMENT OF INFORMATION RESOURCES TECHNOLOGIES

1 TAC §201.13

(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 Department of Information Resources or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Department of Information Resources (department) proposes to repeal §201.13, concerning information resource standards. Simultaneous with the publication of the proposed repeal, the department is proposing new §202.1, concerning information resources security standards definitions; §202.2, concerning information resources security standards policy; §202.3, concerning management and staff responsibilities for information resources security standards; §202.4, concerning managing security risks; §202.5, concerning personnel and contractor security practices; §202.6, concerning managing physical security risks; §202.7, concerning information resources security safeguards; and §202.8, concerning information resources security standards for data communications systems. The foregoing new sections are proposed to replace existing §201.13(a), concerning information security standards, which is being proposed for repeal herein.

Concomitant with publication of this proposed repeal, the department is proposing new chapter 208, §208.1, concerning definitions applicable to communications wiring standards for state

facilities, and §208.2, concerning communications wiring standards for state facilities. New chapter 208 is proposed to replace existing §201.13(c).

Mr. Mel Mireles, director of the Enterprise Operations Division, has determined that for each year of the first five years after repeal of the rule, there will be no cost for state government as a result of such repeal. Mr. Mireles does not anticipate either a loss of, or increase in, revenues to state or local government as a result of the proposed repeal. There will be no fiscal implications for local government as a result of repealing §201.13. There will be no effect on small businesses. There will be no additional anticipated economic cost to persons as a result of adoption of the repeal.

The public benefit of repeal of the rule is to clarify the department's rules by having the state information resources security standards and the state communications wiring standards located in separate chapters, rather than together in §201.13. It is necessary to repeal §201.13 to relocate the rules contained therein to new chapters.

Comments on the proposed repeal may be submitted to Renee Mauzy, General Counsel, Department of Information Resources, via mail to P.O. Box 13564, Austin, Texas 78711, or electronically to renee.mauzy@dir.state.tx.us no later than 5:00 p.m. CST within 30 days after publication.

Repeal of §201.13 is proposed under Texas Government Code §2054.052(a), which provides the department may adopt rules as necessary to implement its responsibilities.

Texas Government Code §2054.051 is affected by the proposed repeal.

§201.13. Information Resource Standards.

This 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 February 25, 2002.

TRD-200201165
Renee Mauzy
General Counsel
Department of Information Resources
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For further information, please call: (512) 475-4750

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1 TAC §201.16

(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 Department of Information Resources or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Department of Information Resources (department) proposes to repeal §201.16, concerning minimum standards for meetings held by videoconference. Simultaneous with the publication of the proposed repeal, the department is proposing new §209.1, concerning definitions applicable to minimum standards for meetings held by videoconference, and is proposing new §209.2, concerning videoconference standards. Both new proposed §209.1 and §209.2, which the department proposes to replace existing §201.16, contain substantive changes from the provisions of §201.16.

The repeal of §201.16 is proposed pursuant to Texas Government Code §2054.052(a), which provides the department may adopt rules as necessary to implement its responsibilities.

Mr. Mel Mireles, director of the Enterprise Operations Division, has determined that for each year of the first five years after repeal of the rule, there will be no cost for state government as a result of such repeal. Mr. Mireles does not anticipate either a loss of, or increase in, revenues to state or local government as a result of the proposed repeal. There will be no fiscal implications for local government as a result of repealing §201.16. There will be no effect on small businesses. There will be no additional anticipated economic cost to persons as a result of adoption of the repeal. The public benefit of repeal of the rule is to clarify the department's rules by having the videoconference rules located in only one chapter, rather than in two chapters. It is necessary to repeal §201.16 to relocate the videoconference rules to new chapter 209.

Comments on the proposed repeal may be submitted to Renee Mauzy, General Counsel, Department of Information Resources, via mail to P.O. Box 13564, Austin, Texas 78711, or electronically to renee.mauzy@dir.state.tx.us no later than 5:00 p.m. CST within 30 days after publication.

Repeal of §201.16 is proposed under Texas Government Code §2054.052(a), which provides the department may adopt rules as necessary to implement its responsibilities.

Texas Government Code §551.127(i) is affected by the proposed rule.

§201.16. Minimum Standards for Meetings Held by Videoconference Call.

This 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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Renee Mauzy
General Counsel
Department of Information Resources
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For further information, please call: (512) 475-4750

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CHAPTER 208. COMMUNICATIONS WIRING STANDARDS

1 TAC §208.1, §208.2

The Department of Information Resources (department) proposes 1 T.A.C. §208.1 and §208.2, concerning definitions applicable to communications wiring standards for state facilities and communications wiring standards for state facilities.

The proposed rules are currently located in 1 T.A.C. §201.13(c), which the department is proposing for repeal simultaneous with publication of these proposed rules. This proposed rulemaking proposes the transfer of §201.13(c) to new chapter 208, establishes a definitions section in §208.1 and updates to the current version the wiring standards applicable to wiring of state facilities in §208.2.

Mr. Mel Mireles, Enterprise Operations Division Director for the department, has determined that for each year of the first five years the proposed rules will be in effect, there will be no fiscal implications for state government as a result of enforcing or administering the proposed rules. There will be no foreseeable fiscal implications for local government as a result of enforcing or administering the proposed rules. Mr. Mireles has determined that for each year of the first five years the rules will be in effect, the public will benefit by being able to locate more easily the wiring standards applicable to state facilities and by having those standards updated to the most recent versions of those standards.

Mr. Mireles believes the proposed rules will have no different effect on small businesses than they will have on large businesses.

Comments on proposed §208.1 and §208.2 may be submitted to Renee Mauzy, General Counsel, Department of Information Resources, via mail to P.O. Box 13564, Austin, Texas 78711, or electronically to renee.mauzy@dir.state.tx.us. by 5:00 p.m. CST, within 30 days after publication.

The rules are proposed pursuant to §2054.052(a), Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act.

§208.1. Definitions.

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

(1) ANSI--The American National Standards Institute.

(2) EIA--The Electronics Industry Association.

(3) TIA--The Telecommunications Industry Association.

§208.2. Communications Wiring Standards.

All state agencies will adhere to the following standards when wiring or re-wiring state-owned or state-leased space:

(1) ANSI/EIA/TIA-568-2001, Commercial Building Telecommunications Cabling Standard or its most recent successor document. This applies to the telecommunications wiring for buildings that are office-oriented and when ANSI/EIA/TIA-570-1999 is not selected. The term "commercial enterprises" is used in ANSI/EIA/TIA-568-1991 to differentiate between office buildings and buildings designed for industrial enterprises. ST-type fiber connectors shall be used for fiber optic terminations.

(2) ANSI/EIA/TIA-570-1999, Residential and Light Commercial Building Telecommunications Wiring Standard or its most recent successor document, when planning and designing premises-wiring systems intended for connecting one to four exchange access lines to various types of customer-premises equipment when ANSI/EIA/TIA-568-2001 is not selected.

(3) ANSI/EIA/TIA-569-2000, Commercial Building Telecommunications Pathways and Spaces or its most recent successor document, when planning and designing state-owned and state-leased space to accommodate telecommunications system wiring.

(4) ANSI/EIA/TIA-606-1993, Administration Standard for the Telecommunications Infrastructure of Commercial Buildings or its most recent successor document, when documenting and administering telecommunications infrastructures in state-owned and state-leased space.

This 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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Renee Mauzy
General Counsel
Department of Information Resources
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 475-4750

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CHAPTER 209. MINIMUM STANDARDS FOR MEETINGS HELD BY VIDEOCONFERENCE

1 TAC §209.1

The Department of Information Resources (department) proposes new §209.1, concerning definitions applicable to minimum standards for meetings held by videoconference. Simultaneous with the publication of the proposed rule, the department is publishing the proposed repeal of §201.16, which is the department's existing rule prescribing minimum standards for meetings held by videoconference, and is proposing new §209.2, concerning videoconference standards. Both new proposed §209.1 and §209.2, which the department proposes to replace existing §201.16, contain substantive changes from the provisions of §201.16. §209.1 defines terms to be used in chapter 209.

The new rule is proposed pursuant to Texas Government Code §2054.052(a), which provides the department may adopt rules as necessary to implement its responsibilities and Texas Government Code §551.127(i), enacted in HB 35, 77th legislative session, which requires the department to specify, by rule, minimum standards for audio and video signals at open meetings held by videoconference.

Mr. Mel Mireles, director of the Enterprise Operations Division, has determined that for each year of the first five years after adoption of the proposed rule, there will be no cost for state government as a result of such adoption. Mr. Mireles does not anticipate either a loss of, or increase in, revenues to state or local government as a result of the proposed rule. There will be no fiscal implications for local government as a result of adoption of proposed §209.1. There will be no effect on small businesses. There will be no additional anticipated economic cost to persons as a result of adoption of the proposed rule. The public benefit of adoption of the proposed rule is that technical and legal terms used in chapter 209 will be defined so the public can understand what is required of governmental bodies meeting via videoconference.

Comments on proposed new §209.1 may be submitted to Renee Mauzy, General Counsel, Department of Information Resources, via mail to P.O. Box 13564, Austin, Texas 78711, or electronically to renee.mauzy@dir.state.tx.us no later than 5:00 p.m. CST within 30 days after publication.

New §209.1 is proposed under Texas Government Code §2054.052(a), which provides the department may adopt rules as necessary to implement its responsibilities and Texas Government Code §551.127(i), which requires the department to specify, by rule, minimum standards for audio and video signals at open meetings held by videoconference.

Texas Government Code §551.127(i) is affected by the proposed rule.

§209.1. Definitions Applicable to Minimum Standards for Meetings held by Videoconference.

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

(1) Codec (Coder/Decoder)--A device for converting analog signals, in this case video and/or audiosignals, to a digital signal and compressing the digital data in the process.

(2) Compressed video--Video data that has been digitized and in the process, condensed by the use of one or more of the common video compression processes (lossy, lossless, interframe compression, etc.). A codec produces compressed video and uncompresses the video at the remote end.

(3) Governmental body--Shall have the meaning assigned to that term in the Texas Open Meetings Act, Texas Government Code, chapter 551.

(4) ITU-T--International Telecommunication Union-Telecommunications Standardization Sector.

(5) NTSC--National Television Standards Committee.

(6) Open or closed meetings--Shall have the meanings assigned to those terms in the Texas Open Meetings Act, Texas Government Code, chapter 551.

(7) Real-Time video--Less than one second latency delay in transmission.

(8) Videoconference--Real-time video and audio communications between or among multiple sites.

This 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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Renee Mauzy
General Counsel
Department of Information Resources
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For further information, please call: (512) 475-4750

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1 TAC §209.2

The Department of Information Resources (department) proposes new §209.2, concerning minimum standards for meetings held by videoconference. Simultaneous with the publication of the proposed rule, the department is publishing the proposed repeal of §201.16, which is the department's existing rule prescribing minimum standards for meetings held by videoconference, and is proposing new §209.1, concerning definitions applicable to minimum standards for meetings held by videoconference. Both new proposed §209.1 and §209.2, which the department proposes to replace existing §201.16, contain substantive changes from the provisions of §201.16.

Section 209.2 sets forth minimum videoconference standards. Proposed subsection 209.2(1) requires that videoconference using full motion real-time video transmissions must meet National Television Standards Committee standards. Subsection 209.2(2) prescribes minimum technical standards applicable to compressed video equipment. Subsection 209.2(3) prescribes standards with respect to the perceptibility of audio and video signals. Subsection 209.2(4) requires state agencies conducting open or closed meetings by videoconference call to review and consider applicable recommendations promulgated by the department, including those published at http://www.dir.state.tx.us/standards.

The new rule is proposed pursuant to Texas Government Code §2054.052(a), which provides the department may adopt rules as necessary to implement its responsibilities and Texas Government Code §551.127(i), enacted in HB 35, 77th legislative session, which requires the department to specify, by rule, minimum standards for audio and video signals at open meetings held by videoconference.

Mr. Mel Mireles, director of the Enterprise Operations Division, has determined that for each year of the first five years after adoption of the proposed rule, there will be no fiscal implications for state government as a result of enforcing or administering the proposed rule. Mr. Mireles does not anticipate either a loss of, or increase in, revenues to state or local government as a result of the proposed rule. No fiscal implications for local government are anticipated as a result of adoption of proposed §209.2. There will be no effect on small businesses. There will be no additional anticipated economic cost to persons as a result of adoption of the proposed rule. Adoption of the proposed rule will benefit the public, because when governmental bodies meet by videoconference, the public will have quality audio and video from the meeting so that they can adequately hear and observe the meeting.

Comments on proposed new §209.2 may be submitted to Renee Mauzy, General Counsel, Department of Information Resources, via mail to P.O. Box 13564, Austin, Texas 78711, or electronically to renee.mauzy@dir.state.tx.us no later than 5:00 p.m. CST within 30 days after publication.

New §209.2 is proposed under Texas Government Code §2054.052(a), which provides the department may adopt rules as necessary to implement its responsibilities and Texas Government Code §551.127(i), which requires the department to specify, by rule, minimum standards for audio and video signals at open meetings held by videoconference.

Texas Government Code §551.127(i) is affected by the proposed rule.

§209.2. Videoconference Standards.

A governmental body holding an open or closed meeting by videoconference shall adhere to the following standards:

(1) A videoconference using full motion real-time analog video transmissions shall meet existing NTSC standards.

(2) A videoconference using compressed video shall use equipment meeting the minimum technical standards listed below, for the type of network used. Use of equipment meeting these standards does not preclude the use of proprietary vendor protocols as long as the governmental body has received certification from the vendor stating that the vendor's equipment and proprietary software protocol release version meets or exceeds each of the specified standards.

(A) ITU-T Recommendation H.221-1999, Frame Structure for a 64 to 1920 kbit/s Channel in Audiovisual Teleservices.

(B) ITU-T Recommendation H.230-1999, Frame synchronous Control and Indication Signals for Audiovisual Teleservices.

(C) ITU-T Recommendation H.231-1997, Multipoint Control Units for Audiovisual Systems Using Digital Channels up to 2 Mbit/s.

(D) ITU-T Recommendation H.242-1999, System for Establishing Communications Between Audiovisual Terminals Using Digital Channels up to 2 Mbit/s.

(E) ITU-T Recommendation H.243-2000, Procedures for Establishing Communication Between Three or More Audiovisual Terminals Using Digital Channels up to 2 Mbit/s.

(F) ITU-T Recommendation H.245-2001, Control protocol for multimedia communication.

(G) ITU-T Recommendation H.261-1993, Video Codec for Audiovisual Services at px64 kbit/s.

(H) ITU-T Recommendation H.320-1996, Narrow-band Visual Telephone Systems and Terminal Equipment.

(I) ITU-T Recommendation H.323-2000, Packet-based multimedia communications systems.

(J) ITU-T Recommendation H.450-1998, Generic functional protocol for the support of supplementary services in H.323.

(3) A videoconference shall adhere to the following standards with respect to the perceptibility of audio and video signals:

(A) Each portion of a meeting held by videoconference that is required to be open to the public by the Texas Open Meetings Act, Texas Government Code, chapter 551, shall be visible and audible to the public at each location specified in Texas Government Code §551.127(e).

(B) Each location specified in Texas Government Code, §551.127(e), shall have two-way communication between with each other meeting location during the entire meeting being held by videoconference.

(C) Each participant in the videoconference call, while speaking, shall be clearly visible and audible to each other participant in the videoconference call. In addition, during the open portions of a meeting required to be open by Texas Government Code, chapter 551, each participant, while speaking, shall be clearly visible and audible to members of the public who are in attendance at a location of the meeting.

(D) The audience and members of the governmental body shall have full view of at least one monitor at each meeting location.

(E) Audio signals perceptible from the remote videoconferencing sites shall be of similar quality and volume as the local audio at the originating site.

(F) The quality of the audio and video signals perceptible by members of the public at each meeting location shall meet or exceed the quality of the audio and video signals perceptible by members of the government body participating in the meeting.

(G) The quality of the audio and video signals perceptible by members of the public at each meeting location shall be of sufficient quality so that members of the public present at each meeting location can observe the demeanor and hear the voice of each participant in the open portion of the meeting.

(H) All video transmissions shall be at least 30 frames per second (FPS) and use full common intermediate format (CIF) quality transmission.

(I) Videoconference calls held between or among sites utilizing different vendor equipment shall adhere to the ITU-T standards listed in this subsection.

(J) Videoconferences involving more than two sites shall be controlled such that the received video at all sites will switch to the speaking participant's site within two seconds of the participant's commencement of speaking.

(K) All videoconferences shall be in color and monitors for the viewing public and for members of the governmental body shall present color video.

(4) State agencies conducting open or closed meetings by videoconference call shall review and consider any applicable recommendations promulgated by the department. Such recommendations may be obtained directly from the department or may be accessed via the Web at the following location: http://www.dir.state.tx.us/standards.

This 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 February 25, 2002.

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Renee Mauzy
General Counsel
Department of Information Resources
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For further information, please call: (512) 475-4750

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CHAPTER 210. TEXASONLINE

1 TAC §210.1, §210.2

The Department of Information Resources (department) proposes 1 T.A.C. §210.1 and §210.2, concerning TexasOnline definitions and profiling fees to be collected by state agency licensing entities participating in the electronic profiling system established by §2054.2606, Government Code. The rules are proposed pursuant to §2054.052(a), Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, §2054.262(b), Government Code, which provides the department may adopt rules prepared by the TexasOnline Authority and §2054.2606(d), Government Code, which requires the TexasOnline Authority to prepare rules for adoption by the department to prescribe the amount of the fee to be collected by a state agency that establishes a profile system for its license holders pursuant to §2054.2606, Government Code.

The TexasOnline Authority voted at its February 8, 2002, open meeting to recommend these proposed rules to the department's board for consideration. On February 20, 2002, the department's board approved both proposed rules for comment.

Mr. Phil Barrett, TexasOnline Division Director for the department, has determined that for each year of the first five years the proposed rules will be in effect, there will be fiscal implications for state government as a result of enforcing or administering the proposed rules. If the rules are adopted as proposed, the license fees charged to covered licensees by state agencies required or opting to participate in the electronic profiling system established

by §2054.2606, Government Code may increase annually by five dollars per covered license renewal. The five dollars per license holder renewal may be collected by the licensing agency by one of three methods. The five dollars per license holder renewal may be collected through increasing the license renewal fees by five dollars per license holder, by the licensing agency covering the five dollars per license holder renewal from other revenues rather than by increasing license renewal fees, or by a combination of increasing license renewal fees by less than five dollars per license holder and covering a portion of the five dollars per license holder from other revenues of the licensing agency. The license fee increase will be transferred from the licensing entity to the department to cover the cost of providing the electronic profiling system through TexasOnline. The affected state agencies and the department will incur minimal costs that will vary by agency in adopting rules to collect the profiling fees. There will be no foreseeable fiscal implications for local government as a result of enforcing or administering the proposed rules, because the rules affect only state agencies that provide profile systems. Mr. Barrett has determined that for each year of the first five years the rules will be in effect, the public will benefit by knowing the definitions applicable to entities covered by the TexasOnline rules, and by having readily accessible licensee profile information available through TexasOnline.

Mr. Barrett believes the proposed rules will have no different effect on small businesses than they will have on large businesses, and that covered licensees will experience an annual five dollar license renewal increase unless the licensing agency chooses to absorb some of the cost from other revenue.

Comments on proposed §§210.1 and 210.2 may be submitted to Renee Mauzy, General Counsel, Department of Information Resources, via mail to P. O. Box 13564, Austin, Texas 78711, or electronically to renee.mauzy@dir.state.tx.us. by 5:00 p.m. CST, within 30 days after publication.

The rules are proposed under §2054.052(a), Government Code, which authorizes the department to adopt rules necessary to implement its responsibilities under the Information Resources Management Act, §2054.262(b), Government Code, which provides the department may adopt rules prepared by the TexasOnline Authority and §2054.2606(d), Government Code, which requires the TexasOnline Authority to prepare rules for adoption by the department to prescribe the amount of the fee to be collected by a state agency that establishes a profile system for its license holders pursuant to §2054.2606, Government Code.

§210.1. TexasOnline Definitions.

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

(1) Authority--the TexasOnline Authority created in Subchapter I, Chapter 2054, Texas Government Code.

(2) Board--the governing board of the Department of Information Resources.

(3) Department--the Department of Information Resources.

(4) Division--the TexasOnline division created by the department pursuant to §2054.264, Texas Government Code.

(5) License holder-individuals for whom and entities for which a profile system is required to be or may be established by state agency licensing entities.

(6) Licensing entity--a department, commission, board, office or other agency of the state or a political subdivision of the state that issues an occupational license.

(7) Occupational license--a license, certificate, registration or other form of authorization that a person must obtain to practice or engage in a particular business, occupation or profession.

(8) Profile system--an electronic system established by a licensing entity that is required by §2054.2606(a), Texas Government Code, or opts pursuant to § 2054.2602, Texas Government Code, to establish an electronic system containing at least the licensee information prescribed by §2054.2606(c), Texas Government Code.

(9) Profiling licensing entities--the state agencies listed in §2054.2606(a) and licensing entities that opt to provide a profile system pursuant to §2054.2606(b).

§210.2. TexasOnline License Holder Profile Fees.

(a) Each licensing entity identified in §2054.2606(a), Government Code that is required to establish a license holder profile system shall, by January 1, 2002, collect five dollars annually from license holders listed in §2054.2606(a), Government Code that are renewing a license. The five dollars per license holder renewal may be collected through increasing the license renewal fees by five dollars per license holder, by the licensing entity covering the five dollars per license holder renewal from other revenues rather than by increasing license renewal fees, or by a combination of increasing license renewal fees by less than five dollars per license holder and covering a portion of the five dollars per license holder from other revenues of the licensing entity. The money shall be transferred from the licensing entity to the department to cover the costs of providing the license holder profile system pursuant to guidelines established by the Office of the Comptroller of Public Accounts.

(b) Each state agency licensing entity that opts to establish a license holder profile system pursuant to §2054.2606(b), Government Code, shall collect five dollars annually per license renewal fee payable by each license holder about whom or which information is available through the profile system. The five dollar per year license renewal fee increases shall begin being collected by the licensing entity from affected license holders as soon as reasonably possible after the licensing entity determines to provide the license holder profile 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.

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Renee Mauzy
General Counsel
Department of Information Resources
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For further information, please call: (512) 475-4750

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT REGULATION
SUBCHAPTER E. INTEREST CHARGES IN LOANS

7 TAC §1.503, §1.504

The Finance Commission of Texas proposes amendments to 7 TAC §1.503 and §1.504, concerning interest charges in Subchapter E loans.

The purpose of the amendments is to make technical and conforming changes to the rules that parallel examination policies. The specific issues addressed relate to: (1) the propriety of charging administrative loan fees on multiple loans to the same borrower; and (2) the propriety of charging late charges on single installment loans.

Section 1.503 addresses when a lender may charge an additional administrative fee to a borrower who has multiple loans under Subchapter E. The modification to Subchapter E under Senate Bill 272, 77th Legislature, created new limitations on the assessment of administrative loan fees when a lender chooses to use the new rate structure available under Subchapter E. When a lender uses the new rate structure under Subchapter E, charges an administrative fee, and then makes another loan to the same borrower the lender may not again assess an administrative fee until the time limitation provided by the statute has lapsed.

Section 1.504 provides that default charges may not be assessed on single payment loans. At the time at which the payment becomes due, the loan has matured and, thus, after maturity interest is the appropriate compensation for the delinquency.

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

Commissioner Pettijohn also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of the amendments will be consistent application of examination policies. Additionally creditors will be more informed regarding the situations in which fees can be assessed.

Comments on the proposed amendments may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to: leslie.pettijohn@occc.state.tx.us.

The amendments are proposed under the Texas Finance Code §11.304 and §342.551, which authorizes the Finance Commission of Texas to adopt rules to enforce Title 4 of the Texas Finance Code.

These rules affect Texas Finance Code Chapter 342, Subchapter E.

§1.503. Administrative Loan Fee.

An authorized lender may collect an administrative loan fee pursuant to §342.201(f), Texas Finance Code on interest bearing and pre-computed loans.

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

(3) An administrative fee may not be contracted for, charged, or received by an authorized lender on the refinance of a loan that utilizes §342.201(a), (d), or (e) rates for a period of 365 days after the lender has entered into a §342.201(e) rate loan in which an administrative fee was contracted for, charged, or received.

(4) [~~(3)~~] Interest may not be assessed, charged, or received on an administrative fee if the assessment causes the total amount of interest to exceed the maximum amount authorized under Chapter 342.

§1.504. Default Charges.

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

(g) Prohibition of default charge on single payment loan. A default charge is prohibited on a single payment loan. After maturity interest is allowed in lieu of a default charge.

This 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 February 22, 2002.

TRD-200201129
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 936-7640

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SUBCHAPTER F. ALTERNATE CHARGES FOR CONSUMER LOANS

7 TAC §1.601

The Finance Commission of Texas proposes amendments to 7 TAC §1.601, concerning alternate charges for consumer Subchapter F loans.

The purpose of the amendments is to make technical and conforming changes to the rules that parallel examination policies. The specific issue addressed relates to consistent limitations on acquisition charges under Subchapter F.

Section 1.601 provides that an acquisition charge ($10 on a cash advance of $100 to $500) may only be assessed to a borrower once in a given month. This is a conforming charge, consistent with the application of the agency's examination policy for more than thirty years. Additionally this rule is consistent with the payday lending rules limitations on earning acquisition charges. These rule changes are necessary to provide clarity and consistency to lenders who construct their transactions in compliance with Chapter 342.

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

Commissioner Pettijohn also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of the amendments will be consistent application of examination policies. Additionally creditors will be more informed regarding the situations in which fees can be assessed.

Comments on the proposed amendments may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to: leslie.pettijohn@occc.state.tx.us.

The amendments are proposed under the Texas Finance Code §11.304 and §342.551, which authorizes the Finance Commission of Texas to adopt rules to enforce Title 4 of the Texas Finance Code.

These rules affect Texas Finance Code Chapter 342, Subchapter F.

§1.601. Authorized Charges.

(a) - (b) (No change.)

(c) An acquisition charge may only be contracted for, charged, or collected once a month on a Subchapter F loan.

This 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 February 22, 2002.

TRD-200201130
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 936-7640

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SUBCHAPTER J. AUTHORIZED LENDER'S DUTIES AND AUTHORITY

7 TAC §1.845

The Finance Commission of Texas proposes new §1.845 concerning the filing of consumer complaints with the Office of Consumer Credit Commissioner.

New §1.845 implements the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the agency.

Section 1.845 specifies the manner in which regulated license holders provide consumers with information on how to file complaints with the agency. The section also requires that the information on how to file complaints be included with each privacy notice a regulated license holder is required by law to provide to consumers.

The agency is considering an alternative method of compliance with the proposed rule and specifically seeks comment on the alternative. The alternative addresses the following situation: if a lender delivers a copy of the loan agreement containing the complaint and inquiries notice simultaneously with the privacy notice, the lender need only deliver one copy of the complaint and inquiry notice to comply with the section. In this situation the notice contained in the loan agreement will satisfy the requirements of the rule for delivery of a notice with the privacy notice

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that, for the first five years that the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules as adopted.

Commissioner Pettijohn also has determined that, for each year of the first five years the rules as adopted are in effect, the public benefit anticipated as a result of the adoption of these rules will be the provision of information to the consumers of regulated licensed holders on how to file complaints with the agency. Costs to comply with this section will be less than $100.00, and there will be no deleterious effect on small businesses.

Comments on proposed §1.845 may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, or by e-mail to: leslie.pettijohn@occc.state.tx.us.

Section 1.845 is proposed under the authority of Finance Code, §11.307, which requires the Finance Commission to adopt rules specifying the manner in which regulated license holders provide consumers with information on how to file complaints with the agency.

§1.845. Complaints and Inquiries Notice.

(a) Definitions. "Privacy notice" means any notice that a lender gives regarding a consumer's right to privacy as required by a specific state or federal law.

(b) Required Notice.

(1) The following notice must be given to let consumers know how to file complaints: The (your name) is (licensed and examined or registered) under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (your name) should contact the Office of Consumer Credit Commissioner through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Austin, Texas 78705-4207. Telephone No.: 800/538-1579. Fax No.: 512/936-7610. E-mail: consumer.complaints@occc.state.tx.us. Website: www.occc.state.tx.us.

(2) The required notice must be given in the language in which a transaction is conducted.

(3) The required notice must be included with each privacy notice.

(4) Regardless of whether any state or federal law requires the lender to give privacy notices, the lender must take appropriate steps to let consumers know how to file complaints by giving the required notice in compliance with paragraph (1) of this subsection.

(5) A notice is also required on each contract of a licensed lender pursuant to §14.104, Texas Finance Code.

(A) The text of the notice required by subsection (b)(1) of this subsection is acceptable to meet this requirement; or

(B) A lender may use the following notice: "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems. Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, (512) 936-7600, (800) 538-1579."

This 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 February 25, 2002.

TRD-200201140
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 936-7640

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CHAPTER 3. STATE BANK REGULATION
SUBCHAPTER F. ACCESS TO INFORMATION

7 TAC §3.112

The Finance Commission of Texas (the commission) proposes new §3.112, concerning charges for providing public information. The commission is concurrently proposing to repeal §11.27, concerning charges for open record requests, in this issue of the *Texas Register*.

The proposed section incorporates by reference the Texas Building and Procurement Commission rules for determining the charges applicable to providing public information. Government Code, §552.262, requires governmental bodies to use these rules.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section.

Ms. Newberg also has determined that, for each of the first five years the section as proposed is in effect, the public benefit anticipated as a result of the adoption of the section will be clear guidance on charges applicable to requests for public information.

Comments concerning the proposed section should be submitted within 30 days of publication to Robin Robinson, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by email to robin.robinson@banking.state.tx.us.

The new section is proposed under Government Code §552.262, which requires governmental entities to use Texas Building and Procurement Commission rules in determining charges for providing public information.

Government Code, Chapter 552, is affected by the proposed section.

§3.112. What will the department charge for providing public information?

(a) If you request the department to provide copies or allow inspection of public information in the possession of the department, you may be required to pay the charges and meet other requirements specified by the Texas Building and Procurement Commission in 1 TAC §§111.61, et seq.

(b) The department may reduce or waive an applicable charge under subsection (a) of this section, in the discretion of the commissioner, if the cost of collecting the charge will exceed the amount of the charge or a public benefit will result from the reduction or waiver.

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

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201108
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Proposed date of adoption: April 19, 2002
For further information, please call: (512) 475-1300

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PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 11. MISCELLANEOUS
SUBCHAPTER A. GENERAL

7 TAC §11.27

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

The Finance Commission of Texas (the commission) proposes the repeal of §11.27, concerning charges for public information requests. The commission is concurrently proposing new §3.112 in this issue of the *Texas Register*, to incorporate the Texas Building and Procurement Commission rules by reference.

The repeal is necessary because Government Code, §552.262, requires governmental entities to use Texas Building and Procurement Commission rules for this purpose.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Newberg also has determined that, for each of the first five years the repeal as proposed will be in effect, the public benefit anticipated as a result of the repeal is the removal of obsolete regulations. There is no anticipated cost to persons who are required to comply with the repeal as proposed. There will be no adverse economic effect on small businesses.

Comments concerning the proposed repeal should be submitted within 30 days of publication to Robin Robinson, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by e-mail to robin.robinson@banking.state.tx.us.

The repeal is proposed under Government Code, §552.262, which requires governmental entities to use Texas Building and Procurement Commission rules in determining charges for providing public information.

Government Code, Chapter 552, is affected by the proposed repeal.

§11.27. Open Records Requests; Charges.

This 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 February 22, 2002.

TRD-200201110
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: April 19, 2002
For further information, please call: (512) 475-1300

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CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER B. REGULATION OF LICENSES

7 TAC §25.41

The Finance Commission of Texas (the commission) proposes to amend §25.41, concerning the filing of consumer complaints with the Texas Department of Banking (department).

The proposed amendment revises the language of the required notice to consumers of prepaid funeral benefits contract sellers on how to file complaints with the department to be consistent with the notice contained in the model prepaid funeral benefits contract and required by §25.3(j) of this title (relating to What Requirements Apply to a Non-Model Contract or Waiver). The amendment also clarifies that the requirement to provide consumers with the required notice when the consumer first obtains a product or service may be accomplished by including the required notice in all prepaid funeral benefits contract forms. The amendment also provides that the notice required to be included with each privacy notice under subsection (b)(3) and required to be accessible on a website offering consumer goods and services under subsection (b)(5)(B) be in substantially the same language and form as the required notice set out in subsection (b)(1).

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as amended.

Ms. Newberg also has determined that, for each of the first five years the section as amended is in effect, the public benefit anticipated as a result of the amendment of this section will be clarification of the manner in which the required notice may be provided as well as improved uniformity and predictability in the provision of information to the consumers of prepaid funeral benefits contract sellers on how to file complaints with the department. No economic costs will be incurred by a person required to comply with this section, and there will be no deleterious effect on small businesses.

Comments on the proposed amendment may be submitted, within 30 days of the date of publication, to Steven L. Martin, Senior Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: steve.martin@banking.state.tx.us.

The amendment is proposed under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which prepaid funeral benefits contract sellers provide consumers with information on how to file complaints with the department.

Finance Code, §11.307 is affected by this proposed amendment.

§25.41. How Do I Provide Information to Consumers on How to File a Complaint?

(a) (No change.)

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: Inquiries should be directed as below. All complaints must be in writing. Concerning the Prepaid Contract: Texas Department of Banking [~~The (your name) is licensed or permitted under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Department of Banking. Any consumer wishing to file a complaint against the (your name) should contact the Texas Department of Banking through one of the means indicated below: In Person or U.S. Mail:~~] 2601 North Lamar Boulevard, [~~Suite 300,~~] Austin, Texas 78705 1-877/276-5554 (toll free) [~~78705-4294 Telephone No.: 877/276-5554 Fax No.: 512/475-1288 Website:~~] www.banking.state.tx.us

(2) (No change.)

(3) You must include the required notice with each privacy notice that you send out. The language and form of the notice must substantially conform to the required notice set out in paragraph (1) of this subsection.

(4) (No change.)

(5) You must use the following measures to give the required notice:

(A) You [~~For consumers who are not given privacy notices, you~~] must give the required notice when the consumer first obtains a product or service from you. This may be accomplished by including the required notice in all prepaid funeral benefits contract forms in compliance with §25.3(j) of this title (relating to What Requirements Apply to a Non-Model Contract and Waiver).

(B) Those portions of your website that offer consumer goods and services must contain access to the required notice. The language and form of the notice must substantially conform to the required notice set out in paragraph (1) of this subsection.

~~[(C) You must also include in all contract forms the notice required by §25.3(j) of this title (relating to What Requirements Apply to a Non-Model Contract or Waiver).]~~

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

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201113
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: April 19, 2002
For further information, please call: (512) 475-1300

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CHAPTER 26. PERPETUAL CARE CEMETERIES

7 TAC §26.2

The Finance Commission of Texas (the commission) proposes new §26.2, concerning recordkeeping requirements for perpetual care cemeteries.

Proposed §26.2 will require owners or operators of perpetual care cemeteries to keep a general file that includes records such as documents and correspondence relating to perpetual care operations, financial information, sample forms of agreements, trustee or bank statements, corporate information, and other documents required to be maintained by provisions of Health & Safety Code, Chapters 711 and 712. The proposed section will also require owners or operators to keep a consumer complaint file, purchase agreement files, a historical register of all interment rights sold, and a monthly recapitulation of all conveyances of interment rights issued subsequent to an examination.

Other than records of consumer complaints, the records that proposed §26.2 will require to be maintained were previously recommended to be maintained by Texas Department of Banking Policy Memorandum No. 1013 (November 25, 1996), as those necessary to support examinations by the banking commissioner. The banking department has not experienced significant recordkeeping compliance problems since Memorandum No. 1013 has been in effect because the recommended records are readily available to perpetual care cemeteries. The new section will appropriately formalize Memorandum No. 1013 as a rule promulgated under Health & Safety Code, §712.008. Consumer complaint records must be maintained for examination by the commissioner under Health & Safety Code, §712.044(a), as amended by the legislature effective September 1, 2001.

Finally, proposed §26.2 will require that records be kept at the cemetery or corporate office. If these locations are not conducive to examination, the proposed section authorizes the banking department to request delivery of the records to another more suitable location for examination.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as adopted.

Ms. Newberg also has determined that, for each of the first five years the section as proposed is in effect, the public benefit will be clear guidance for perpetual care cemeteries on the records that are required under Health & Safety Code, Chapter 712 for examination by the commissioner. No economic cost will be incurred by a person required to comply with this section, and there will be no deleterious effect on small businesses.

Comments concerning the proposed section should be submitted within 30 days of publication to Robin Robinson, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by e-mail to robin.robinson@banking.state.tx.us.

The section is proposed under Health & Safety Code, §712.008, which authorizes the commission to adopt rules necessary to enforce and administer Health & Safety Code, Chapter 712.

Health & Safety Code, Chapter 712, is affected by the proposed section.

§26.2. What records am I required to maintain?

(a) What unique defined terms are used in this section?

(1) "You" or "I" means the owner or operator of a perpetual care cemetery.

(2) "Perpetual care property" or "property" means all niches, crypts, and ground space sold in connection with perpetual care.

(3) "Consumer complaint" means a written complaint relating to the perpetual care fund or to discharge of the corporation's perpetual care responsibilities that you receive from a consumer at your cemetery location. The term does not include oral complaints.

(4) "Maintain" means to store and retain information and documents specified by this section in such a way that the information can be expeditiously retrieved for examination by the commissioner, whether by hard copy or produced electronically and printed for review.

(b) What records must I maintain?

(1) You must maintain the following records in a general file:

(A) the current certificate of authority to operate a perpetual care cemetery, unless prominently displayed in the cemetery office;

(B) the latest filed annual statement required under Health & Safety Code, §712.041;

(C) your most current consolidated financial statement or, in the alternative, your most current financial records and/or tax return, provided that the records must substantiate your use or expenditure of fund income;

(D) a sample form of each purchase agreement you currently use;

(E) a sample form of each document of conveyance of interment rights you currently use;

(F) the current trust agreement governing the fund;

(G) all examination reports and official correspondence sent to you by the banking department during the preceding three years;

(H) all trustee statements and all written correspondence from the trustee that you received since the last examination;

(I) minutes of each meeting of the cemetery corporation's board of directors held since the last banking department examination or, if the cemetery corporation is a wholly-owned subsidiary and does not hold board meetings, minutes of each meeting of the parent corporation's board of directors held since the last examination;

(J) all correspondence you sent to or received from the banking department during the preceding three years;

(K) all maps, plats, and property dedications that you have filed reflecting the dates of filing in the county records under Health & Safety Code, §711.034;

(L) your current sales maps showing all gardens, mausoleums, crematories, and columbaria in the cemetery;

(M) records and photographs relating to lawn crypt construction and completion, to demonstrate you complied with Health & Safety Code, §711.061;

(N) each cemetery price list that you used at any time in the preceding three years; and

(O) your quarterly reconciliation of capital gains and losses in the fund since the last examination, if your trust agreement includes capital gains and losses in the definition of trust income.

(2) You must maintain the following records in a segregated consumer complaint file:

(A) each written complaint that you received from a consumer regarding the manner in which you operate the perpetual care cemetery or perform your contractual obligations to a consumer; and

(B) all written correspondence and other records relating to a consumer complaint, including records showing how you resolved or otherwise disposed of the complaint.

(3) You must maintain a separate file for each property purchaser that contains all executed property purchase agreements, conveyance documents, and all related information.

(4) You must maintain, and update at least monthly, a historical register of all interment rights sold, showing:

(A) the purchaser's name;

(B) the date of purchase;

(C) the purchase agreement number;

(D) a specific description of the property you sold; and

(E) how and when you disposed of the purchase agreement, including whether the agreement was conveyed, canceled, or voided.

(5) You must maintain a monthly recapitulation of all conveyance of interment rights issued since the date of your last examination that includes, for each paid-in-full property sale:

(A) the date the purchase agreement was executed;

(B) the property purchaser's name;

(C) the purchase agreement number;

(D) the date that the purchase agreement was paid-in-full;

(E) the conveyance document number;

(F) the amount of ground area, number of crypts, or number of niches conveyed under the purchase agreement, and the corresponding sales price of each;

(G) the deposits to the fund from sales, as required by Health & Safety Code, §712.028;

(H) any additional deposits to the fund:

(i) that are required by contract in an amount in excess of the deposits required by Health & Safety Code, §712.028;

(ii) that result from exchanged or traded-in property;

(iii) that result from the sale of additional or subsequent rights of interment; or

(iv) that are voluntarily made in excess of the amount of deposits required by Health & Safety Code, §712.028;

(I) total deposits for each conveyance, which is the sum of subparagraphs (G) and (H) of this paragraph for each conveyance; and

(J) cumulative monthly totals of the amounts listed in subparagraphs (F), (G), and (H) of this paragraph.

(c) Where do I need to keep the records required under this section?

(1) You must keep all required records at the perpetual care cemetery's physical location or corporate office.

(2) If the physical location of the records is not conducive to examination by banking department personnel, the banking department may request that you deliver your records to a mutually agreeable location in your area that is more suitable for conducting an examination. In this situation, if you refuse to agree, the commissioner may consider your inaction to constitute refusal to submit to an examination and initiate an appropriate enforcement action against you under Health & Safety Code, §712.0441.

This 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 February 22, 2002.

TRD-200201114
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: April 19, 2002
For further information, please call: (512) 475-1300

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7 TAC §26.3

The Finance Commission of Texas (commission) proposes new §26.3, concerning written notice to prohibit interment of a homicide perpetrator in the same perpetual care cemetery as the homicide victim.

Proposed §26.3 will implement and clarify Health & Safety Code, §712.009, which generally prohibits a perpetual care cemetery from interring an individual that caused the death of a victim interred in the cemetery (barred individual) upon receipt of a specified written notice. Proposed §26.3 provides that a written notice is ineffective if the cemetery does not receive the written notice prior to the time it inters the remains of a barred individual, and that a written notice must be supported by or promptly supplemented with records showing the barred individual caused the death of the victim in a manner that invokes Health & Safety Code, §712.009.

The proposed section will provide guidance on how a cemetery should respond to a written notice, what options are available to a cemetery that receives a written notice, and how a cemetery should deal with the authorized representative of the victim and the authorized representative of the barred individual. The proposed section also suggests possible means of resolving contractual issues if the cemetery is a party to a pre-existing contract to inter the remains of a barred individual.

Proposed §26.3 will require the cemetery to maintain specified records relating to a written notice for three years after the date of a written notice determined to be invalid or ineffective, or ten years after the date of an effective written notice or any subsequent renewal notice.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five

years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section.

Ms. Newberg also has determined that, for each of the first five years the new section is in effect, the public benefit anticipated as a result of the adoption is enhancement of the rights of crime victims and their families. No economic cost will be incurred by a person required to comply with this section, and there will be no deleterious effect on small businesses.

Comments concerning the proposed section may be submitted within 30 days of publication to Robin Robinson, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, or by e-mail to robin.robinson@banking.state.tx.us.

The commission requests comment from the public regarding the potential operation and impact of Health & Safety Code, §712.009, and the proposed section. Commentors are requested to address the following questions:

1. Assuming a proper notice, if the perpetrator owned a burial plot and/or a preneed contract, is the perpetual care cemetery obligated to repurchase the property from or refund the contract to the perpetrator's representative?

2. Assuming a proper notice, what are the perpetual care cemetery's obligations if:

a. the perpetrator's arrangements were made prior to arrangements by or for the victim?

b. a deceased family member of the perpetrator had purchased property for all of the family members, including the perpetrator?

c. a family member of the perpetrator is buried in the cemetery, and the perpetrator's representative wants the perpetrator buried next to the family member?

d. the families of both the victim and the perpetrator own burial plots in which family members are buried?

3. If the perpetrator is buried in violation of the notice, can the cemetery disinter and relocate the perpetrator's remains without incurring liability to the perpetrator's representative or family members?

4. If the perpetrator is buried prior to notice by the victim's representative and the victim owned a burial plot and/or a preneed contract, is the perpetual care cemetery obligated to repurchase the property from or refund the contract to the victim's representative?

5. If the perpetrator is buried prior to notice by the victim's representative, what are the perpetual care cemetery's obligations if:

a. the victim's arrangements were made prior to arrangements by or for the perpetrator?

b. a deceased family member of the victim had purchased property for all of the family members, including the victim?

c. a family member of the victim is buried in the cemetery, and the victim's representative wants the victim buried next to the family member?

d. the families of both the victim and the perpetrator own burial plots in which family members are buried?

6. If the perpetual care cemetery must repurchase property or refund a contract, is the cemetery entitled to keep any portion of a refund to cover recordkeeping expenses, or additional expenses incurred such as handling remains or opening a grave prior to notice? If so, are expenses reimbursable at cost or per a pricing schedule?

7. Under any scenario represented by the preceding questions, does the cemetery incur liability to any person under applicable law, such as for infliction of emotional distress or violations of the Deceptive Trade Practices-Consumer Protection Act (Business & Commerce Code, §§17.41 et seq?

8. Does the commission possess adequate rulemaking authority to adopt rules regarding disposition of any of the preceding questions?

The new section is proposed under Health & Safety Code, §712.009, which requires the commission to adopt rules to implement that statutory provision.

Health & Safety Code, §712.009, is affected by the proposed new section.

§26.3. How to Respond to a Written Notice to Prohibit Interment of a Homicide Perpetrator in the Same Cemetery as a Homicide Victim.

(a) What unique defined terms are used in this section?

(1) "Authorized person" means the person that has the right to control the disposition of an individual's remains, as specified by Health & Safety Code, §711.002.

(2) "Barred individual" means a natural person whose remains you have been or may be requested to inter in your cemetery, who caused the death of a victim already interred in your cemetery as a result of conduct constituting:

(A) murder under Penal Code, §19.02;

(B) capital murder under Penal Code, §19.03;

(C) criminally negligent homicide under Penal Code, §19.05;

(D) intoxication manslaughter under Penal Code, §49.08; or

(E) a crime under a statute of another state that is similar to Penal Code, §§19.02, 19.03, 19.05, or 49.08.

(3) "Time of interment" means the time you place the remains of an individual in the individual's final resting place.

(4) "Written notice" means the notice specified by Health & Safety Code, §712.009(b)(2), requesting that a barred individual not be interred in your cemetery.

(5) "You" or "I" means the owner or operator of a perpetual care cemetery.

(b) What should I do if I receive a written notice requesting that I not inter a named person in my cemetery? If you receive a written notice under Health & Safety Code, §712.009(b)(2), this subsection specifies the actions you should take within the two week period following the date you receive the notice. It may be in your best interests to inform your attorney and the banking department that you received a notice under Health & Safety Code, §712.009(b)(2). If you consult an attorney, you should follow your attorney's advice.

(1) If you receive the written notice after the time of interment of the person named as a barred individual in the notice, you should state that interment has already occurred in a written reply to the person who sent you the notice.

(2) If you receive the written notice prior to the time of interment of the person named as a barred individual in the notice, you should take the actions specified in this paragraph.

(A) If you are not aware that the person named as the barred individual has died or you have not scheduled internment of the named person's remains, you should make appropriate entries in your records to temporarily prevent any future interment of the named person for a period of up to two weeks, to permit you to investigate the facts and circumstances surrounding the notice.

(B) If the named person has died and interment of the remains of the named person in your cemetery is pending, you should:

(i) temporarily suspend any plans to inter the named person for a period of up to two weeks, to permit you to investigate the facts and circumstances surrounding the notice; and

(ii) notify the authorized person of the possibly barred individual that you are required to temporarily suspend interment to investigate the facts and circumstances surrounding the notice.

(C) You should immediately examine the written notice and any accompanying documents to determine if the written notice satisfies the requirements of subsection (c) of this section. If the written notice satisfies these requirements without any further inquiry, you must comply with subsection (d) of this section. If the written notice does not comply with subsection (c) of this section, you should identify as soon as possible, in a written reply to the person who sent you the notice, the additional information or documents that must be furnished to you in order for the notice to comply with subsection (c) of this section. You should also specify a date by which you must receive the additional information or documents. You may also choose to include other information in your reply, such as:

(i) notice that you have not yet been requested to inter the barred individual's remains, or that internment has been temporarily suspended pending a reply to your request for additional information;

(ii) notice that failure to submit a timely response with the requested information and documents may permit interment of the person named as the barred individual;

(iii) notice that, if you determine the written notice complies with subsection (c) of this section, you will not inter the barred individual in your cemetery during the seven year period following the date of the notice, and that the period can be extended from time to time if you receive a timely renewal notice; and/or

(iv) if your cemetery is the only cemetery serving the municipality or county in which the victim and the person named as the barred individual lived, notice that you will inter the barred individual's remains in a different part of your cemetery or otherwise as far away as possible from the place where the victim is interred, if you determine the written notice complies with subsection (c) of this section.

(c) What must the written notice contain to satisfy legal requirements? To satisfy the requirements of Health & Safety Code, §712.009, a written notice must be received by you prior to the time of internment of the person named as the barred individual, and must contain, or have attached documents containing, information that unambiguously:

(1) identifies a victim interred in your cemetery;

(2) identifies the sender as the authorized person of the victim;

(3) identifies a person as a barred individual and requests that the barred individual not be interred in your cemetery; and

(4) demonstrates that the named person is a barred individual, by including:

(A) a certified, final trial court judgment that has not been overturned on appeal, convicting the identified person of an offense specified in subsection (a)(2) of this section for causing the victim's death; or

(B) effective only if the individual dies before conviction, a certified document that:

(i) identifies the named person as causing the victim's death, in violation of a specified offense that is listed in subsection (a)(2) of this section; and

(ii) is signed by an authorized representative of the medical examiner or law enforcement agency having jurisdiction over the specified offense.

(d) What must I do if I receive a written notice that complies with subsection (c) of this section? If you are subject to a written notice that satisfies the requirements of Health & Safety Code, §712.009(b)(2), as discussed in subsection (c) of this section, you should take the actions specified in this subsection.

(1) If the barred individual has died and you had temporarily suspended interment of the barred individual's remains under subsection (b)(2)(B) of this section, you should notify the authorized representative of the barred individual that you may not inter the barred individual in your cemetery. Alternatively, if your cemetery is the only cemetery serving the municipality or county in which the victim and the barred individual lived, you should explain the authorized representative's options to select an interment location within the boundaries you specify for the purpose of ensuring interment of the barred individual's remains is in a different part of your cemetery or otherwise as far away as possible from the place where the victim is interred. At your option, you may also explain other, non-interment services you can provide. If a contract exists that purports to require you to inter the barred individual's remains, you should also comply with subsection (e) of this section.

(2) If you are not aware that the barred individual has died or you have not scheduled or been requested to provide interment of the barred individual's remains, you should make appropriate entries in your records to either:

(A) prevent internment of the barred individual's remains for a period of seven years following the date you received the written notice; or

(B) require interment of the barred individual's remains in a different part of your cemetery or as far as possible away from the place where the victim is interred, for a period of seven years following the date you received the written notice, if your cemetery is the only cemetery serving the municipality or county in which the victim and the barred individual lived.

(3) If you are not aware that the barred individual has died or you have not scheduled or been requested to provide interment of the barred individual's remains, you should also make appropriate entries in your records to remind you of future actions that may be required if you are requested in the future to inter the barred individual's remains. For example, if the written notice contained and relied on a certified trial court judgment, you should, by means of a notice in writing, give a reasonable opportunity (e.g., two weeks) to:

(A) the authorized person of the barred individual, to submit satisfactory proof that the conviction was overturned on appeal, to possibly avoid the application of Health & Safety Code, §712.009; and

(B) the authorized person of the victim, to submit a document that satisfies subsection (c)(5)(B) of this section if the conviction was overturned on appeal, or a certified document demonstrating that the conviction was finally upheld on appeal, to ensure that Health & Safety Code, §712.009, will apply to interment of the barred individual.

(e) Does a written notice that complies with subsection (c) of this section ever expire?

(1) If you are subject to a written notice that satisfies the requirements of Health & Safety Code, §712.009(b)(2), as discussed in subsection (c) of this section, you are bound by Health & Safety Code, §712.009, for a period that ends seven years after the date you received the written notice. However, the authorized representative of the victim may periodically extend this period by sending you a written renewal notice under Health & Safety Code, §712.009(f).

(2) If you receive a written renewal notice before the expiration of the seven year period initiated by a previous notice, you should immediately examine the written renewal notice, any accompanying documents, and the documents you received in connection with any prior notice to determine if the written renewal notice satisfies the requirements of subsection (c) of this section, in a manner similar to the investigation you conducted under subsection (b)(2)(C) of this section when you received the initial written notice.

(3) If a written renewal notice, any accompanying documents, and the documents you received in connection with any prior notice collectively satisfy the requirements of Health & Safety Code, §712.009(b)(2), as discussed in subsection (c) of this section, the period during which you are bound by Health & Safety Code, §712.009, will be extended for an additional period that ends seven years after the date you received the written renewal notice.

(f) What should I do if I have a contract to inter the barred individual's remains and I am subject to a written notice that complies with subsection (c) of this section? You should consult an attorney if you have a contract to inter the remains of a barred individual. Although you are protected from owing damages to the authorized representative of the barred individual under Health & Safety Code, §712.009(e), if you are barred from interring remains under that section, you will still be required to return any funds you received under a contract that you did not earn. You and the authorized representative of the barred individual may be able to negotiate a satisfactory settlement to enable you to earn at least a portion of the funds you received for the contract, such as by performing services not involving interment in your cemetery or assisting in alternate arrangements for disposition of the barred individual's remains.

(g) What records must I maintain if I receive a written notice? You must maintain the following records with respect to each victim interred in your cemetery that has been identified by a written notice:

(1) the written notice you received that identified a victim interred in your cemetery;

(2) the documents you received with the written notice or in response to your request for additional documents;

(3) each written renewal notice you received relating to the initial written notice retained under paragraph (1) of this subsection;

(4) any documents you received with a written renewal notice or in response to your request for additional documents;

(5) to the extent not already identified by prior paragraphs of this subsection, all correspondence to or from the authorized person of the victim or the authorized person's legal representative or attorney, including any complaints that you were required by a written notice to comply with Health & Safety Code, §712.009, but you inappropriately or unlawfully failed to comply;

(6) to the extent not already identified by prior paragraphs of this subsection, all correspondence to or from the authorized person of the barred individual or the authorized person's legal representative or attorney, including any complaints that a written notice was defective and did not require you to comply with Health & Safety Code, §712.009, but you inappropriately or unlawfully complied;

(7) all correspondence to or from your attorney concerning a written notice or related matters, subject to valid claims of privilege;

(8) if interment is authorized under Health & Safety Code, §712.009(d), documents demonstrating that you interred the barred individual in a place that is as far away as possible from the place you interred the victim;

(9) any contract that purported to require interment of the barred individual in your cemetery and, to the extent not already identified by prior paragraphs of this subsection, all correspondence, agreements, modifications, releases, cancelled checks, and deposit slips relating to the resolution of claims related to the contract; and

(10) to the extent not already identified by prior paragraphs of this subsection, all correspondence, pleadings, briefs, and court orders relating to litigation you initiated or defended with regard to issues of compliance or noncompliance with Health & Safety Code, §712.009.

(h) How long must I retain records relating to a written notice I received?

(1) With respect to a written notice that you determined was invalid and did not require you to comply with Health & Safety Code, §712.009, you must retain the records specified by subsection (g) of this section at least until the day after the third anniversary of the date you received the written notice.

(2) With respect to a written notice that you determined met the requirements of Health & Safety Code, §712.009, you must retain the records specified by subsection (g) of this section at least until the day after the 10th anniversary of the date you last received a written notice or renewal notice (i.e., the day after the third anniversary of the date the effective period of the last written notice or renewal notice expired).

This 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 February 22, 2002.

TRD-200201115
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: April 19, 2002
For further information, please call: (512) 475-1300

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7 TAC §26.11

The Finance Commission of Texas (the commission) proposes to amend §26.11 concerning the filing of consumer complaints with the Texas Department of Banking (department).

The proposed amendment revises the language of the required notice to consumers of perpetual care cemeteries on how to file

complaints with the department to be consistent with similar recently adopted rules applying Finance Code, §11.307 to other regulated industries. The amendment requires the required notice be included in the perpetual care cemetery purchase agreement. The amendment also provides that the notice required to be included with each privacy notice under section (b)(3) and required to be accessible on a website offering consumer goods and services under subsection (b)(5)(B) must be in substantially the same language and form as the required notice set out in subsection (b)(1).

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that, for each year of the first five years that the section is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the section as amended.

Ms. Newberg also has determined that, for each of the first five years the section as amended is in effect, the public benefit anticipated as a result of the amendment of this section will be clarification of the manner in which the required notice may be provided as well as improved uniformity and predictability in the provision of information to the consumers of perpetual care cemeteries on how to file complaints with the department. No economic costs will be incurred by a person required to comply with this section, and there will be no deleterious effect on small businesses.

Comments on the proposed amendment may be submitted, within thirty days of the date of publication, to Steven L. Martin, Senior Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: steve.martin@banking.state.tx.us.

The amendment is proposed under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which perpetual care cemeteries provide consumers with information on how to file complaints with the department.

Finance Code, §11.307 is affected by this proposed amendment.

§26.11. How Do I Provide Information to Consumers on How to File a Complaint?

(a) (No change.)

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: Complaints concerning perpetual care cemeteries should be directed to: Texas Department of Banking [~~The (your name) is certificated under the laws of the State of Texas and by state law is subject to regulatory oversight by the Texas Department of Banking. Any consumer wishing to file a complaint against the (your name) should contact the Texas Department of Banking through one of the means indicated below:~~] [~~In Person or U.S. Mail:~~] 2601 North Lamar Boulevard, [~~Suite 300,~~] Austin, Texas 78705 1-877/276-5554 (toll free) [~~78705-4294 Telephone No.: 877/276-5554 Fax No.: 512/475-1288 Website:~~] www.banking.state.tx.us

(2) (No change.)

(3) You must include the required notice with each privacy notice that you send out. The language and form of the notice must substantially conform to the required notice set out in paragraph (1) of this subsection.

(4) (No change.)

(5) You must use the following measures to give the required notice:

(A) You [~~For consumers who are not given privacy notices, you~~] must give the required notice when the consumer first obtains a product or service from you by including the required notice in the perpetual care cemetery purchase agreement. [~~This may be accomplished by including the required notice in a purchase agreement.~~]

(B) Those portions of your website that offer consumer goods and services must contain access to the required notice. The language and form of the notice must substantially conform to the required notice set out in paragraph (1) of this subsection.

This 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 February 22, 2002.

TRD-200201116
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: April 19, 2002
For further information, please call: (512) 475-1300

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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 85. RULES OF OPERATION FOR PAWNSHOPS

SUBCHAPTER D. OPERATION OF PAWNSHOPS

7 TAC §85.423

The Finance Commission of Texas proposes new §85.423 concerning the filing of consumer complaints with the Office of Consumer Credit Commissioner.

New §85.423 implements the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the agency.

Section 85.423 specifies the manner in which pawnshop license holders provide consumers with information on how to file complaints with the agency. The section also requires that the information on how to file complaints be included with each privacy notice a pawnshop license holder is required by law to provide to consumers.

The agency is considering an alternative method of compliance with the proposed rule and specifically seeks comment on the alternative. The alternative addresses the following situation: if a pawnbroker delivers a copy of the pawn ticket agreement containing the complaint and inquiries notice simultaneously with the privacy notice, the pawnbroker need only deliver one complaint and inquiry notice to comply with the section. In this situation the notice contained in the pawn ticket would satisfy the requirements of the rule for delivery of a notice with the privacy notice.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that, for the first five years that the rules are in effect, there

will be no fiscal implications for state or local government as a result of enforcing or administering the rules as adopted.

Commissioner Pettijohn also has determined that, for each year of the first five years the rules as adopted are in effect, the public benefit anticipated as a result of the adoption of these rules will be the provision of information to the consumers of pawnshop licensed holders on how to file complaints with the agency. Costs to comply with this section will be less than $100.00, and there will be no deleterious effect on small businesses.

Comments on proposed §85.423 may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, or by e-mail to: leslie.pettijohn@occc.state.tx.us.

Section 85.423 is proposed under the authority of Finance Code, §11.307, which requires the Finance Commission to adopt rules specifying the manner in which pawnshop license holders provide consumers with information on how to file complaints with the agency.

§85.423. Complaints and Inquiries Notice.

(a) Definitions. "Privacy notice" means any notice that a pawnbroker gives regarding a consumer's right to privacy as required by a specific state or federal law.

(b) Required Notice.

(1) The following notice must be given to let consumers know how to file complaints: The (your name) is (licensed and examined or registered) under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (your name) should contact the Office of Consumer Credit Commissioner through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Austin, Texas 78705-4207. Telephone No.: 800/538-1579. Fax No.: 512/936-7610. E-mail: consumer.complaints@occc.state.tx.us. Website: www.occc.state.tx.us.

(2) The required notice must be given in the language in which a transaction is conducted.

(3) The required notice must be included with each privacy notice.

(4) Regardless of whether any state or federal law requires the pawnbroker to give privacy notices, the pawnbroker must take appropriate steps to let consumers know how to file complaints by giving the required notice in compliance with paragraph (1) of this subsection.

(5) A notice is also required on each contract of a licensed pawnbroker pursuant to §14.104, Texas Finance Code.

(A) The text of the notice required by subsection (b)(1) of this subsection is acceptable to meet this requirement; or

(B) A pawnbroker may use the following notice: "TEXAS PAWNBROKERS ARE LICENSED AND REGULATED BY THE TEXAS CONSUMER CREDIT COMMISSIONER. FOR INFORMATION OR ASSISTANCE WITH ANY PAWN OR OTHER CREDIT PROBLEM CALL 1-800-538-1579."

This 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 February 25, 2002.

TRD-200201141
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 936-7640

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 21. LOCAL HISTORY PROGRAMS

13 TAC §21.31

The Texas Historical Commission proposes an amendment to Chapter 21, §21.31 (related to awards granted by the Texas Historical Commission) concerning the granting of awards and the award selection process. This amendment is proposed as a means of simplifying the nominations and selection process.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the amendment is in effect there will only be fiscal implications to those local governments that may choose to participate in the awards process. Fiscal implications to state government will be minimal and will be dependent upon funds appropriated by the legislature.

Mr. Oaks has also determined that for each year of the first five years the amendment is in effect the public will benefit through the simplification of the awards process. There will be no effect on small businesses or individuals as a result of the amendment.

Comments on the proposed amended rule may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276, (512) 463-6100. Comments will be accepted for 30 days after publication in the *Texas Register*.

This amendment is proposed under Texas Government Code, §442.005(q) that authorizes the Texas Historical Commission to promulgate rules to carry out the intent of this chapter and associated legislative mandates.

§21.31. Awards.

(a) The Texas Historical Commission may establish and present such awards and prizes as it determines to be appropriate. [~~The following preservation awards will be presented by the agency, with requirements and criteria detailed in the current Texas Preservation Handbook for County Historical Commissions, which is available from the Texas Historical Commission:~~]

[~~(1) governor's award for historic preservation;~~]

[~~(2) the Ruth Lester lifetime achievement award;~~]

[~~(3) Glenda Morgan award of excellence in museums;~~]

[~~(4) award of excellence in historic architecture;~~]

[~~(5) award of excellence in preserving history;~~]

[~~(6) award of excellence in archeology;~~]

[~~(7) award of merit in historic preservation;~~]

[~~(8) museum awards;~~]

[~~(9) distinguished service award;~~]

~~[(10) John Ben Shepperd leadership award;]~~

~~[(11) outstanding volunteer of the year award.]~~

(b) The conditions of eligibility, procedures for consideration, and criteria for judging such awards shall be determined by the Commission and made available to members of the public who may be interested in nominating individuals or organizations for such awards.

(c) Decisions on the awards shall be made by vote of the Commission in a duly posted open meeting.

(d) Awards shall be made without regard to the race, religion, ethnicity, gender, political affiliation, or national origin of the nominee.

This 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 February 22, 2002.

TRD-200201075
Larry Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 463-6100

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CHAPTER 23. PUBLICATIONS

13 TAC §23.3

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

The Texas Historical Commission proposes the repeal of Chapter 23, §23.3 (related to the T.R. Fehrenbach Award), concerning the requirements for nomination for this award. The repeal is proposed as a means of simplifying the nomination and selection process.

It was decided at the January 11, 2002, meeting of the Texas Historical Commission that this rule would no longer be needed as Chapter 21, §21.31 is being amended to cover all awards granted by the Texas Historical Commission.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications to state or local governments as a result of the repeal.

Mr. Oaks has also determined that for each year of the first five years the repeal is in effect the public will benefit through the simplification of the awards process. There will be no effect on small businesses. There is no anticipated cost to individuals as a result of this repeal.

Comments on the repeal of this rule may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276, (512) 463-6100. Comments will be accepted for 30 days after publication in the *Texas Register*.

The repeal is proposed under Texas Government Code, §442.005(q) that authorizes the Texas Historical Commission to promulgate rules to carry out the intent of this chapter and associated legislative mandates.

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

§23.3. Rules of the T.R. Fehrenbach Book Award of the Texas Historical Commission: 1989-1998.

This 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 February 22, 2002.

TRD-200201076
Larry Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 463-6100

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 4. ENVIRONMENTAL PROTECTION

SUBCHAPTER D. RAILROAD COMMISSION OF TEXAS VOLUNTARY CLEANUP PROGRAM

16 TAC §§4.401, 4.405, 4.410, 4.415, 4.420, 4.425, 4.430, 4.435, 4.440, 4.445, 4.450

The Railroad Commission of Texas proposes new §§4.401, 4.405, 4.410, 4.415, 4.420, 4.425, 4.430, 4.435, 4.440, 4.445, and 4.450, which will be new Subchapter D of new Chapter 4, Title 16 of the Texas Administrative Code, relating to the Railroad Commission of Texas Voluntary Cleanup Program. Chapter 4 will be entitled "Environmental Protection."

The purpose of the voluntary cleanup program (VCP) is to provide an incentive to those lenders, developers, owners, and operators who did not cause or contribute to the pollution to remediate soil and water that has been contaminated by activities over which the Commission exercises jurisdiction. The proposed new rules set forth provisions relating to eligibility to participate in the Commission's voluntary cleanup program, application to participate in the program, rejection of an application, entering into a voluntary cleanup agreement, termination of such agreement and cost recovery, voluntary cleanup work plans and reports, certificates of completion, conditional certificates of completion, and persons released from liability.

Senate Bill 310, 77th Legislature (2001), amended Texas Natural Resources Code, Chapter 91, by adding new §§91.651-91.661 (Subchapter O), specifically authorizing the Commission to establish a voluntary cleanup program. The purpose of new Subchapter O is to provide an incentive for the remediation of property by removing the liability to the state of lenders, developers, owners, and operators who did not cause or contribute

to contamination released at the property. Neither Subchapter O nor the proposed new rules establish technical cleanup standards. Instead, the voluntary cleanup agreement will list all statutes, rules, and standards with which the participant must comply, including cleanup standards. Once a person has completed a cleanup under this program, the Commission will issue a certificate of completion that will specifically release the person from state liability. Because the statute and the proposed new rules require that participants in the program pay for Commission oversight, there is no net additional cost to the agency for this program. The benefit to the state is that contaminated sites are cleaned up and returned to productive use.

Proposed new §4.401 states the purpose of the voluntary cleanup program, and proposed new §4.405 sets forth definitions used in the subchapter. Proposed new §4.410 states the eligibility standards for the voluntary cleanup program. The application and acceptance process provides the Commission with a formal means of determining whether or not a site and a party are eligible to enter the program. Proposed new §4.415 lists basic information that must be submitted as part of the application that the Commission will use to make this determination. This proposed rule also includes the $1,000 application fee required by Texas Natural Resources Code §91.654.

Proposed new §4.420 contains the standards for acceptance or rejection of an application, and provides that if the Commission rejects an application, an applicant may resubmit an application using the process set out in this rule. This rule also contains a method by which the Commission may return half of the application fee for those sites the Commission determines are ineligible. The Commission specifically requests comments on the sufficiency of the list of factors that will be considered in determining whether to accept or reject an application.

If the Commission accepts an application, the eligible applicant and the Commission will negotiate a voluntary cleanup agreement under proposed new §4.425. The rule establishes a process and a schedule by which the Commission and an eligible applicant may either negotiate and execute an agreement or terminate negotiations. The rule also outlines certain elements that the Commission is required by statute to include in any agreement, including reimbursement to the Commission by the participant for reasonable oversight costs incurred by the Commission and a schedule by which these costs will be collected; the statutes, rules, and standards with which the participant must comply; a description of work plans and reports to demonstrate cleanup activities; and a schedule for submission of these documents.

Proposed new §4.430 outlines the standards for terminating a voluntary cleanup agreement and for cost recovery by the Commission in that event.

Proposed new §4.435 states the standards and procedures for the Commission's review of all work plans and reports. These standards include consideration of future land use, protection of human health and the environment and avoidance of actions that could result in spreading or exacerbating contamination beyond current limits or that may increase the cost of cleanup. The Site Remediation Section may request additional information.

Under proposed new §4.440, the Commission will issue to the participant a certificate of completion granting the release of liability to the state; acknowledging the protection from liability provided by the newly-enacted Texas Natural Resource Code, §91.660; stating the proposed future land use; and including a legal description of the site and the name of the site's surface and mineral owners and mineral operators at the time the application was filed to participate in the program. The Commission specifically requests comments on the proposed definition of "completion" in §4.405 and on the statutory authority, if any, for the Commission issuing conditional certificates of completion. The Commission also specifically requests comments on what circumstances, if any, would be appropriate for a conditional certificate. The Commission has included proposed provisions for conditional certificates in §4.440(c).

Persons who caused or contributed to the pollution are not eligible to participate in the program. Only those persons who are not "responsible persons" as defined by Texas Natural Resources Code, §91.113, may be released from liability under this program. This statutory definition of "responsible person" is carried through to proposed new §4.405(13) as "any operator or other person required by law, rules adopted by the Railroad Commission, or a valid order of the Railroad Commission to control or clean up the oil and gas wastes or other substances or materials."

The Commission estimates that it will receive applications for between 12 and 19 sites each year under the program these proposed rules establish. Texas Natural Resources Code, Chapter 91, Subchapter O, directs the Commission to recover all reasonable costs fairly attributable to the voluntary cleanup program, including direct and indirect costs of overhead, salaries, equipment, utilities, legal, management, and support costs. The Commission is currently developing a methodology by which to routinely recover these costs, and the Commission expects that as it gains experience with the VCP it will be in a position to formalize its VCP cost recovery methods in future amendments to this rule. While the Commission's Oil Field Cleanup Fund will be used as the operating account for the voluntary cleanup program funds, the program is designed to be self-funding. Other than possible use of funds to start up the voluntary cleanup program, which ultimately will be recovered in the form of VCP application fees, funds from the Oil Field Cleanup Fund account targeted towards plugging of abandoned oil and gas wells, remediation of abandoned facilities, and other authorized activities are not expected to be used to operate the voluntary cleanup program.

Leslie Savage, Planning and Administration, Oil and Gas Division, has determined there will be no net fiscal impact for state government associated with the adoption of the proposed rules. Senate Bill 1, 77th Legislature (2001) appropriated to the Commission funding for one full-time employee to assist in the development and execution of the voluntary cleanup program. The Commission will incur overhead and administrative costs in reviewing applications and initial communications with persons who apply for the program. Most, if not all, of these costs should be offset by the application fee. Those costs not offset by the application fee will be recovered through reimbursement to the Commission by applicants to the program. Also, during the course of various projects, Oil and Gas Division staff oversight costs will be incurred before they are reimbursed, resulting in potential minor net cost to the Commission based on the time value of money. However, the Commission anticipates that because the voluntary cleanup agreements into which the Commission will enter under these proposed new rules will provide for regularly scheduled payments during the project life, the Commission's costs effectively will be zero.

Local governments may incur overhead and administrative costs if particular projects include efforts that ordinarily would require

a local permit. For these projects, the person engaged in the voluntary cleanup and Commission staff may need to consult with local government employees to assure that the activity proceeds consistent with what the local permit would have required.

David Cooney, Jr., Assistant Director, Environmental Law Section, Office of General Counsel, has determined that for each year of the first five years the proposed new rules are in effect, the public benefits include reduction of the number of sites to be remediated with money from the Oil Field Cleanup Fund; additional protection of human health and the environment; faster cleanup of sites; productive use of formerly contaminated properties; and possible restoration of property values that may have been depressed due to environmental damage.

Mr. Cooney has also determined that there will be no mandatory increased costs to small businesses, micro-businesses, or individuals who are members of the regulated community, because the program established under the proposed new rules is voluntary. These proposed rules are consistent with the Commission's response to spills and releases, and create only an additional incentive to encourage cleanup.

Because of the myriad variables that affect costs for cleanup activities it is not possible to calculate an average or anticipated cost of compliance. As an example of the way in which costs could be incurred under proposed new §§4.401- 4.450, assume that a person, such as a developer, undertakes a voluntary cleanup of a typical primary production facility with one old tank battery site and one reserve pit where all equipment has been removed and wells plugged according to Commission regulation. This hypothetical person would incur the expense of the $1,000 application fee; personnel, labor and possibly travel expenses in negotiating a voluntary cleanup agreement with the Commission staff; expense for the environmental assessment, if required; and, if the project went forward, the expense of cleaning up the property and reimbursing the Commission for the costs of staff oversight of the project.

The Commission has not requested a local employment impact statement pursuant to Texas Government Code, §2001.022(b), because it is not known where cleanup under the voluntary cleanup program may be implemented, if at all. The Commission has not conducted a regulatory analysis of a major environmental rule under Texas Government Code, §2001.0225(b), for two reasons. First, the Commission finds that proposed new §§4.401-4.450 are not "major environmental rules" as that term is defined in Texas Government Code, §2001.0225(g)(3). Second, the Commission proposes new §§4.401-4.450 under the specific provisions enacted by Section 34, Senate Bill 310, 77th Legislature (2001), rather than the general powers of the Commission. Therefore, according to Texas Government Code, §§2001.0225(a)(4), these new rules are not subject to the requirements of the section.

During an informal comment period from August 7, 2001, to October 8, 2001, the Commission received informal comments from representatives of the Texas Oil and Gas Association (TXOGA); the Permian Basin Petroleum Association (PBPA); Daniel B. Stephens&Associates, Inc.; and Staff of EPA's Region 6 Brownfields Team (EPA). Commission staff has reviewed the informal comments and offers the following responses.

TXOGA recommended that this proposal for creation of a separate chapter for environmental regulations be abandoned (or at least deferred) until such time as the benefit is defined and confusion is eliminated as to how this action will impact existing waste management regulations. A previous staff proposal (which has not proceeded to rulemaking) for consolidating the Commission's oil and gas environmental rules into a separate chapter of the Texas Administrative Code contained a proposed statement of purpose for the new chapter. According to that statement, the new chapter was to contain information and procedures by which operators demonstrate compliance with environmental regulations of the Commission. It would have set forth standards and procedures (applicable to all new and existing regulations put in that chapter) for: (1) determining whether an actual or potential risk exists at a site; (2) screening contaminants at the site to identify those that pose a risk; (3) developing cleanup standards based on contamination levels that are protective of human and health and the environment; and (4) establishing a reporting mechanism for informing the Commission regarding specific remediation activities. The standards and procedures in that statement are consistent with the statutory authority of the Commission to establish risk assessment as the guide for conducting site investigations and environmental assessments, and for controlling and cleaning up oil and gas wastes and other substances and materials. TXOGA agrees that these standards are appropriate for development of optional risk-based corrective action guidelines for remediation of sites at which cleanup to simple standards defined in permits by rule is not relatively easy and inexpensive. TXOGA stated that there is no reason to believe the legislature ever intended that these standards and procedures should apply to the whole of the Commission's oil and gas environmental regulations. To do so would imply that all waste management and remediation activities must be subject to rigorous analysis to prove that each provision meets each of the above tests.

The Commission does not believe the creation of a new chapter should be abandoned, and points out that the only provisions at issue at this time are the provisions in the VCP. As TXOGA stated, the Commission's previous proposal never proceeded to formal rulemaking. None of the provisions in that effort are part of the proposed VCP rules. The Commission proposes the VCP rules in Chapter 4 because the VCP rules do not sensibly fit into any other chapter of Commission rules. Commission staff is evaluating the potential benefit to the public and the staff from a reorganization of all oil and gas rules into two general categories of production rules and environmental protection rules, and a new chapter would facilitate such a reorganization. However, that possible reorganization of existing Commission rules is not part of this proposal. The Commission will not adopt any rule or statement of purpose without proper public notice, comment, and vote by the Commission.

Next TXOGA commented on approval authority for the various aspects of the Voluntary Cleanup Program being specifically delegated in the proposed rules to the "Assistant Director" (defined as the administrative head of the Site Remediation Section). TXOGA did not object to delegation of such authority to this level but stated that definition by rule of the specific level to which authority is delegated removes the ability of the Commission to modify that delegation (e.g., in the event the Site Remediation Section is renamed) without further rulemaking.

The Commission agrees with this comment and notes that the delegation provision in the proposed rule actually defines "Commission" as the Railroad Commission of Texas, the director of the Oil and Gas Division, or a staff delegate of the division director. The Commission has worded the proposed rules so that persons who read the rules clearly understand to whom participants will

be reporting in the VCP process, so the rules refer to the Site Remediation Section when that section is specifically involved.

For clarification, TXOGA recommended revising §4.405(l) to read: "(1) Applicant--A person who is eligible to participate in the voluntary cleanup program and who *submits* the required forms and information for doing so, *together with the application fee required by §4.415(b)(3)*."

The Commission agrees with this comment and proposes the new rule with this wording.

TXOGA questioned the wording in Texas Natural Resources Code and proposed §4.410(a). Texas Natural Resource Code, §91.653(a) states: "Any site that is contaminated with a contaminant is eligible for participation in the voluntary cleanup program except the portion of a site that may be subject to a Commission order." Proposed new §4.410(a) says: "Any site that is contaminated with a contaminant is eligible for participation in the voluntary cleanup program except the portion of a site that is or may become subject to a Commission order to control or clean up the contaminants."

The Commission notes that the language in the rule is intended to make clear that sites actually under Commission order or involved in an active enforcement proceeding do not qualify for the program, which is the Commission's interpretation of the statute. This comment caused the Commission to consider the efficacy of allowing into the program sites under Commission order where the party subject to the order is neither available nor capable of accomplishing the directives of the order, and a third party is willing to perform the cleanup. The Commission believes there may be circumstances where allowing such a third party to participate in the program would benefit the state; however, the Commission believes Texas Natural Resource Code, §91.653(a), does not currently authorize the Commission to allow such sites into the program. The Commission certainly invites comment on this issue.

The Permian Basin Petroleum Association (PBPA) stated that the term "Assistant Director" should be replaced with "Railroad Commission" or "Railroad Commissioners."

The Commission notes that the proposed rule defines "Commission" as "the Railroad Commission of Texas, the director of the Oil and Gas Division or a staff delegate of the division director." The Commission has worded the proposed rules so that persons who read the rules clearly understand to whom participants will be reporting in the VCP process, so the rules refer to the Assistant Director when the Assistant Director is specifically involved.

Daniel B. Stephens and Associates, Inc. (DBSA) commented that the VCP should allow any person who is not under an enforcement order by any State or Federal agency and has right, title or legal share of the affected property that has been negatively impacted by activities under the jurisdiction of the Texas Railroad Commission to participate in the program.

The Commission's proposed rule does not allow participation by any person who caused or contributed to the contamination subject of the voluntary cleanup agreement. Such persons have a legal obligation to clean up a contaminated site, are subject to Commission enforcement, and should not be considered "voluntary" participants. Furthermore, the Legislature established the VCP based on a projection of 12 to 20 sites per year, so the Commission may not have the personnel or resources to accommodate a large influx of sites which could occur if the program were opened up to *any* person who is not under an enforcement order by any state or federal agency and has right, title, or legal share of the affected property. Accordingly, this rule proposal does not allow persons who caused or contributed to the contamination to participate in the VCP.

DBSA recommended that the proposed rules include a Conditional Certification of Completion to create a cooperative atmosphere between the Commission and the regulated community.

The Commission agrees and proposed new §4.440 (c) includes provisions for a Conditional Certificate of Completion.

In addition to the VCP, DBSA recommended that the Commission consider creating an Innocent Owner Program (IOP) at a future date. An IOP would provide liability protection for persons who did not have prior knowledge of negative environmental conditions and did not cause or contribute to contamination on their property. Properties that contain environmental source areas would not be eligible for the IOP.

The Commission has determined that issues concerning any IOP program are beyond the scope of its statutory authority and thus should be addressed by the legislature.

DBSA agreed that the VCP agreement should refer to the appropriate statues, rules, and standards necessary for completion of voluntary cleanup. Regarding listed cleanup standards, all agreements should be virtually identical. Alternate cleanup standards should be justified using site- specific information and a full evaluation of human and ecological risk, both on- and offsite. DBSA stated that it may be simpler to include all default cleanup values in the appropriate statues, rules, and standards with equations and models available to calculate site-specific values, instead of detailing cleanup values in the agreement. It also may be problematic to include appropriate cleanup standards exclusively in the agreement. Including cleanup standards in the agreement requires properties to be fully investigated and completely delineated prior to acceptance into the VCP in order to guarantee that the appropriate values are listed. If additional constituents not identified in the agreement are identified during the course of the investigation, the absence of listed cleanup values may potentially cause inadequate investigation and cleanup.

The Commission anticipates operating the program with sufficient flexibility to address the contingencies pointed out in this comment. For example, a VCP agreement may state that the site will be remediated according to a specific state standards protocol, thereby incorporating into the agreement all of the options available under such protocol.

DBSA suggested some additional definitions for clarity.

DBSA suggested that defining "completion" as "the point at which no additional response actions are necessary and all appropriate cleanup standards have been met." DBSA recommended that "conditional completion" be defined as "the point at which the applicant is satisfactorily maintaining remediation systems, engineering controls, post-closure monitoring programs, or institutional controls with the eventual goal of obtaining completion." DBSA proposed to define "Conditional Certificate of Completion" as "an interim certificate that would be followed by a final Certificate of Completion after all cleanup goals stated in the agreement have been met." DBSA suggested that "ineligible applicant" be defined as "an applicant who did cause or contribute to the contaminants on the site subject of the voluntary cleanup agreement and whose application the Site Remediation Section has accepted." DBSA suggests an ineligible applicant is not eligible to receive the liability release in

the final certificate, but may obtain the certificate to ensure that future owners and operators are released of liability. DBSA goes on to state that in certificates obtained by ineligible applicants, the responsible party must be listed along with the site's surface and mineral owners and mineral operators on the certificate.

The Commission declines to incorporate the suggested definitions into the proposed rule at this time because the provisions in proposed new §4.440 relating to Certificate of Completion and Conditional Certificate of Completion are sufficient to address the issues raised in the comment. The Commission declines to define the term "ineligible applicant" because persons who caused or contributed to the contamination that is the subject of the VCP agreement may not participate in the program.

DBSA suggested that a conditional certificate of completion would be extremely beneficial for the success of the VCP. Section 4.401 states that the goal of the VCP is to provide an incentive to clean up property by removing the liability to the state of lenders, developers, owners, and operators who did not cause or contribute to contamination released at the site. Issuance of conditional certificates of completion would stimulate property transactions encouraged by the liability release, while at the same time would require the applicant to continue tasks required to obtain a final certificate of completion. Issuance of such a certificate would be appropriate if (1) no receptors are immediately threatened by contamination originating from the VCP site and; (2) any of the following are used to mitigate exposure of contamination originating from the VCP site to potential receptors including but not limited to remediation systems, engineering controls, post-closure monitoring programs, and/or institutional controls; and (3) a notarized affidavit signed by the applicant or representative of the applicant that details a schedule of post closure monitoring activities and reporting to the Railroad Commission of Texas with an estimated date of completion. The estimated date of completion should not exceed 15 years from the date of the affidavit. If post-closure monitoring is expected to exceed 15 years, then a more active method of contaminant mitigation may be necessary. Once no additional response actions are necessary and all cleanup standards have been met, then a Final Certificate of Completion may be issued.

The Commission agrees that conditional certificates of completion may be appropriate in certain circumstances, and one of the purposes of the VCP is to encourage property transactions; however, the Commission declines to incorporate the specific suggested language concerning conditional certificates of completion into the proposed rule. The provisions in proposed new §4.440, relating to Certificate of Completion and Conditional Certificate of Completion, are sufficient to address the issues raised in the comment. The Commission has incorporated into proposed new §4.440(c)(7) the suggestion concerning a notarized affidavit signed by the applicant that details a schedule of post closure monitoring activities and reporting to the Railroad Commission of Texas with an estimated date of completion.

DBSA disagreed with the exclusion of responsible persons from participation in the VCP. Section 4.401 states that the purpose of the VCP is to provide an incentive to clean up property by removing the liability to the state of lenders, developers, owners, and operators who did not cause or contribute to the contamination released at the site. While responsible persons should not be granted a release from liability, including responsible persons as participants would provide an incentive to clean up contaminated properties still under the financial obligation of responsible persons. Subsequent property owners or operators would benefit from the liability release certificate. Regarding proposed new §4.440(c)(3), DBSA commented that if the responsible party is known, then this party should be listed on the final certificate of completion along with the site's current surface and mineral owners and mineral operators.

The Commission notes that it currently uses an Operator Cleanup Program where persons who caused or contributed to contamination are subject to enforcement and may work with the Commission to achieve remediation. Further, the Legislature established the VCP based on a projection of 12 to 20 sites per year, so the Commission may not have the personnel or resources to accommodate a large influx of sites that could occur if the program were opened up to responsible persons not under an enforcement order by any state or federal agency. Accordingly, this rule proposal does not allow persons who caused or contributed to the contamination to participate in the VCP.

DBSA asked for further explanation as to why the proposed rules do not meet the requirements of Texas Government Code, §2001.0225, or the definition of Texas Government Code, §2001.0225(g)(3).

The Commission's proposed rules are not "major environmental rules" as defined by Texas Government Code, §2001.0225(g)(3), because they 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, which is an essential element in the definition of a major environmental rule. Even if this rulemaking were a "major environmental rule," it does not exceed any state or federal standards and would not be adopted under the agency's general rulemaking authority. Accordingly, this rulemaking does not meet the criteria of Texas Government Code, §2001.0225(a).

With respect to proposed new §4.401, DBSA requested clarification to insure that the applicant understands that third-party liability is not removed by earning a VCP Certificate of Completion. An example of a third party could be the Environmental Protection Agency (EPA), unless the Commission has a memorandum of agreement indicating the EPA will honor the liability release granted in Commission VCP certificates.

The Commission will consider this comment during the comment period. The Commission does not have a memorandum of agreement indicating that the EPA will honor the liability release granted in Commission VCP certificates, but believes such an understanding would be in order for those sites, if any, where EPA has jurisdiction under federal law.

Regarding proposed new §4.410, DBSA questioned subsection (b)(2)(A)(i) which states that the applicant must provide general information concerning the applicant's financial ability to perform the voluntary cleanup. DBSA asked whether, since responsible persons cannot be included as applicants, an eligible applicant may include responsible persons as the entity financially responsible for cleanup activities on the property.

This comment raises the following question: Would the Commission disqualify an applicant whose application indicates that a responsible person is one of the applicant's sources of financial capability to perform the remediation? The answer to this question is no. The Commission is interested in assuring that the applicant has the financial ability to carry out the entire voluntary cleanup, and is not concerned about the source of the applicant's funding. Note, however, that the focus is on the applicant. The

applicant is required to have the funding as a qualification for approval to participate. The Commission will not approve an application unless the applicant has sufficient financial resources to carry out the project that is subject of the application. Further note that a responsible person who funds an applicant's voluntary cleanup will not immunize itself from obligations imposed on "responsible persons."

DBSA recommended that §4.415(c)(3)(C) include the wording "relevant information concerning the potential for human and ecological exposure to contamination at the site."

The Commission agrees that a wording change is needed for clarity, but has not used DBSA's suggested language. The Commission rule proposal for §4.415(c)(3)(C) now reads, "relevant information concerning exposure to contamination at the site by all potential receptors as indicated by site specific considerations."

DBSA stated that in §4.420, the section should include wording that indicates that the identified contaminating activity or environmental contamination must be one that is regulated under the jurisdiction of the Texas Railroad Commission and not other state or federal programs.

The Commission has addressed this concern in proposed new §4.401, which states, "The purpose of the voluntary cleanup program is to provide an incentive to clean up property contaminated by activities under Railroad Commission jurisdiction by removing the liability . . ."

DBSA recommended that §4.420(a)(6) be reworded to state "provided information does not indicate that the person or the site is ineligible."

The Commission agrees with this comment and the proposed rule reflects the change by adding the suggested phrase to §4.420(a)(3), moving what was (a)(7) to (a)(6), and deleting (a)(7) as these paragraphs were written in the draft rules considered in the informal comment period. DBSA observed that some verbiage in proposed new §4.425 conflicts with the information conveyed in the preamble. DBSA recommended that §4.425(a) should include the wording, "Before the Site Remediation Section evaluates any plan or report detailing cleanup goals and proposed response action methods, the applicant shall enter into a voluntary cleanup agreement with the Commission that sets forth the *default cleanup values* terms and conditions of the evaluation of the reports, *including proposed alternative cleanup values*, and the implementation of work plans."

The Commission points out that the concerns raised in this comment are addressed in §4.425(b)(7), regarding technical standards.

DBSA requested that proposed new §4.425(c)(2)include negotiation time limits.

The Commission expects the parties to establish negotiation time frames in the VCP agreements, so that a failure to meet schedules will subject participants to the same consequences as failure to abide by the terms of the agreement.

DBSA suggested that proposed new §4.440 include additional text that defines which entity determines when response actions are no longer necessary and specifies that final certificates will be issued only upon attainment of appropriate cleanup standards.

The Commission agrees that the rule should clearly state that the Commission will determine when response actions are no longer necessary; however the Commission foresees the possibility that a final certificate, with reopeners, could be issued before attainment of appropriate cleanup standards when the participant employs certain engineering or institutional controls.

Regarding §4.440(c)(3), DBSA commented that if the responsible person is known, then this person should be listed on the final certificate of completion along with the site's current surface and mineral owners and mineral operators.

The Commission's primary purpose in creating the VCP is to facilitate site remediation. The phrase "if the responsible party is known" involves legal issues beyond the intended purpose of the program. The Commission therefore declines to incorporate this suggestion into the proposed rule.

The Environmental Protection Agency (EPA) commented that the cleanup selected for some VCP sites may result in controls (*e.g.*, caps) to assure protectiveness. Conditional certificates or use of reopeners would be appropriate in these situations.

The Commission agrees that reopeners are appropriate for all remediations that include use of post-closure care, engineering, and institutional controls. The proposed rules include a definition of and provisions for conditional certificates of completion, which the Commission anticipates will be appropriate for long-term remediations that involve more active care and reporting, such as pump-and-treat groundwater cleanups. Sites at which passive engineering controls or land use restrictions are used may be eligible for a final certificate with reopener to cover contingencies such as control failure or a change in land use.

In general, the Commission foresees three types of closures: (1) the remediation work is complete, the site is closed to protective levels for all constituents in all pathways for all property uses, all requirements of the VCP agreement have been met, and the final certificate of completion is issued with standard health and safety reopeners; (2) the remediation work is complete, but control maintenance is required so that receptors are and will remain protected, and a certificate is issued with more site-specific reopeners; and (3) a reliable long-term remediation system is in place for which a conditional certificate, requiring continued maintenance and success of the long-term system, would be issued, so that receptors are and will remain protected. The Commission contemplates that there will be cases where certificates described in scenarios (2) and (3) may, over time, be replaced by the type of certificate described in scenario (1) once a site meets the standards for which the Commission issues a type (1) certificate. There also may be times when conditions made part of certificates described in scenarios (2) and (3) may fail, triggering a requirement that the participant revisit relevant remediation issues at the site.

The EPA commended the Commission for requiring that certificates include the proposed future land use as in §4.440(c)(2). EPA suggested also that reopeners could be included in certificates issued for site cleanups to non- residential standards.

The Commission intends that certificates issued for site cleanups to non-residential standards shall be conditioned on maintaining the land use for which the certificate was issued. Certificates of completion for such sites will include reopeners or conditions requiring the land use to be maintained.

The EPA suggested that the recordation of certificates in public records would inform future land owners and the community of the VCP cleanup and ensure the integrity of the institutional controls.

The Commission has stated that a primary purpose of the VCP is to return unmarketable land to productive use. Where institutional controls are used to ensure protectiveness, the voluntary cleanup agreement shall provide for the use of such controls, which may include recordation of the certificate of completion, deed restrictions, or reliance on city ordinances or other laws relating to restrictions in property use.

The EPA commented that the meaning of the term "completion" in §4.440(a) of the draft considered during the informal comment period is an important VCP definition and suggested that the description be included in §4.405 as a definition.

The Commission agrees with this comment and proposed new §4.405 includes the definition of "completion."

The EPA also suggested that the definition of "completion" ("that no more response actions are necessary") should indicate that closure is contingent on maintenance of planned land use and any other post-certificate controls required for the selected cleanup.

The Commission's proposed new rules include a definition of and provisions for conditional certificates of completion, which the Commission anticipates will be appropriate for long-term remediations that involve more active care and reporting, such as pump-and-treat groundwater cleanups. Sites at which passive engineering controls or land use restrictions are used may be eligible for a final certificate with reopener to cover contingencies such as control failure or a change in land use. The definition of "completion" in proposed new §4.405 indicates that closure is contingent on maintenance of planned land use and any other post-certificate controls required for the selected cleanup.

The EPA observed that prospective participants might benefit from a preamble discussion of any interaction, division of responsibilities, and relationship of the Railroad Commission VCP and the Texas Natural Resources Conservation Commission (TNRCC) VCP.

The Commission's VCP may include only sites contaminated by activities over which the Commission exercises jurisdiction, as outlined in Texas Natural Resources Code, §91.101. For sites contaminated by activities over which both the Commission and the TNRCC have jurisdiction, the Commission will operate consistent with the principles stated in its Memorandum of Understanding with TNRCC, found in 16 Texas Administrative Code, §3.30, relating to Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Natural Resources Conservation Commission (TNRCC).

The EPA commented that the draft rules were not clear as to whether the VCP will provide an opportunity for community involvement.

Proposed new §4.450(b)(2)(D) states that if the applicant is not the surface owner of the site, the applicant must provide written authorization from all surface owners of the site agreeing to the applicant's participation in the program. The Commission also notes that involvement of parties such as surface owners and adjoining landowners will be a necessary component of delineation of the full nature and extent of contamination subject of the voluntary cleanup. Participants in the program will need permission for access to properties included in the delineation and will need to involve surface owners with any land use restrictions that may be part of remediations.

The EPA suggested that a description of the Commission's oversight role (both during cleanup and post-certificate) would help to support and encourage the VCP. The information would reduce potential customers' anxiety and increase citizens' confidence.

The Commission finds from a review of the proposed new rules that the Commission's oversight role is clearly described.

In reference to the proposed new provision stating that the Commission will process applications in the order in which they are received, the EPA pointed out that some of the VCP sites may be related to development projects and, given the time pressures normally associated with development projects and the desire to encourage the cleanup and revitalization of these contaminated sites, the Commission might consider including a provision allowing sites involved in development projects to be prioritized or perhaps put on an expedited the Commission review schedule.

The Commission finds that proposed new §4.420 clearly gives the Commission 45 days to reject an application, which means all applications should be processed within 45 days. The Commission is not inclined to change either this provision or the provision that applications will be processed in the order received because these provisions provide sufficient certainty to applicants and maintain order and efficiency for Commission staff. The Commission notes that the Voluntary Cleanup Agreement may include deadlines that further the goals of developments under a time crunch. The Commission also notes that it has discretion as to the enforceability of its rules which allow staff to accommodate the rare true emergency, such as the discovery of previously unknown contamination during the course of a project.

EPA observed that the preamble to the draft rules stated that the rules do not establish technical cleanup standards; rather, the voluntary cleanup agreement between the Commission and the participant will include site-specific cleanup standards. Including general guidance or rules about VCP cleanup standards and remediation planning strategies would support and encourage the program by providing potential customers valuable information and would increase citizens confidence in the VCP. Guidance on Commission expectation for assessments, work plans, and reports would be useful.

The Commission intends to evaluate developing such guidance based on experience as its VCP program matures, and will include some of these issues in future rulemakings.

The EPA sought clarity whether the release provided by the certificate applies to future owners not listed on the certificate as participants and whether the certificate is transferable.

The Commission intends for the release provided by the certificate to apply to future owners not listed on the certificate as participants and to be transferable in order to facilitate property transactions and redevelopment.

The EPA recommended that one of the final report requirements should be confirmatory analytical sample results, when appropriate.

The Commission agrees with this comment and anticipates its VCP agreements will include a requirement for a final confirmatory analytical sample results, when appropriate.

The EPA commended the Commission for not limiting VCP participation to prospective purchasers.

The Commission does not intend to limit VCP participation to prospective purchasers, but also reminds the reader that the proposed new rules do not allow persons who caused or contributed to the contamination to be allowed to participate in the VCP.

Comments on the proposed rules should be submitted to David Cooney, Jr., Office of General Counsel, Railroad Commission of Texas, P. O. Box 12967, Austin, TX 78711-2967, or via electronic mail at david.cooney@rrc.state.tx.us. Comments will be accepted until 5:00 p.m. on the 45th day after publication of these rules in the *Texas Register*. The Commission specifically requests comments on proposed new §4.420, regarding the sufficiency of factors for acceptance or rejection of an application, and on proposed new §4.440, regarding the legal authority and circumstances that would be appropriate for issuance of conditional certificates of completion. For further information, call Mr. Cooney at (512) 463-6977.

The Commission proposes the new rules under the provisions of Section 34, Senate Bill 310, 77th Legislature (2001), which enacts new Texas Natural Resources Code, §§91.651-91.661, authorizing the Commission to establish a voluntary cleanup program according to the standards set forth in those new sections; Texas Natural Resources Code, §91.113, which governs the investigation, assessment, or cleanup by Commission of oil and gas wastes or other substances or materials regulated by the Commission under Texas Natural Resources Code, §91.101; and Texas Water Code, §26.131, which makes the Commission solely responsible for the control and disposition of waste and the abatement and prevention of pollution of surface and subsurface water resulting from activities associated with the exploration, development, and production of oil or gas or geothermal resources and any other activities regulated by the Commission pursuant to Texas Natural Resources Code, §91.101.

Texas Natural Resources Code, §91.113, and §§91.651- 91.661, as enacted by Senate Bill 310, 77th Legislature (2001), and Texas Water Code, §26.131, are affected by the proposed new rules.

Issued in Austin, Texas, on February 21, 2002.

§4.401. Purpose.

The purpose of the voluntary cleanup program is to provide an incentive to clean up property contaminated by activities under Railroad Commission jurisdiction by removing the liability to the state of lenders, developers, owners, and operators who did not cause or contribute to contamination released at the site. The program is restricted to voluntary actions but does not replace other voluntary actions.

§4.405. Definitions.

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

(1) Applicant--A person who is eligible to participate in the voluntary cleanup program and who submits the required forms, information, and fee for doing so.

(2) Assistant director--The administrative head of the Site Remediation Section.

(3) Certificate of completion--The document executed by the Commission upon satisfactory completion of obligations under a Voluntary Cleanup Agreement.

(4) Completion--The cleanup of a site to the point that no more response actions are necessary.

(5) Commission--The Railroad Commission of Texas, the director of the Oil and Gas Division, or a staff delegate of the division director.

(6) Conditional certificate of completion--The document executed by the Commission upon a participant's satisfactory conditional completion of obligations under a Voluntary Cleanup Agreement.

(7) Conditional completion -- The cleanup of a site to the point that further response actions are limited to maintenance of engineering or institutional controls and/or the continued successful operation of long-term remediation systems.

(8) Contaminant--A waste, pollutant, or other substance or material regulated by or that results from an activity under the jurisdiction of the Commission under Texas Natural Resources Code, Chapters 91 or 141, or the Texas Water Code.

(9) Division--The Oil and Gas Division of the Commission.

(10) Eligible applicant--An applicant who did not cause or contribute to the contaminants on the site that is the subject of the voluntary cleanup agreement and whose application the Site Remediation Section has accepted.

(11) Participant--An eligible applicant with whom the Commission has entered into a voluntary cleanup agreement.

(12) Response action--The control, cleanup, or removal of a contaminant from the environment.

(13) Responsible person--Any operator or other person required by law, rules of the Commission, or a valid order of the Commission to control or clean up the oil and gas wastes or other substances or materials.

(14) Site Remediation Section--Those Commission staff, individually or collectively, who are employed in the Site Remediation Section, or its successor, of the Oil and Gas Division.

(15) Voluntary cleanup--A response action taken under and in compliance with this subchapter.

§4.410. Eligibility for the Voluntary Cleanup Program.

(a) Any site that is contaminated with a contaminant is eligible for participation in the voluntary cleanup program except the portion of a site that is or may become subject to a Commission order to control or clean up the contaminants.

(b) Any person who is not a responsible person as that term is defined in §4.405(13) of this title (relating to Definitions) is eligible to participate in the voluntary cleanup program.

§4.415. Application to Participate in the Voluntary Cleanup Program.

(a) A person applying to participate in the voluntary cleanup program shall submit to the Site Remediation Section an application to participate in the voluntary cleanup program and an application fee as required by subsection (b) of this section.

(b) A person submitting an application to participate in the voluntary cleanup program shall:

(1) use the application form provided by the Commission;

(2) provide the following information:

(A) general information concerning:

(i) the applicant and the applicant's capability, including the applicant's financial capability, to perform the voluntary cleanup;

(ii) the site; and

(iii) the names, addresses, and telephone numbers of all surface and mineral owners and mineral operators of property where the contamination came to be located;

(B) other background information requested by the Site Remediation Section based on the particular circumstances of the site in question;

(C) an environmental assessment of the actual or threatened release of the contaminant or contaminants at the site that includes, at a minimum, the information set forth in subsection (c) of this section; and

(D) if the applicant is not the surface owner of the site, written authorization from all surface owners of the site agreeing to the applicant's participation in the program;

(3) submit the application fee of $1,000; and

(4) follow any schedule set by the Site Remediation Section.

(c) The environmental assessment required by subsection (b)(2)(C) of this section shall include, at a minimum:

(1) a legal description of the site;

(2) a description of the physical characteristics of the site; and

(3) to the extent known by the applicant:

(A) the operational history of the site;

(B) information concerning the nature and extent of any relevant contamination or release at the site and immediately contiguous to the site, and wherever the contamination came to be located; and

(C) relevant information concerning the potential for human exposure to contamination at the site.

§4.420. Acceptance or Rejection of an Application.

(a) The Site Remediation Section shall process applications in the order in which they are received.

(b) The Commission may accept an application if it:

(1) is submitted by a person eligible to participate in the program, pursuant to §4.410(b) of this title (relating to Eligibility for the Voluntary Cleanup Program);

(2) pertains to an eligible site, pursuant to §4.410(b) of this title (relating to Eligibility for the Voluntary Cleanup Program);

(3) includes all of the information required by §4.415 of this title (relating to Application to Participate in the Voluntary Cleanup Program), provided the information does not indicate that either the person or the site is ineligible;

(4) demonstrates that the applicant has the financial capability to pay for all costs of the response action, including but not limited to the direct costs of the response action and the reasonable costs attributable to the oversight of the response action likely to be incurred by the Commission;

(5) includes written authorization from all surface owners of the site agreeing to the applicant's participation in the program, or proof that the applicant is the surface owner of the site; and

(6) includes the application fee.

(c) The Commission may reject an application to participate in the voluntary cleanup program if:

(1) a state or federal enforcement action is pending that concerns the remediation of the contaminant or contaminants described in the application;

(2) a federal grant requires an enforcement action at the site;

(3) the application is incomplete or inaccurate; or

(4) the application fails to meet the requirements of subsection (b) of this section.

(d) If the Commission rejects the application, the Commission shall:

(1) not later than the 45th day after the Site Remediation Section receives the application, notify the applicant in writing that the application has been rejected;

(2) explain the reasons for rejection of the application; and

(3) inform the applicant that the Commission will refund half the application fee unless the applicant indicates a desire to resubmit the application.

(e) If the Commission rejects an application because it is incomplete or inaccurate, then not later than the 45th day after the Site Remediation Section receives the application, the Assistant Director shall notify the applicant in writing of all information needed to make the application complete or accurate. If the applicant resubmits the application not later than the 45th day after the Assistant Director issues notice that the application has been rejected, the applicant shall not submit an additional application fee. This waiver of the application fee applies only to the first re-submission within 45 days of notice of an incomplete application. An applicant who re-submits an application after the 45th day shall submit the application fee required by §4.415(b)(3) of this title, relating to Application to Participate in the Voluntary Cleanup Program.

§4.425. Voluntary Cleanup Agreement.

(a) Before the Site Remediation Section evaluates any plan or report detailing the cleanup goals and proposed response action methods, the eligible applicant shall enter into a voluntary cleanup agreement with the Commission that sets forth the terms and conditions of the evaluation of the reports and the implementation of work plans.

(b) A voluntary cleanup agreement shall:

(1) include provisions by which the participant commits to pay the Commission all reasonable costs:

(A) incurred by the Commission for review and oversight of the participant's work plan and reports and for the Commission's field activities;

(B) attributable to the voluntary cleanup agreement including direct and indirect costs of overhead, salaries, equipment, utilities, and legal, management, and support costs; and

(C) that exceed the amount of the application fee submitted to the Commission by the applicant as required by §4.415 of this title (relating to Application to Participate in the Voluntary Cleanup Program);

(2) identify all statutes and rules with which the participant shall comply;

(3) identify all state and federal standards, requirements, criteria, or limitations to which the response action would otherwise be subject if a state or federal permit were required;

(4) describe any work plan or report that the participant is required to submit for review by the Commission, including a final

report that provides all information necessary to verify that all work contemplated by the voluntary cleanup agreement has been completed;

(5) include a schedule for the participant to submit and for the Site Remediation Section to review the information required by paragraph (4) of this subsection;

(6) identify specific tasks, deliverables, and schedules for conducting and completing the response action, including terms specifying negotiating periods between reports and consequences for failure to meet deadlines in the agreement;

(7) state the technical standards to be applied by the Site Remediation Section in evaluating the work plans and reports with reference to the proposed future land use to be achieved; and

(8) be signed by both the participant or the participant's authorized representative and the Assistant Director.

(c) If the eligible applicant and the Commission do not reach an agreement on or before the 30th day after good faith negotiations have begun:

(1) either the eligible applicant or the Commission may withdraw from the negotiations, in which event the Commission shall retain the application fee; or

(2) the eligible applicant and the Commission may continue negotiating.

(d) The Commission shall not initiate an enforcement action against a participant who is in compliance with this section for the contamination or release that is the subject of the voluntary cleanup agreement or for activity that resulted in the contamination or release that is the subject of a voluntary cleanup agreement.

§4.430. Termination of Agreement and Cost Recovery.

(a) At any time and for any reason, either the Commission or the participant may terminate a voluntary cleanup agreement by giving to the other written notice 15 days prior to the stated termination date. The participant shall pay and the Commission shall recover only those costs incurred or obligated by the Commission before notice of termination of becomes effective. The Commission shall retain the application fee.

(b) Termination of the agreement does not affect any right the Commission has under other law to recover its costs. The Commission shall not issue a certificate of completion to a participant in a voluntary cleanup agreement that is terminated.

(c) If the participant does not pay to the Commission the Commission's costs under a voluntary cleanup agreement before the 31st day after the date the person receives notice that the costs are due and owing, the Commission may request that the attorney general bring an action in the name of the state in Travis County to recover the amount owed plus reasonable legal expenses, including attorneys' fees, witness costs, court costs, and deposition costs, pursuant to Texas Natural Resources Code, §91.657(c).

§4.435. Voluntary Cleanup Work Plans and Reports.

(a) After signing a voluntary cleanup agreement, the participant shall prepare and submit to the Site Remediation Section the work plans and reports required by the agreement.

(b) The Site Remediation Section shall review and evaluate the work plans and reports for accuracy, quality, and completeness. The Site Remediation Section may approve or not approve a voluntary cleanup work plan or report. If the Site Remediation Section does not approve a work plan or report, the Site Remediation Section shall, within the deadline established by the Voluntary Cleanup Agreement, notify the participant of the specific additional information or commitments needed to obtain approval.

(c) At any time during the evaluation of a work plan or report, the Site Remediation Section may request additional or corrected information.

(d) After considering future land use, the Site Remediation Section may approve work plans and reports submitted under this section that do not require cleanup or removal of all contaminants at a site if the partial response actions for the property:

(1) will be completed in a manner that protects human health and the environment;

(2) will not cause, contribute, or exacerbate discharges, releases, or threatened releases that are not required to be cleaned up or removed under the work plan; and

(3) will not interfere with or substantially increase the cost of response actions to address any remaining contaminants.

§4.440. Certificate of Completion and Conditional Certificate of Completion.

(a) If the Site Remediation Section determines that a participant has completed a voluntary cleanup approved under this subchapter, the Commission shall certify that the action has been completed by issuing the participant a certificate of completion.

(b) The certificate of completion shall:

(1) acknowledge the protection from liability provided by §4.445 of this title (relating to Persons Released from Liability);

(2) indicate the proposed future land use;

(3) include a legal description of the site and the names of the site's surface and mineral owners and mineral operators at the time the application to participate in the voluntary cleanup program was filed; and

(4) include an Affidavit of Completion on a form prescribed by the Commission. The affidavit of completion is a sworn statement made by the participant that is attached to and becomes part of the certificate of completion issued by the Commission. The affidavit shall:

(A) identify the site and its surface and mineral owners and mineral operators;

(B) identify the response actions performed including, if appropriate, any reliance on engineering or institutional controls;

(C) declare that the degree of inquiry used in determining the appropriate response actions, the response actions, and reporting were consistent with industry standards; and

(D) state that the certificate of completion has not been acquired by fraud, misrepresentation, or knowing failure to disclose material information.

(c) If the Site Remediation Section determines that the participant has substantially completed a voluntary cleanup approved under this subchapter, and that oversight and maintenance of controls and remediation systems provide a strong likelihood of success with minimal maintenance and reporting, the Commission may issue a conditional certificate of completion. The conditional certificate of completion shall:

(1) acknowledge the protection from liability provided by §4.445 of this title (relating to Persons Released from Liability);

(2) indicate the proposed future land use;

(3) include a legal description of the site and the names of the site's surface and mineral owners and mineral operators at the time the application to participate in the voluntary cleanup program was filed;

(4) identify the oversight and maintenance activities and results the person must perform, reach, and maintain for the conditional certificate to remain in force;

(5) include a schedule of activities;

(6) identify responses in case of remedy failure; and

(7) include an Affidavit of Response Action Implementation. The Affidavit of Response Action Implementation is a sworn statement made by the participant and that is attached to and becomes part of the conditional certificate of completion issued by the commission. In addition to all of the elements identified in §4.40(b)(4), the Affidavit of Response Action Implementation shall include a schedule the participant's post closure monitoring activities and reporting to the Railroad Commission of Texas with an estimated date of completion, and identify contingencies that the participant is obligated to implement if any response action fails in whole or in part.

(d) If the Site Remediation Section determines that the participant has not completed a voluntary cleanup approved under this subchapter, the Assistant Director shall so notify the participant, the current surface and mineral owners and the mineral operators of the site that is the subject of the cleanup.

§4.445. Persons Released from Liability.

(a) A person who is not a responsible person, as that term is defined in §4.405 of this title (relating to Definitions), at the time the person applies to participate in a voluntary cleanup does not become a responsible person solely because the person signs the application or the voluntary cleanup agreement.

(b) A participant who is not a responsible person at the time the Commission issues a certificate of completion under §4.440 of this title (relating to Certificate of Completion and Conditional Certificate of Completion) is released, as of the date of the certificate, from all liability to the state for cleanup of contaminants specified in the voluntary cleanup agreement for areas of the site covered by the certificate, except for releases and consequences that the participant causes.

(c) The release from liability provided by this subchapter does not apply to a person who:

(1) caused or contributed to the contamination at the site covered by the certificate;

(2) acquires a certificate of completion by fraud, misrepresentation, or knowing failure to disclose material information;

(3) knows at the time the person acquires an interest in the site for which the certificate of completion was issued that the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information; or

(4) changes the land use from the use specified in the certificate of completion if the new use may result in increased risks to human health or the environment.

§4.450. Federal, State, or Local Permits.

(a) A state or local permit is not required for a voluntary cleanup under this subchapter. A participant shall coordinate a voluntary cleanup with ongoing federal and state waste programs.

(b) Any participant conducting a voluntary cleanup shall comply with any state or federal standard, requirement, criterion, or limitation to which the response action would otherwise be subject if a state or federal permit were required.

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

Filed with the Office of the Secretary of State on February 21, 2002.

TRD-200201070
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 475-1295

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PART 8. TEXAS RACING COMMISSION

CHAPTER 307. PROCEEDINGS BEFORE THE COMMISSION

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §307.7

The Texas Racing Commission proposes an amendment to §307.7, relating to ejection and exclusion. The amendment would establish a deadline to request a hearing to contest an ejection or exclusion. The 20-day period was selected to be consistent with the administrative penalty provision in the Racing Act. The amendment is necessary because the absence of a deadline required an interpretation of a "reasonable" period to request a hearing. With this deadline, the procedure to request a hearing will be definite.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendments are in effect there are no fiscal implications for state or local government as a result of enforcing the proposal.

Ms. Kennison has also determined that for each of the first five years the rule is in effect the public benefit anticipated will be greater certainty in the procedural rules of the agency. There will be no fiscal implications for small or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendment is proposed under the Texas Civil Statutes, Article 179e,§3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and Government Code, §2001.004, which requires the Commission to adopt rules of practice stating the

nature and requirements of all available formal and informal procedures.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§307.7. Ejection or Exclusion.

(a) The Commission, executive secretary, stewards, or racing judges, may order an individual ejected or excluded from an association's grounds in accordance with the Act if the Commission, executive secretary, stewards, or racing judges, determine that:

(1) the individual may be excluded or ejected under the Act, §3.16 or §13.01; and

(2) the individual's presence on association grounds is inconsistent with maintaining the honesty and integrity of racing.

(b) Not later than 20 days after notification of the exclusion or ejection is sent or served, a [~~A~~] person ejected or excluded under this section may request a hearing pursuant to the Act, §13.02 and this chapter.

(c) If a person is excluded under this section, a race animal owned or trained by or under the care or supervision of the person is ineligible to be entered or to start in a race in Texas.

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

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201079
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 833-6699

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CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER D. GREYHOUND RACETRACKS

DIVISION 1. FACILITIES AND EQUIPMENT

16 TAC §309.313

The Texas Racing Commission proposes an amendment to §309.313, relating to kennel buildings. Gulf Greyhound Park, with the support of the Texas Greyhound Association, petitioned the Commission for this rule change. The amendment would lift the lift maximum number of greyhounds permitted in a kennel building and, instead, would leave it to the discretion of the executive secretary to determine the appropriate number. The executive secretary would make such a determination based on the input of commission veterinarians with regard to the health and safety of the greyhounds.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government.

Ms. Kennison has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that the public is assured that the welfare of greyhounds is protected. There will be no economic impact to small or micro businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§309.313. Kennel Buildings.

(a) - (b) (No change.)

(c) The executive secretary shall approve the maximum number of crates for each kennel building. The executive secretary may permit a change in the number of crates upon a showing that the change will have no impact on the health and safety of the individuals and greyhounds in the building. [~~Each kennel building must be furnished 60 crates constructed of stainless steel or a comparable material.~~] Each crate must:

(1) have a drop latch or a comparable latch;

(2) be constructed of stainless steel or a comparable material and on casters; and

(3) measure at least three feet wide, four feet deep, and three feet high.

(d) - (f) (No change.)

(g) An association may not permit [~~:~~]

[~~(1) more than 60 greyhounds to be housed in a kennel building; or~~]

[~~(2)~~] more than one greyhound to be housed in a crate.

This 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 February 22, 2002.

TRD-200201080
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 833-6699

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DIVISION 2. OPERATIONS

16 TAC §309.351

The Texas Racing Commission proposes an amendment to §309.351, related to kennel contracts. The purpose of this amendment is to establish a deadline for associations to file their executed kennel contracts with the Commission.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government.

Ms. Kennison has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that the public can be assured that the Commission is kept informed of the contractual agreements of all individuals and entities involved in pari-mutuel racing. There will be no economic impact to small or micro businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§309.351. Kennel Contracts.

(a) In contracting with a kennel owner, an association shall use a contract approved by the executive secretary. [~~Commission.~~]

(b) Not later than January 31 of each year for which the contract is to be performed, an [~~An~~] association shall file a copy of each executed kennel contract with the Commission.

(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.

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201081
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 833-6699

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CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING

SUBCHAPTER D. DRUG TESTING

DIVISION 1. GENERAL PROVISIONS

16 TAC §319.301

The Texas Racing Commission proposes an amendment to §319.301, related to drug testing of animals. The proposal would explicitly state that there is no entitlement to a purse from a race until drug testing on the race animals has been completed and the executive secretary has cleared the race for payment. This amendment is necessary because although it was clearly set forth in horse racing, there was only an implication in greyhound racing. This amendment makes it clear that a negative test result is a pre-condition to the awarding of purses for both species.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the proposal.

Ms. Kennison has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that there is a clearer understanding of the Commission's rules. There will be no fiscal implications for small businesses or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal will have no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The proposal implements Texas Civil Statutes, Article 179e.

§319.301. Testing Authorized.

(a) The stewards and racing judges may require a specimen of urine, blood, saliva, or other bodily substance to be taken from a race animal for the purpose of testing for the presence of a prohibited drug, chemical, or other substance.

(b) Testing under this subchapter may be required at any time in accordance with these rules and may be conducted in an area approved by the commission veterinarian under the supervision of the commission veterinarian.

(c) A person is not entitled to a purse until drug testing has been completed and the executive secretary has cleared the race for payment.

This 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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Judith L. Kennison
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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CHAPTER 323. DISCIPLINARY ACTION AND ENFORCEMENT

SUBCHAPTER C. CRIMINAL ENFORCEMENT

16 TAC §323.201

The Texas Racing Commission proposes an amendment to §323.201, related to the reporting of criminal activity, arrests, and convictions. The amendment will delete the requirement that licensees, Commission employees, and applicants report arrests to the Commission. The amendment also updates the reference to the current traffic statutes.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing the proposal.

Ms. Kennison has also determined that for each of the first five years the amendment is in effect the public benefit anticipated will be greater reliance on the accuracy of the Commission rules. There will be no fiscal implications for small businesses or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendments as proposed. The proposal will have no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Written comments must be submitted within 30 days after publication of the proposed amendment in the *Texas Register* to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, fax (512) 833-6907.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas.

The amendment implements Texas Civil Statutes, Article 179e.

§323.201. Reporting of Criminal Activity [~~, Arrests,~~] and Convictions.

(a) A licensee, a Commission employee, or an applicant for a license from the Commission shall report any [~~arrest for or~~] conviction of a felony or misdemeanor, other than a misdemeanor under Vernon's Texas Codes Annotated, Transportation Code, Title 7, Vehicles and Traffic, [~~the Uniform Act Regulating Traffic on Highways, Texas Civil Statutes, Article 6701d,~~] or a similar misdemeanor traffic offense.

(b) (No change.)

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

Filed with the Office of the Secretary of State on February 22, 2002.

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Judith L. Kennison
General Counsel
Texas Racing Commission
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING THE STUDENT SUCCESS INITIATIVE

19 TAC §§101.2001, 101.2003, 101.2005, 101.2007, 101.2009, 101.2011, 101.2013, 101.2015, 101.2017, 101.2019

The Texas Education Agency (TEA) proposes new §§101.2001, 101.2003, 101.2005, 101.2007, 101.2009, 101.2011, 101.2013, 101.2015, 101.2017, and 101.2019, concerning assessment. The new sections are proposed to implement the grade advancement requirements of the new testing program, the Texas Assessment of Knowledge and Skills (TAKS), in accordance with Texas Education Code (TEC), §28.0211.

The 76th Texas Legislature, 1999, mandated a new testing program of increased rigor, size, and scope that must be implemented no later than the 2002-2003 school year. Planning for this new program, the TAKS, began in the fall of 1999. The TEA is committed to including the widest and best possible input into this important development process from all stakeholders in Texas education. Planning for implementing this new program has included careful attention to the role of assessment in the broader context of the education system, including such areas as curriculum, staff development, and recommended high school program requirements. Beginning in January 2000, the TEA has provided the State Board of Education (SBOE) a progress report on TAKS planning as a regular agenda item.

TEC, §28.0211, specifies the new grade advancement requirements, enacted by the 76th Texas Legislature as the Student Success Initiative. This initiative mandates new passing requirements to be phased in as follows: beginning in school year 2002-2003 for the reading test at Grade 3, beginning in school year 2004-2005 for the reading and mathematics tests at Grade 5, and beginning in school year 2007-2008 for the reading and mathematics tests at Grade 8. As specified by these requirements, a student may advance to the next grade level only by passing these tests or by unanimous decision of his or her grade placement committee as likely to perform at grade level after accelerated instruction. TEC, §28.0211, provides that admission, review, and dismissal (ARD) committees will determine the manner of participation in accelerated instruction of special education students who do not perform satisfactorily on one or more of the specified assessment instruments. ARD committees will also make decisions about promotion/retention of these special education students.

The following is a summary of important aspects of the Student Success Initiative.

Multiple (at least three) Test Opportunities. TEC, §28.0211, requires that students have at least three opportunities during the school year to pass these statewide tests and provides that the commissioner set the dates for these administrations. TEC, §28.0211, also allows districts to administer an alternate assessment instrument after students fail a second time. The alternate assessment instruments must be approved by the commissioner.

Accelerated Instruction. School districts are required to provide accelerated instruction in the subject area failed after each test administration. An accelerated instruction group may not have a ratio of more than 10 students for each teacher. In addition, transportation must be provided by the school district if the accelerated instruction occurs outside regular school hours.

Grade Placement Committee. For a student who fails a second time, school districts are required to establish a grade placement committee for the student. The grade placement committee consists of the principal or designee, the student's parent or guardian, and the teacher of the subject area failed by the student. The law charges the grade placement committee with prescribing the accelerated instruction that the district will provide the student before the statewide assessment is administered a third time.

If the student fails at least three attempts, the student is retained at the same grade level. The parent or guardian may appeal this retention to the student's grade placement committee, which may promote the student if it determines by unanimous decision that, in accordance with local school board standards, it is likely the student will perform at grade level given accelerated instruction upon promotion. The final decision of this committee cannot be appealed. Regardless of whether a student who fails three times is retained or promoted, the grade placement committee must develop a plan for the accelerated instruction the student shall receive the next school year. The plan must be designed to enable the student to perform at the appropriate grade level at the end of the next school year.

Parental Notification. The law sets forth notification requirements that districts must follow regarding these testing requirements for grade advancement. In addition to notification of the overall testing requirements, districts must notify parents or guardians of the grade placement committee process and the promotion/retention decisions. As part of these requirements, districts must notify the parent or guardian of the time, place, and purpose of the committee. In addition, the district must notify the student's parent or guardian about the student's failure to pass the stipulated tests, the student's assignment to an accelerated instructional program, and the possibility that the student may be retained in the same grade level.

Miscellaneous Provisions. Passage of statewide tests does not preclude retention in accordance with local policy based on other factors such as attendance, coursework, etc. Results for the tests specified by this law must be reported to the appropriate school district not later than 10 days after receipt of the test materials by the agency or its test contractor. The law adds indicators to the school accountability system that address the requirements of the student success initiative such as the number of students provided accelerated instruction, the number of students promoted by grade placement committees, and subsequent performance on the state-required tests.

The proposed new 19 TAC Chapter 101, Assessment, Subchapter BB, Commissioner's Rules Concerning the Student Success Initiative, has been developed in accordance with TEC, §28.0211. Development of the proposed rules has been guided by agency commitment to the following policy: to support student academic achievement of the essential knowledge and skills at each grade level to enable a student to succeed at the next grade level. Multiple opportunities will be provided to gather educator and public input and comments for further development of the rules before final adoption.

The purpose of these rules is to ensure the effective implementation of the grade advancement testing requirements as part of an overall system of support for student academic achievement. This system includes but is not limited to the following: informal and formal assessment of student needs at preceding grades and corresponding early intervention activities that address those needs; continuous and ongoing evaluation by a variety of means; research-based instructional programs; targeted accelerated instruction informed by multiple testing opportunities and other means of evaluation; a grade placement committee which decides on an individual student basis the most effective way to support a student's academic achievement on grade level; and accelerated education plans for every student who does not pass the required grade advancement assessments after three opportunities, whether he/she is retained or promoted by his/her grade promotion committee.

The following is a summary of the provisions addressed in proposed new 19 TAC Chapter 101, Subchapter BB.

Proposed new 19 TAC §101.2001 sets forth the policy of the TEA relating to the grade advancement testing requirements, defines the proficiency that students must demonstrate in order to advance to the next grade, establishes the grade placement committee, and delineates the purpose of the rules. §Proposed new 19 TAC §101.2003 specifies the grades and subjects in which eligible students must be tested by certain school years as well as provisions relative to students receiving special education services, limited English proficient students, and dyslexic students.

Proposed new 19 TAC §101.2005 establishes test administration procedures and schedule, directs school administrators to maintain the integrity of the test administration, and specifies that TEA shall provide three opportunities per year for required tests and that the commissioner will set the dates.

Proposed new 19 TAC §101.2007 provides details regarding the composition and role of the grade placement committee; notifications concerning student failures; prescriptions for accelerated instruction; decisions regarding alternate assessment; process to appeal retention; and development of accelerated education plans for students who do not pass after three testing opportunities, regardless of whether the student is promoted or retained.

Proposed new 19 TAC §101.2009 sets forth provisions relating to notices to parents or guardians. In addition to notification of the overall testing requirements, districts must notify parents or guardians of the grade placement committee process and the promotion/retention decisions. As part of these requirements, districts must notify the parent or guardian of the time, place, and purpose of the committee. In addition, the district must notify the student's parent or guardian about the student's failure to pass the stipulated tests, the student's assignment to an accelerated instructional program, and the possibility that the student may be retained in the same grade level.

Proposed new 19 TAC §101.2011 delineates alternate assessment provisions, including the establishment of an annual list of state-approved alternate achievement tests and the requirement that the alternate assessment be given on the same date as the third administration of statewide assessment, that scoring contractors send test results to schools for verification within 10 days, and that schools follow procedures for test security and confidentiality.

Proposed new 19 TAC §101.2013 specifies requirements for accelerated instruction for students who fail to demonstrate proficiency, including coordination with previous diagnostic testing and intervention activities, student-teacher ratio for group-administered accelerated instruction, provision of transportation to students required to attend acceleration programs that occur outside of regular school hours, and factors upon which to base accelerated instruction.

Proposed new 19 TAC §101.2015 directs school districts to establish a waiver process by which a parent or guardian may request that a student not participate in the third testing opportunity.

Proposed new 19 TAC §101.2017 requires scoring contractors to provide assessment results within 10 working days following receipt of test materials.

Proposed new 19 TAC §101.2019 establishes provisions concerning students retained in Grade 8 relative to their earning high school graduation credit and the placement of these students in an age- appropriate learning environment.

School districts and charter schools will be required to adopt new procedures in accordance with these rules. In addition, new reporting requirements of the student success initiative specify additional information for the Academic Excellence Indicator System.

Ann Smisko, associate commissioner for curriculum, assessment, and technology, has determined that for the first five-year period the new sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the new sections. At the state level, the existing agency contract with a private organization for the Texas assessment program will not be impacted by the proposed rules since it is set at a fixed price; the period of this contract ends August 31, 2005. The rules mainly provide procedural clarification in areas where statute directs that rules be adopted.

Although no significant costs are anticipated for local governments, there are two areas of potential cost associated specifically with provisions contained in these rules that should be noted. First, proposed new §101.2007(h) requires that the accelerated education plan for a student who has not passed after three testing opportunities provide for interim progress reports to the student's parent or guardian and the opportunity for consultation with the teacher and/or principal as needed. Anecdotal evidence suggests that these practices are fairly standard and will not represent new activities for most districts. However, if a district does not generally provide any type of interim progress report or opportunities for consultation associated with its accelerated instruction programs, some additional cost could be incurred. Assuming that an interim progress report was produced each six weeks and sent home with the student, the cost of producing the reports would be estimated to range from $1 to $2.50 per student annually, depending on the detail included within the report and the level of report automation. Because the passing standard for the state-mandated assessment program has not yet been established, it is impossible to predict at this time how many students might not pass after three attempts and thus be subject to the interim reporting requirement.

The second area of potential cost relates to early notification concerning students at risk of failing the first administration of an assessment required for promotion. Specifically, proposed new §101.2009(b) requires that a district provide early notice to parents or guardians of students identified in a preceding grade to be at risk of failure on the first administration of the assessment required for promotion. Existing rule requires that all parents be made aware of the grade advancement requirements. In addition, statute relating to 2nd grade reading diagnosis requires the reporting of results to parents of all students. It is assumed that early notification would be incorporated into the required notice of the results of the reading diagnosis for students in the 2nd grade, thus resulting in no additional cost for early notice of the results diagnosis for this group of students. Beginning in school year 2003-2004, early notification concerning 4th grade students who may be at risk for failure would represent a new requirement. In addition, beginning in school year 2006-2007, early notification concerning 7th grade students who may be at risk for failure would represent a new requirement. Assuming that such early warning is incorporated into the affected grade's automated report of assessment results as provided to parents and/or if the warning is incorporated into the communication concerning promotion requirements in general, the notice would not represent significant additional cost. Again, because passing standards have not been established for the required assessments, it is not possible to predict the number of students to whom the early notice requirement might apply.

Ms. Smisko has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be that the Texas student assessment program provides Texas students, schools, and the public with an accurate gauge of students' academic progress in learning the key components of the Texas Essential Knowledge and Skills. The addition of the student success testing requirements will further support all students in their academic achievement of reading and mathematics on grade level or above throughout their schooling. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the new sections.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed new sections submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The new sections are proposed under the Texas Education Code (TEC), §28.0211, which authorizes the commissioner of education to adopt rules and procedures necessary to implement grade advancement testing requirements to support student academic achievement of the essential knowledge and skills.

The new sections implement the TEC, §28.0211.

§101.2001. Policy.

(a) The policy of the Texas Education Agency relating to the grade advancement testing requirements, as specified in the Texas Education Code (TEC), §28.0211(a), is to support student academic achievement of the essential knowledge and skills at each grade level to enable a student to succeed at the next grade level.

(b) In addition to local policy relating to grade advancement, students in Grades 3, 5, and 8 shall demonstrate proficiency in the subjects required by TEC, §28.0211(a), in order to advance to the next grade. Demonstrated proficiency is defined under this section as meeting the passing standard on the appropriate assessment instruments specified by §101.2003(a) of this title (relating to Grade Advancement Testing Requirements) or on a state-approved alternate assessment authorized in §101.2011 of this title (relating to Alternate Assessment). A student who does not demonstrate proficiency as described in this section may only advance to the next grade if the student's Grade Placement Committee, as specified in §101.2007 of this title (relating to Role of Grade Placement Committee), determines by unanimous decision, in accordance with the standards for promotion established by the local school board, that the student is likely to perform at grade level at the end of the next year given additional accelerated instruction.

(c) The purpose of these rules is to ensure the effective implementation of the grade advancement testing requirements as part of an overall system of support for student academic achievement. This system includes but is not limited to the following:

(1) informal and formal assessment of student needs at preceding grades and corresponding early intervention activities that address those needs;

(2) continuous and ongoing evaluation by a variety of means;

(3) research-based instructional programs;

(4) targeted accelerated instruction informed by multiple testing opportunities and other means of evaluation;

(5) a grade placement committee which decides on an individual student basis the most effective way to support a student's academic achievement on grade level; and

(6) accelerated education plans for every student who does not pass the required grade advancement assessments after three opportunities, whether he or she is retained or promoted by his or her grade promotion committee.

§101.2003. Grade Advancement Testing Requirements.

(a) Each school district and charter school shall test eligible students in accordance with the grade advancement requirements for the grades and subjects specified in the Texas Education Code (TEC), §28.0211(a). These requirements pertain to the following assessment instruments under TEC, §39.023(a), (b), and (l):

(1) the reading test at Grade 3, beginning in the 2002-2003 school year;

(2) the reading and mathematics tests at Grade 5, beginning in the 2004-2005 school year; and

(3) the reading and mathematics tests at Grade 8, beginning in the 2007-2008 school year.

(b) A student receiving special education services under the TEC, Chapter 29, Subchapter A, enrolled in Grades 3, 5, or 8 and who is receiving instruction on grade level in the essential knowledge and skills in a subject specified under subsection (a) of this section is eligible under this section. In accordance with §101.5(b) of this title (relating to Student Testing Requirements) and TEC, §28.0211(i), the student's admission, review, and dismissal (ARD) committee shall determine appropriate assessment and acceleration options for each eligible student. Assessment decisions must be made on an individual basis and in accordance with administrative procedure established by the Texas Education Agency (TEA). These decisions shall be documented in the student's individualized education program (IEP).

(c) A limited English proficient (LEP) student, as defined by the TEC, Chapter 29, Subchapter B, who is administered an assessment in English or Spanish for a grade and subject specified in subsection (a) of this section is eligible under this section. In accordance with §101.1003 of this title (relating to Role of the Language Proficiency Assessment Committee), the student's language proficiency assessment committee (LPAC) shall determine appropriate assessment and acceleration options for each eligible student. The grade placement committee, as specified in §101.1007 of this title (relating to Limited English Proficient Students at Grades Other Than Exit Level), shall make its decisions in consultation with a member of the student's LPAC. Assessment decisions must be made on an individual basis and in accordance with administrative procedure established by the TEA.

(d) As specified in §101.1009 of this title (relating to Limited English Proficient Students Who Receive Special Education Services), decisions regarding assessments for LEP students who receive special education services shall be made by the ARD committee, which includes a member of the LPAC to ensure that issues related to the student's language proficiency are duly considered.

(e) In accordance with TEC, §28.021(b), decisions regarding a student who is dyslexic and eligible under this section shall consider the student's potential for achievement or proficiency in the tested subject.

(f) A school district or charter school must determine a student's previous testing history and, if applicable, the accelerated instructional program he or she has received.

§101.2005. Test Administration and Schedule.

(a) The Texas Education Agency (TEA) shall establish the test administration procedures in the applicable test administration materials. The superintendent of each school district and chief administrative officer of each charter school shall be responsible for following these procedures and maintaining the integrity of the test administration and the security and confidentiality requirements, as specified in Chapter 101, Subchapter C, of this title (relating to Security and Confidentiality).

(b) The TEA shall provide three opportunities per year for the tests required for grade advancement as specified in the Texas Education Code, §28.0211(a). The commissioner of education shall specify the dates of these administrations in the assessment calendar.

§101.2007. Role of Grade Placement Committee.

(a) In accordance with the Texas Education Code (TEC), §28.0211, the superintendent of each school district and chief administrative officer of each charter school shall establish procedures for convening a grade placement committee (GPC) for each student who fails to demonstrate proficiency on the second administration of the test required for grade advancement. Decisions by the GPC shall be made on an individual student basis to ensure the most effective way to support the student's academic achievement on grade level.

(b) The GPC shall be composed of the principal or principal's designee, the student's parent or guardian, and the student's teacher(s) of the subject of the grade advancement(s) test on which the student has failed to demonstrate proficiency. If this teacher is unavailable, the

principal shall designate a certified professional educator who is most familiar with the student in the subject area to serve on the GPC. If more than one parent or guardian has the authority to make educational decisions regarding the student, participation of any one is sufficient and any one may appeal or agree to promotion under TEC, §28.0211(e). The district may accept a parent's or guardian's written designation of another individual to serve on the GPC for all purposes.

(1) If a parent or guardian or designee is unable to attend a meeting, the district may use other methods to ensure parent participation, including individual and conference telephone calls. The district may designate an individual to act on behalf of the student in place of a parent, guardian, or designee if no such person can be located. A surrogate parent named to act on behalf of a student with a disability shall be considered a parent for purposes of TEC, §28.0211.

(2) The district shall make a good faith effort to notify a parent or guardian to attend the GPC. If a parent or guardian is unavailable, the remaining members of the GPC must convene as required by this section and take any actions required, except that the GPC may not agree to promote a student under TEC, §28.0211(e), unless a parent, guardian, or designee has appealed. A district may allow an appeal to be filed in writing in lieu of attending the GPC.

(c) Within five working days of receipt of student test results for the second administration of the test required for grade advancement, the district shall notify (for each student who fails to demonstrate proficiency) the campus principal of student test results. Upon receipt of this notice, the principal shall notify the teacher and parent or guardian of the test results. This notice shall include a description of the purpose and responsibilities of the GPC and the time and place for the GPC to hold its first meeting.

(d) The GPC is responsible for prescribing the accelerated instruction the student is to receive before the third testing opportunity. The GPC shall also decide at this time whether the student shall take the assessment specified in §101.2003 of this title (relating to Grade Advancement Testing Requirements) or the alternate assessment, as authorized by §101.2011 of this title (relating to Alternate Assessment). In the absence of unanimous agreement, the student shall take the assessment specified in §101.2003.

(e) The GPC must convene again if a student fails to demonstrate proficiency on the third administration of a test required for grade advancement and is thereby automatically retained at the same grade level. Within five working days of receipt of student test results for this administration, the district shall notify (for each student who fails to demonstrate proficiency) the principal or principal's designee of student test results. Upon receipt of this notice from the district, the principal shall inform the teacher and parent or guardian of the time and place for the GPC to hold a meeting. This notice shall inform the parent or guardian of the opportunity to appeal the automatic retention of the student. The district shall establish a procedure to ensure the parent's or guardian's receipt of the retention notification. The parent or guardian may appeal the retention by submitting a request to the GPC within five working days of receipt of this retention notification.

(f) If an appeal has been initiated by the parent or guardian, the GPC may decide in favor of promotion only if the GPC concludes, upon review of all facts and circumstances and in accordance with standards adopted by the local school board, that the student is likely to perform on grade level given additional accelerated instruction during the next school year. A student may be promoted only if the GPC's decision is unanimous. The review and final decision of the GPC must be appropriately documented as meeting the standards adopted by the local school board. These standards may include but are not limited to the following:

(1) evidence of satisfactory student performance, including grades, portfolios, work samples, local assessments, and individual reading and mathematics diagnostic tests or inventories;

(2) improvement in student test performance over the three testing opportunities; and

(3) extenuating circumstances that have adversely affected the student's participation in either the required assessments or accelerated instruction.

(g) In accordance with TEC, §28.0211(e), the placement decision by the GPC shall be made before the start of the next school year or, if applicable, upon reenrollment of a student after this date.

(h) A student who has been promoted upon completion of a school year in another state may be enrolled in that grade without regard to whether the student has successfully completed an assessment required under TEC, §28.0211. This subsection does not limit the authority of a district to appropriately place a student under TEC, Chapter 25, Subchapter B.

(i) In addition to the placement decision, the GPC shall develop an accelerated educational plan for each student who does not pass after three testing opportunities, regardless of whether the student has been promoted or retained. This plan shall include the accelerated instruction that the district must provide during the next school year. The plan must be designed to enable the student to perform at the appropriate grade level by the end of the next school year. The district shall establish a policy for monitoring the student during the school year to ensure that the student is progressing in accordance with the plan. The accelerated education plan must provide for interim progress reports to the student's parent or guardian and the opportunity for consultation with the teacher and/or principal as needed.

§101.2009. Notice to Parents or Guardians.

(a) As specified in §101.9 of this title (relating to Grade Advancement Requirements), the superintendent of each school district or chief administrative officer of each charter school shall notify parents or guardians of the grade advancement requirements.

(b) The district shall provide early notice to parents or guardians of students identified in a preceding grade to be at risk of failure on the first administration of the test required for grade advancement the next year. Local board policy must establish the instruments/procedures to be used to make this determination. In the case of second grade students, it must include the results of the reading inventory required under Texas Education Code, §28.006. This notice shall be provided before the end of the school year preceding the grade advancement requirements.

(c) The district shall notify the parent or guardian of a student who has failed to demonstrate proficiency on the first administration of a grade advancement test within five working days of receipt of student test results from this administration. This notice shall include the student's test results, description of the grade advancement policy, the accelerated instruction to which the student has been assigned, and the possibility that the student might be retained at the same grade level for the next school year. In addition, the notice shall encourage parents or guardians to meet immediately with the student's teacher to outline mutual responsibilities to support the student during accelerated instruction.

(d) Whenever the district is required to notify a parent or guardian about the requirements related to promotion and accelerated instruction for students at risk of retention, including the notification requirements for the grade placement committee under §101.2007 of this title (relating to Role of the Grade Placement Committee), the district shall make a good faith effort to ensure that the notice

is provided either in person or by regular mail, is clear and easy to understand, and is written in English or in the parent's or guardian's native language.

§101.2011. Alternate Assessment.

(a) On the third testing opportunity, each school district and charter school may establish by local board policy a district-wide procedure to use a state-approved alternate assessment instead of the statewide assessment instrument specified in §101.2003(a) of this title (relating to Grade Advancement Testing Requirements). The commissioner of education shall provide annually, to school districts and charter schools, a list of state-approved group-administered achievement tests certified by test publishers as meeting the requirements of Texas Education Code, §28.0211. This list shall include nationally recognized instruments for obtaining valid and reliable data, which demonstrate student competencies in the applicable subject at the appropriate grade level range. The district shall select only one test for each applicable grade and subject to be used under this section.

(b) The alternate assessment must be given on the same date as the third administration of statewide assessment.

(c) A company or organization scoring a test defined in subsection (a) of this section shall send test results to the school district for verification within ten working days following receipt of the test materials from the school district.

(d) To maintain the security and confidential integrity of group-administered achievement tests, school districts and charter schools shall follow the procedures for test security and confidentiality delineated in Chapter 101, Subchapter C, of this title (relating to Security and Confidentiality).

§101.2013. Accelerated Instruction.

(a) Each time a student fails to demonstrate proficiency on an assessment required for grade advancement, the school district or charter school shall provide the student with accelerated instruction in the applicable subject. Accelerated instruction should be consistent with previous diagnostic testing and intervention activities, if any, the student has received. Group-administered accelerated instruction may not have a ratio of more than ten students to each teacher.

(b) Accelerated instruction required after the first and second testing opportunities should be designed to address student needs to the greatest extent possible before the next respective testing opportunity.

(c) The superintendent of each school district and chief administrative officer of each charter school shall be responsible for providing transportation to students required to attend acceleration programs if these programs occur outside of regular school hours.

(d) Accelerated instruction shall be based on but not limited to the following:

(1) assessment of specific student needs, which may include as appropriate the following: teacher observations and evaluations; academic progress reports; previous identification of student needs and corresponding interventions; and performance on previous assessment instruments in the applicable subject.

(2) best instructional practices identified through research that the district may obtain and implement through technical assistance from the Texas Education Agency and education service centers.

§101.2015. Parental Waiver.

The superintendent of each school district and chief administrative officer of each charter school shall establish a waiver process by which a parent or guardian may request that a student not participate in the third test opportunity due to potential harm to the student. The waiver must provide documentation of potential harm, student need, and other appropriate information. If a parental waiver is granted, the student must still participate in all required acceleration and is subject to retention based on the failure on the second test administration.

§101.2017. Scoring and Reporting.

In accordance with §101.81 of this title (relating to Scoring and Reporting), the scoring contractor will provide school districts with the results of the assessments required by the Texas Education Code, §28.0211, or, if applicable, the results of the alternate assessment specified in §101.2011 of this title (relating to Alternate Assessment), within ten working days following the receipt of the test materials from the school district or charter school.

§101.2019. Credit for High School Graduation.

(a) Students who have been retained in Grade 8 in accordance with the grade advancement testing requirements may earn course credit for high school graduation during the next school year in subject areas other than the subject area which caused the student to be retained.

(b) The superintendent of each school district and chief administrative officer of each charter school may establish a policy that provides for the placement of retained students in an age-appropriate learning environment. In accordance with local grade configurations for elementary, middle, and high school campuses, this policy may specify the age by which a retained student should be placed on the next level campus even though not yet promoted to the grade of that campus.

This 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 February 25, 2002.

TRD-200201134
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 463-9701

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PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 239. STUDENT SERVICES CERTIFICATES

SUBCHAPTER C. EDUCATIONAL DIAGNOSTICIAN CERTIFICATE

19 TAC §§239.80 - 239.86

The State Board for Educator Certification (SBEC) proposes new §§239.80-239.86. This creates a new subchapter C, concerning Educational Diagnostician Certificate.

The proposed new rules provide for the following:

admission to an educator preparation program;

preparation;

educator standards for the standard educational diagnostician certificate;

issuance of the standard educational diagnostician certificate;

renewal of the standard educational diagnostician certificate; and

transition language that will supersede various rules regarding the certification of the educational diagnostician once the new requirements become effective.

The proposed rules include the standards recommended by the Advisory Standards Development Committee for Educational Diagnostician. The standards will be used to develop assessments. The standards for educational diagnostician were posted on the SBEC web site for public comment for a period of thirty days. No changes to the standards were suggested. A concern was expressed about whether the standards adequately addressed the knowledge and skills an educational diagnostician should have to differentiate between children who truly have special education needs and those whose learning challenges result solely from deficits in English-language proficiency. Upon further review and discussion, however, it was agreed that the proposed standards adequately addressed this concern.

The requirements listed above are consistent with those in rule for the other new student services certificates (school librarian and school counselor). They differ, however, from the current educational diagnostician requirements in that the proposed rules require two years of classroom teaching experience in a public or accredited private school. The current rules require a candidate to have a valid teaching certificate and three years of classroom teaching experience.

Barry Alaimo, Director of Accounting and Financial Operations, has determined that for the first five-year period the rules are in effect there will be no fiscal implications as a result of enforcing or administering the rules.

Dan Junell, General Counsel, has determined that for each year of the first five years that the rules would be in effect, the public would benefit from the proposed rules because they would help ensure certification of only qualified candidates as educational diagnosticians while not imposing unreasonable barriers to certification. Persons who would be required to comply with the rules should incur no additional costs as a result of their implementation because they do not change the certification fees for educational diagnostician candidates.

Interested persons wishing to comment on the proposed rules must submit their comments in writing to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity, Austin, TX 78701-2603, within the 30-day comment period, which begins on the date of publication of this issue of the *Texas Register*. The comments should contain the following title or reference: "Comment(s) on the proposed new educational diagnostician rules, 19 TAC Ch. 239, Subch. C."

The new rules are proposed under Texas Education Code (TEC) §21.041(a), which requires SBEC to propose rules for the general administration of TEC Ch. 21, Subch. B; §21.041(b)(2), which requires SBEC to propose rules that specify the classes of educator certificates to be issued; and §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate.

No other statutes, articles or codes are affected by the proposed new rules.

§239.80. General Provision.

(a) Because the educational diagnostician plays a critical role in campus effectiveness and student achievement the State Board for Educator Certification adopts the rules in this subchapter to ensure that each candidate for the educational diagnostician certificate is of the highest caliber and possesses the knowledge and skills necessary to improve the performance of the diverse student population of this state.

(b) Each individual serving as a educational diagnostician is expected to actively participate in professional development activities to continually update his or her knowledge and skills. Currency in best practices and research as related to both campus leadership and student learning is essential.

§239.81. Minimum Requirements for Admission to an Educational Diagnostician Preparation Program.

(a) Prior to admission to a preparation program leading to the educational diagnostician certificate, an individual must:

(1) hold a baccalaureate degree from an accredited institution of higher education; and

(2) meet the requirements for admission to an educator preparation program under Chapter 227 of this title (relating to Provisions for Educator Preparation Students).

(b) Preparation programs may adopt requirements for admission in addition to those required in subsection (a) of this section.

§239.82. Preparation Requirements.

(a) Structured, field-based training must be focused on actual experiences with each of the standards identified in §239.83 of this subchapter (relating to Standards for the Educational Diagnostician Certificate) to include experiences at diverse types of campuses.

(b) Each preparation program must develop and implement specific criteria and procedures that allow admitted individuals to substitute professional educational diagnostician training and/or experience directly related to the standards identified in §239.83 of this subchapter for part of the preparation coursework or other program requirements.

§239.83. Standards for the Educational Diagnostician Certificate.

(a) The knowledge and skills identified in this section must be used by educational diagnostician preparation programs in the development of curricula and coursework and will be used by the State Board for Educator Certification as the basis for developing the assessments required to obtain the Standard Educational Diagnostician Certificate. These standards must also serve as the foundation for the professional growth plan, and continuing professional education activities required by §239.85 of this subchapter (relating to Requirements to Renew the Standard Educational Diagnostician Certificate).

(b) Standard I. The educational diagnostician understands and applies knowledge of the purpose, philosophy, and legal foundations of evaluation and special education.

(1) The beginning educational diagnostician knows and understands:

(A) state and federal regulations relevant to the role of the educational diagnostician;

(B) laws and legal issues related to the assessment and evaluation of individuals with educational needs;

(C) models, theories, and philosophies that provide the basis for special education evaluations;

(D) issues, assurances, and due process rights related to evaluation, eligibility, and placement within a continuum of services; and

(E) rights and responsibilities of parents/guardians, schools, students, and teachers and other professionals in relation to individual learning needs.

(2) The beginning educational diagnostician is able to:

(A) articulate the purpose of evaluation procedures and their relationship to educational programming; and

(B) conduct evaluations and other professional activities consistent with the requirements of laws, rules and regulations, and local district policies and procedures.

(c) Standard II. The educational diagnostician understands and applies knowledge of ethical and professional practices, roles, and responsibilities.

(1) The beginning educational diagnostician knows and understands:

(A) ethical practices regarding procedural safeguards (e.g., confidentiality issues, informed consent) for individuals with disabilities;

(B) ethical practices related to assessment and evaluation;

(C) qualifications necessary to administer and interpret various instruments and procedures; and

(D) organizations and publications relevant to the field of educational diagnosis.

(2) The beginning educational diagnostician is able to:

(A) demonstrate commitment to developing quality educational opportunities appropriate for individuals with disabilities;

(B) demonstrate positive regard for the culture, gender, and personal beliefs of individual students;

(C) promote and maintain a high level of competence and integrity in the practice of the profession;

(D) exercise objective professional judgment in the practice of the profession;

(E) engage in professional activities that benefit individuals with exceptional learning needs, their families, and/or colleagues;

(F) comply with local, state, and federal monitoring and evaluation requirements;

(G) use copyrighted educational materials in an ethical manner; and

(H) participate in the activities of professional organizations in the field of educational diagnosis.

(d) Standard III. The educational diagnostician develops collaborative relationships with families, educators, the school, the community, outside agencies, and related service personnel.

(1) The beginning educational diagnostician knows and understands:

(A) strategies for promoting effective communication and collaboration with others, including parents/guardians and school and community personnel, in a culturally responsive manner;

(B) concerns of parents/guardians of individuals with exceptional learning needs and appropriate strategies to help parents/guardians address these concerns;

(C) strategies for developing educational programs for individuals through collaboration with team members;

(D) roles of individuals with disabilities, parents/caregivers, teachers, and other school and community personnel in planning educational programs for individuals; and

(E) family systems and the role of families in supporting student development and educational progress.

(2) The beginning educational diagnostician is able to:

(A) use collaborative strategies in working with individuals with disabilities, parents/caregivers, and school and community personnel in various learning environments;

(B) communicate and consult effectively with individuals, parents/guardians, teachers, and other school and community personnel;

(C) foster respectful and beneficial relationships between families and education professionals;

(D) encourage and assist individuals with disabilities and their families to become active participants in the educational team;

(E) plan and conduct collaborative conferences with individuals who have exceptional learning needs and their families or primary caregivers;

(F) collaborate with classroom teachers and other school and community personnel in including individuals with exceptional learning needs in various learning environments;

(G) communicate with classroom teachers, administrators, and other school personnel about characteristics and needs of individuals with disabilities;

(H) use appropriate communication skills to report and interpret assessment and evaluation results;

(I) provide assistance to others who collect informal and observational data;

(J) effectively communicate to parents/guardians and professionals the purposes, methods, findings, and implications of assessments; and

(K) keep accurate and detailed records of assessments, evaluations, and related proceedings (e.g., ARD/IEP meetings, parent/guardian communications and notifications).

(e) Standard IV. The educational diagnostician understands and applies knowledge of student assessment and evaluation, program planning, and instructional decision making.

(1) The beginning educational diagnostician knows and understands:

(A) the characteristics, needs, and rights of individual students in relation to assessment and evaluation for placement within a continuum of services;

(B) the relationship between evaluation and placement decisions; and

(C) the role of team members, including the student when appropriate, in planning an individualized program.

(2) The beginning educational diagnostician is able to:

(A) use assessment and evaluation information to plan individualized programs and make instructional decisions that result in appropriate services for individuals with disabilities, including those from culturally and/or linguistically diverse backgrounds;

(B) interpret and use assessment and evaluation data for targeted instruction and ongoing review; and

(C) assist in identifying realistic expectations for educationally relevant behavior (e.g., vocational, functional, academic, social) in various settings.

(f) Standard V. The educational diagnostician knows eligibility criteria and procedures for identifying students with disabilities and determining the presence of an educational need.

(1) The beginning educational diagnostician knows and understands:

(A) characteristics of individuals with disabilities, including those with different levels of severity and with multiple disabilities;

(B) educational implications of various disabilities; and

(C) the variation in ability exhibited by individuals with particular types of disabilities.

(2) The beginning educational diagnostician is able to:

(A) access information on the cognitive, communicative, physical, social, and emotional characteristics of individuals with disabilities;

(B) gather background information regarding the academic, medical, and family history of individuals with disabilities; and

(C) use various types of assessment and evaluation procedures appropriately to identify students with disabilities and to determine the presence of an educational need.

(g) Standard VI. The educational diagnostician selects, administers, and interprets appropriate formal and informal assessments and evaluations.

(1) The beginning educational diagnostician knows and understands:

(A) basic terminology used in assessment and evaluation;

(B) standards for test reliability;

(C) standards for test validity;

(D) procedures used in standardizing assessment instruments;

(E) possible sources of test error;

(F) the meaning and use of basic statistical concepts used in assessment and evaluation (e.g., standard error of measurement, mean, standard deviation);

(G) uses and limitations of each type of assessment instrument;

(H) uses and limitations of various types of assessment data;

(I) procedures for screening, prereferral, referral, and eligibility;

(J) the appropriate application and interpretation of derived scores (e.g., standard scores, percentile ranks, age and grade equivalents, stanines);

(K) the necessity of monitoring the progress of individuals with disabilities;

(L) methods of academic and nonacademic (e.g., vocational, developmental, assistive technology) assessment and evaluation; and

(M) methods of motor skills assessment.

(2) The beginning educational diagnostician is able to:

(A) collaborate with families and other professionals in the assessment and evaluation of individuals with disabilities;

(B) select and use assessment and evaluation materials based on technical quality and individual student needs; score assessment and evaluation instruments accurately;

(C) create and maintain assessment reports;

(D) select or modify assessment procedures to ensure nonbiased results;

(E) use a variety of observation techniques;

(F) assess and interpret information using formal/informal instruments and procedures in the areas of cognitive/adaptive behavior and academic skills;

(G) determine the need for further assessment in the areas of language skills, physical skills, social/emotional behavior, and assistive technology;

(H) determine a student's needs in various curricular areas, and make intervention, instructional, and transition planning recommendations based on assessment and evaluation results;

(I) make recommendations based on assessment and evaluation results;

(J) prepare assessment reports; and

(K) use performance data and information from teachers, other professionals, individuals with disabilities, and parents/guardians to make or suggest appropriate modifications and/or accommodations within learning environments.

(h) Standard VII. The educational diagnostician understands and applies knowledge of ethnic, linguistic, cultural, and socioeconomic diversity and the significance of student diversity for evaluation, planning, and instruction.

(1) The beginning educational diagnostician knows and understands:

(A) issues related to definition and identification procedures for individuals with disabilities, including individuals from culturally and/or linguistically diverse backgrounds;

(B) characteristics and effects of the cultural and environmental backgrounds of students and their families, including cultural and linguistic diversity, socioeconomic diversity, abuse/neglect, and substance abuse;

(C) issues related to the representation in special education of populations that are culturally and linguistically diverse;

(D) ways in which diversity may affect evaluation; and

(E) strategies that are responsive to the diverse backgrounds and particular disabilities of individuals in relation to evaluation, programming, and placement.

(2) The beginning educational diagnostician is able to:

(A) apply knowledge of cultural and linguistic factors to make appropriate evaluation decisions and instructional recommendations for individuals with disabilities; and

(B) recognize how student diversity and particular disabilities may affect evaluation, programming, and placement, and use procedures that ensure nonbiased results.

(i) Standard VIII. The educational diagnostician knows and demonstrates skills necessary for scheduling, time management, and organization.

(1) The beginning educational diagnostician knows and understands:

(A) time management strategies and systems appropriate for various educational situations and environments;

(B) legal and regulatory timelines, schedules, deadlines, and reporting requirements; and

(C) methods for organizing, maintaining, accessing, and storing records and information.

(2) The beginning educational diagnostician is able to:

(A) select, adapt, or design forms to facilitate planning, scheduling, and time management;

(B) maintain eligibility folders; and

(C) use technology appropriately to organize information and schedules.

(j) Standard IX. The educational diagnostician addresses students' behavioral and social interaction skills through appropriate assessment, evaluation, planning, and instructional strategies.

(1) The beginning educational diagnostician knows and understands:

(A) requirements and procedures for functional behavioral assessment, manifestation determination review, and behavioral intervention plans;

(B) applicable laws, rules and regulations, and procedural safeguards regarding the planning and implementation of behavioral intervention plans for individuals with disabilities;

(C) ethical considerations inherent in behavior interventions;

(D) teacher attitudes and behaviors that influence the behavior of individuals with disabilities;

(E) social skills needed for school, home, community, and work environments;

(F) strategies for crisis prevention, intervention, and management;

(G) strategies for preparing individuals to live productively in a multiclass, multiethnic, multicultural, and multinational world; and

(H) key concepts in behavior intervention (e.g., least intrusive accommodations/ modifications within the learning environment, reasonable expectations for social behavior, social skills curricula, cognitive behavioral strategies).

(2) The beginning educational diagnostician is able to:

(A) conduct functional behavioral assessments;

(B) assist in the development of behavioral intervention plans; and

(C) participate in manifestation determination review.

(k) Standard X. The educational diagnostician knows and understands appropriate curricula and instructional strategies for individuals with disabilities.

(1) The beginning educational diagnostician knows and understands:

(A) instructional strategies, technology tools and applications, and curriculum materials for students with disabilities within the continuum of services;

(B) varied learning styles of individuals with disabilities;

(C) curricula for the development of motor, cognitive, academic, social, language, affective, career, and functional skills for individuals with disabilities;

(D) techniques for modifying instructional methods and materials for individuals with disabilities;

(E) functional skills instruction relevant to transitioning across environments (e.g., preschool to elementary school, school to work);

(F) supports needed for integration into various program placements; and

(G) individualized assessment strategies for instruction (e.g., authentic assessment, contextual assessment, curriculum-based assessment).

(2) The beginning educational diagnostician is able to:

(A) interpret and use assessment and evaluation data for instructional planning; and

(B) use assessment and evaluation, planning, and management procedures that are appropriate in relation to student needs and the instructional environment.

§239.84. Requirements for the Issuance of the Standard Educational Diagnostician Certificate.

To be eligible to receive the Standard Educational Diagnostician Certificate under this subchapter, the individual must:

(1) successfully complete a educational diagnostician preparation program that meets the requirements of §239.82 of this title (relating to Preparation Requirements) and §239.83 of this title (relating to Standards for the Educational Diagnostician Certificate) of this subchapter;

(2) successfully complete the assessments required under this title;

(3) hold a master's degree from an accredited institution of higher education; and

(4) have two school years of classroom teaching experience in a public or accredited private school.

§239.85. Requirements to Renew the Standard Educational Diagnostician Certificate.

(a) Each individual issued a Standard Educational Diagnostician Certificate under this title is subject to Chapter 232, Subchapter R of this title (relating to Certificate Renewal and Continuing Professional Education Requirements).

(b) An individual who holds a valid Texas educational diagnostician certificate issued prior to September 1, 1999, may voluntarily comply with the requirements of this section under procedures adopted by the executive director under §232.810 of this title (relating to Voluntary Renewal of Current Texas Educators).

§239.86. Transition and Implementation Dates.

(a) Section 239.84 of this title (relating to Requirements for Issuance of the Standard Educational Diagnostician Certificate), shall be implemented and shall supersede all conflicting provisions in this title on September 1, 2003. All other sections of this subchapter shall take effect pursuant to Texas Government Code, §2001.036, relating to Effective Date of Rules.

(b) Section 230.316 of this title (relating to Educational Diagnostician (Special Education)) shall expire on September 1, 2003.

This 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 February 21, 2002.

TRD-200201049
William Franz
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 469-3011

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CHAPTER 242. SUPERINTENDENT CERTIFICATE

19 TAC §242.5, §242.20

The State Board for Educator Certification (SBEC) proposes amendments to §242.5 and §242.20 relating to the superintendent certificate.

The proposed amendments are designed to eliminate unnecessary barriers to candidates seeking the superintendent certificate and to remove unduly prescriptive language in the rule regarding admission to a superintendent preparation program. The major provisions of the proposed amendments would accomplish the following:

Remove unnecessarily prescriptive language concerning grade point averages and nationally-normed assessments and allow preparation entities the full authority to set admission criteria for candidates seeking the standard superintendent certificate. These amendments will make this chapter consistent with the guidance contained in Chapters 227 and 228 of SBEC's rules generally governing educator preparation programs.

Delete the reference to the conditional principal certificate, which was never implemented.

Allow holders of a principal's certificate from another state to be admitted to a superintendent's preparation program without first obtaining a Texas principal's certificate if the candidate passed an out-of-state principal certification exam that is comparable to the Texas exam for principal certification (the Examination for the Certification of Educators in Texas or "ExCET test").

Barry Alaimo, Director of Accounting and Financial Operations, has determined that for the first five-year period the rules are in effect there may not be fiscal implications as a result of enforcing or administering the rules. Certification exam-fee revenue may be slightly reduced as a result of a small decrease in the number of individuals taking the Texas principal certification exam. Individuals from another state who have passed another jurisdiction's principal certification exam comparable to Texas' would not be required to take the Texas principal certification exam to enter a superintendent preparation program.

Dan Junell, General Counsel, has determined that for each year of the first five years that the rules would be in effect, the public would benefit from the proposed rules because they would help ensure certification of only qualified candidates as superintendents while not imposing unreasonable barriers to certification. Persons who would be required to comply with the rules should incur no additional costs as a result of their implementation because they do not change the certification fees for superintendent candidates. Some candidates certified as a principal by other states may have fewer costs because they would not be required to pass the Texas principal certification exam to enter a superintendent preparation program if the other jurisdiction's principal exam is comparable to Texas'.

Interested persons wishing to comment on the proposed rules must submit their comments in writing to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity, Austin, TX 78701-2603, within the 30-day comment period, which begins on the date of publication of this issue of the *Texas Register*. The comments should contain the following title or reference: "Comment(s) on the proposed amendments to the superintendent certification rules, 19 TAC Ch. 242."

The amendments are proposed under Texas Education Code (TEC) §21.041(a), which requires SBEC to propose rules for the general administration of TEC Ch. 21, Subch. B; §21.041(b)(2), which requires SBEC to propose rules that specify the classes of educator certificates to be issued; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.044, which requires SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate and to specify the minimum academic qualifications required for a certificate.

No other statutes, articles or codes are affected by the proposed new rules.

§242.5. Minimum Requirements for Admission to a Superintendent Preparation Program.

(a) As administered and determined by the program, satisfactory performance on [~~Successful completion of~~] an assessment that is based upon characteristics of effective educational leaders.

(b) Hold, at a minimum, a Standard [~~Conditional~~] Principal Certificate or the equivalent issued under [~~Chapter 241 of~~] this title [~~relating to Principal Certificate~~] or by another state or country, provided the individual performed satisfactorily on a principal certificate examination similar to and at least as rigorous as that required under this title.

(c) [~~Hold, at a minimum, a Master's degree from an accredited institution of higher education~~]

[~~(d) As determined by the preparation program, an acceptable combination of scores from a nationally-normed assessment and grade point average.~~]

[~~(e)~~] Each preparation program must develop and implement specific criteria and procedures that allow admitted individuals to substitute experience and/or professional training directly related to the standards identified in §242.15 of this title (relating to Standards Required for the Superintendent Certificate) for part of the preparation requirements.

§242.20. Requirements for the Standard Superintendent Certificate.

(a) The individual shall satisfactorily complete an assessment based on the standards identified in §242.15 of this title (relating to Standards Required for the Superintendent Certificate).

(b) The individual shall successfully complete an SBEC-approved superintendent preparation program and be recommended for certification by that program.

(c) The individual shall hold, at a minimum, a master's degree from an accredited institution of higher education.

This 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 February 21, 2002.

TRD-200201050
William Franz
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 469-3011

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TITLE 22. EXAMINING BOARDS

PART 2. TEXAS STATE BOARD OF BARBER EXAMINERS

CHAPTER 51. PRACTICE AND PROCEDURE

SUBCHAPTER D. BARBER SHOPS

22 TAC §51.98

The Texas State Board of Barber Examiners proposes new §51.98, State-Mandated Fee for Occupational Licensing Transactions Using the Internet. The proposed new rule is pursuant to Senate Bill 187 and Senate Bill 645, 77th Texas Legislature, Regular Session, and sets forth the subscription fee per licensee prescribed by the TexasOnline Authority for the Texas State Board of Barber Examiners.

Douglas A. Beran, Ph.D., Executive Director, has determined that for the first five-year period the rule is in effect, there will be an increase in revenue to state government of approximately $54,000 per year as a result of enforcing or administering this new rule (approximately 9,000 licensees per year x $6.00). These amounts will be transferred directly to the TexasOnline Authority. Because the fee would be collected through ongoing administrative procedures, there would be no additional costs to the state as a result of enforcing or administering the rule. The proposed new rule has no foreseeable economic implications relating to costs or revenues for local government.

Dr. Beran also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rule will be to ensure that licensees and permit holders comply with the licensing requirements of the rules of the board and may be able to do so over the internet. The anticipated economic costs to persons who are required to comply with the rules as adopted will be $6.00 per licensee whether or not the licensee renews his/her license over the internet.

Comments on the proposed new rule may be submitted to Douglas A. Beran, Ph.D., Executive Director, State Board of Barber Examiners, 5717 Balcones Drive, Suite 217, Austin, Texas 78731 (1-888-870-8755; Fax (512) 458-4901; e-mail douglas.beran@tsbbe.state.tx.us) no later than 30 days from the date that the proposed action is published in the *Texas Register*.

The new rule is proposed under the requirements of Senate Bill 187 and Senate Bill 645, 77th Texas Legislature, Regular Session, and the Texas Occupations Code Chapter 1601.155 Authority to Set Fees and 1601.151 General Powers and Duties of the Board which vests the board with the authority to make and enforce all rules and regulations necessary for the performance of its duties, to establish standards of conduct and ethics for all persons licensed or practicing under the provision of the Texas Barber Law, and to regulate the practice and teaching of barbering in keeping with the intent of the Texas Barber Law and to ensure strict compliance with the Texas Barber Law.

No other article or statute is affected by this new rule.

§51.98. State-Mandated Fee for Occupational Licensing Transactions Using the Internet.
As required by Senate Bill 187 and Senate Bill 645, 77th Texas Legislature, Regular Session, each licensee, upon renewal, shall pay a $6.00 State-Mandated Fee for Occupational Licensing Transactions Using the Internet. This fee is in addition to 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 February 19, 2002.

TRD-200201009
Douglas A. Beran
Executive Director
Texas State Board of Barber Examiners
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 458-0111

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PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.17

(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 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 (BNE or Board) proposes the repeal of the current 22 TAC §217.17, and proposes a new 22 TAC §217.19, relating to Incident-Based Peer Review, and a new 22 TAC §217.20, relating to Safe Harbor Peer Review for RNs. The Board is intentionally skipping §217.17 in the sequence of the proposed new rule numbers in anticipation of future expansion of §217. The proposed rule numbers also allow the two peer review related rules to be sequentially numbered. This notice concerns the repeal of the current §217.17.

In July 2000, the Board of Nurse Examiners requested that the Board's Nursing Practice Advisory Committee (NPAC) review and recommend changes to the "parity of counsel" section of the Peer Review Rule 217.17(c). The NPAC consists of representatives from nursing practice and education, nursing organizations, hospital organizations, state agencies, and consumer groups. The Board's request of NPAC was precipitated by a request from the American Association of Nurse Attorneys-Texas Division (TAANA). TAANA voiced concerns that a nurse being peer reviewed is not, under current rule, afforded the opportunity to have a support person with him/her during the actual peer review proceeding when such support and advice may be essential to a productive peer review process. The NPAC met five times between October 2000-October 2001 to address the Board's charge. The NPAC also expanded its initial charge, with the Board's agreement, to consider and review the remainder of §217.17 relating to Minimal Procedural Standards During Peer Review. Based on these NPAC recommendations, the BNE proposes a general overhaul of the peer review rules to add clarity and understanding for those required to conduct nursing peer review pursuant to chapter 303 of the Texas Occupations Code.

The basic rules and concepts of peer review have been in existence since 1987. The peer review process is currently outlined in chapter 303, TEX. OCC. CODE, with additional requirements specified in chapter 301, TEX. OCC. CODE. The "parity of counsel" section of the rule has been in effect since 1995. Safe Harbor Peer Review was added to the rule in 1997. The purpose of peer review is to serve as a means of determining a nurse's adherence to the BNE and Board of Vocational Nurse Examiners (BVNE) rules by having other nurses in the same work setting review practice-based incidents. Under chapter 303, licensed vocational nurses are also included in the incident-based peer review process. The result of a peer review may be that a nurse is reported to the BVNE or BNE if a peer review committee determines that a nurse engaged in conduct not in compliance with the applicable statutory and regulatory standards. Peer review may also serve as a quality improvement mechanism to identify system problems that may contribute to patient-related errors.

Based on recommendations from NPAC and discussion at the Board meeting on January 24, 2002, the Board hereby proposes to repeal the current §317.17, Minimal Procedural Standards During Peer Review, and to propose two revised/new §217.19 and §217.20.

Kathy Thomas, Executive Director, has determined that there are no fiscal implications for state or local government entities as a result of repealing this rule.

Ms. Thomas has also determined that the public benefit to repealing this rule is the clarification of the process and procedures regarding both Incident-Based Peer Review and Safe Harbor Peer Review. There will be no effect on small businesses. There is no anticipated increase in costs to any persons as a result of repealing this rule.

Comments on the proposed rule repeal must be made in writing to Kathy 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 of §217.17 is proposed under the authority of the Texas Occupations Code §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act, including rules relating to Incident-Based Peer Review and Safe Harbor Peer Review. The repeal of the current rule affects the Nursing Practice Act, Texas Occupations Code §301.403 and §§301.405(c)-301.405(f), and chapter 303 as they pertain to registered nurses. The repeal of the current rule also affects Licensed Vocational Nurses, as defined in Texas Occupations Code chapter 302, and as specified in chapter 303.

§217.17. Minimum Procedural Standards During Peer Review.

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

Filed with the Office of the Secretary of State on February 21, 2002.

TRD-200201058
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 305-6811

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22 TAC §217.19, §217.20

The Board of Nurse Examiners for the State of Texas (BNE or Board) proposes the repeal of 22 TAC §217.17, and the adoption of a new 22 TAC §217.19, relating to Incident-Based Peer Review for nurses, and new 22 TAC §217.20, relating to Safe Harbor Peer Review for registered nurses (RNs). The Board is intentionally skipping §217.17 in the sequence of the proposed new rule numbers in anticipation of future expansion of §217. The proposed rule numbers also allow the two peer review related rules to be sequentially numbered. This notice concerns the adoption of new §217.19 and §217.20.

In July 2000, the Board of Nurse Examiners requested that the Board's Nursing Practice Advisory Committee (NPAC) review and recommend changes to the "parity of counsel" section of the Peer Review Rule §217.17(c). The NPAC consists of representatives from nursing practice and education, nursing organizations, hospital organizations, state agencies, and consumer groups. The Board's request of NPAC was precipitated by a request from the American Association of Nurse Attorneys-Texas Division (TAANA). TAANA voiced concerns that a nurse being peer reviewed is not, under current rule, afforded the opportunity to have a support person with him/her during the actual peer review proceeding when such support and advice may be essential to a productive peer review process. The NPAC met five times between October 2000-October 2001 to address the Board's charge. The NPAC also expanded its initial charge, with the Board's agreement, to consider and review the remainder of §217.17 relating to Minimal Procedural Standards During Peer Review. Based on these NPAC recommendations, the BNE proposes a general overhaul of the peer review rules to add clarity and understanding for those required to conduct nursing peer review pursuant to chapter 303 of the Texas Occupations Code.

The basic rules and concepts of peer review have been in existence since 1987. The peer review process is currently outlined in chapter 303, TEX. OCC. CODE, with additional requirements specified in chapter 301, TEX. OCC. CODE. The "parity of counsel" section of the rule has been in effect since 1995. Safe Harbor Peer Review was added to the rule in 1997. The purpose of

peer review is to serve as a means of determining a nurse's adherence to the BNE and Board of Vocational Nurse Examiners (BVNE) rules by having other nurses in the same work setting review practice-based incidents. Under chapter 303, licensed vocational nurses are also included in the incident-based peer review process. The result of a peer review may be that a nurse is reported to the BVNE or BNE if a peer review committee determines that a nurse engaged in conduct not in compliance with the applicable statutory and regulatory standards. Peer review may also serve as a quality improvement mechanism to identify system problems that may contribute to patient-related errors.

The proposed rules are a culmination of NPAC's recommendations to the Board as well as the Board's review of public comments received during the open meeting on January 24, 2002. A summary and rationale behind the major changes are as follows:

New proposed §217.19(a) is a slight modification to the old §217.17(a). Sections (1) and (2) were moved to the front of the rule for more logical flow as these sections define incident-based peer review and clarifies its application to RNs and licensed vocational nurses (LVNs).

Proposed §217.19(a)(3) states that a facility conducting peer review must have written policies and procedures to guide participants in fulfilling minimum due process requirements. The amended language includes information formerly included only in the statutes (TEX. OCC. CODE §§303.006-303.007, 301.403, 301.410) regarding confidentiality of proceedings, suspected chemical dependency issues, the reporting of the nurse to either the BNE or BVNE, and conducting peer review under existing facility policies.

Proposed §217.19(a)(4)(A-H) repeats the statute (TEX. OCC. CODE §303.003) relating to peer review committee membership. A new restriction exists to exclude "any person or person with administrative authority for personnel decisions directly relating to the nurse." As administrative/employment decisions are separate from licensure actions, the Board felt that the presence of administrative or Human Resource personnel involved in disciplinary matters could have a negative effect (intentional or unintentional) on the peer review process. The new rule language adds the provision that the required written notice to the nurse of both the pending peer review, as well as the peer review committee results, must be sent by certified mail to the nurse's last known address.

The time line for the peer review meeting was extended from 30 to 45 days to accommodate adequate notice and review time. The nurse's rights are further extended in proposed rule language to give the nurse the same rights as the peer review committee in relation to calling/questioning witnesses, making opening and closing statements, and asking/responding to questions of the committee. The last item in this newly proposed section provides the nurse ten (10) calendar days after notice of the committee's findings to submit a written rebuttal statement (a clarification on current rule language that offers the nurse "reasonable opportunity" to submit a rebuttal). In addition, any allowed disclosure of the committee's findings must include the nurse's rebuttal as well.

Proposed §217.19(a)(5) relates to a nurse's right to representation during a peer review proceeding and is a substantive change from the rule as it exists currently. The current rule outlines "parity of participation of counsel," which means that if a facility or other entity employing the nurse has legal counsel present during the peer review proceeding, the nurse must be allowed to have legal counsel present. In addition, the nurse's attorney must be allowed to participate in the peer review process to the same extent as the employing entity's attorney participates. The Board is not recommending any changes to this provision.

The current peer review rule also provides that if the employing entity chooses not to have their legal counsel present during the peer review process, they may deny a nurse's request to be accompanied during the peer review proceeding by any other person. It has been widely reported by TAANA, and by nurses reporting to the Board that have undergone peer review, that a nurse being peer reviewed is often placed in a position where he/she must walk into a room of facility-picked personnel and peers, and sit by himself/herself throughout the peer review meeting. Given the consequence of the peer review may be a report to the BNE or BVNE for potential licensure violations, the BNE sees current peer review practice as one of high anxiety for the nurse involved.

While the Board's mission is to protect the public through the regulation of professional nursing, there is also sensitivity to establishing rules that serve to promote an unbiased and non-adversarial peer review process. Toward this end, the proposed revisions §217.19(a)(5) relating to a Nurse's Right to Representation would permit the nurse, as part of minimum due process, to be accompanied to the peer review proceeding by either another nurse peer or by legal counsel. The person accompanying the nurse to the peer review proceeding would be limited to consulting/supporting the nurse only, and he would not be permitted to interact with the peer review committee unless facility policy and/or the peer review committee chairperson so permitted. The term "accompany" is used to express the intent that the nurse must attend the meeting if he/she chooses to participate; having an alternate person attend the peer review meeting for the nurse is not an option.

The proposed new rule language clearly limits the nurse's support to one person only, identifies who (either a nurse peer or an attorney) may come with the nurse to the peer review, and specifies the extent to which the guest may participate (consultative/supportive role to the nurse only). The proposed §217.19(a)(5) also requires both parties (facility and nurse) to disclose seven (7) days prior to the peer review proceeding whether they will have an attorney present.

Proposed §217.19(a)(6) relates to confidentiality. As the nature of peer review is such that confidential patient information may often need to be disclosed in the meeting, the person accompanying the nurse must maintain the confidentiality of this information.

Proposed §217.19(a)(7) relates to system issues in nursing errors. The current rule requires peer review committees to examine the nurse's knowledge, skills, and judgment in relation to an incident. Since the 1999 report "To Err Is Human" from the Institute of Medicine, much emphasis has been placed on examining the entire "system" when errors occur, not just a single human element. This proposed new language would require a committee to examine the extent to which factors beyond the nurse's control may have contributed to an incident. The Board believes that the peer review process is one of the primary vehicles for examining "system" errors.

Proposed §217.19(a)(8) incorporates the statute (TEX. OCC. CODE §301.403) into the rule language, clarifying what the peer review committee must report to the BNE or BVNE if the committee determines that a report is warranted.

Proposed §217.19(a)(9) relates to peer review conducted in bad faith, and prohibits such conduct by nurses.

Proposed §217.19(a)(10) attempts to specify whether or not the nurse being peer reviewed must participate in the peer review proceeding. Both the current and new rules would require that a nurse be notified of a pending peer review and provided an opportunity to participate; however, this section in the proposed new rule clarifies that the nurse may choose not to participate in the peer review once he/she has been notified in advance as stated in the rule.

Proposed §217.19(b) is a new section which states that a nurse's duty to report a nurse for unsafe nursing practice is met by the nurse reporting to a peer review committee provided certain conditions are met. If the nurse believes that peer review was conducted in bad faith, he/she would still have a duty to report the nurse being reviewed to the appropriate licensing Board. Section 217.11(16) requires that a nurse report any nurse who the he/she believes in good faith is or has engaged in unsafe nursing practice. The Board believes that if either the reporting nurse or a nurse on the peer review committee feels that the committee reached its decision (to not report a nurse) in "bad faith," either or both nurses may still report the nurse being peer reviewed. Therefore, reporting a nurse to the peer review committee does not automatically absolve the nurse of his/her duty to report unsafe practice.

Proposed §217.20 relates to peer review initiated directly by a registered nurse who believes in good faith that he/she is being asked to violate some provision of the Nursing Practice Act (NPA) and Board Rules. This is known as Safe Harbor Peer Review, and applies to RNs only. Safe Harbor Peer Review is outlined in TEX. OCC. CODE §303.005. Because Safe Harbor does not apply to LVNs, and because the minimal procedural standards differ between Incident-Based Peer Review and Safe Harbor Peer Review, the BNE proposes addressing Safe Harbor Peer Review in a separate rule, 22 TAC §217.20.

Proposed §217.20 provides that any written request for Safe Harbor will be acceptable as long as the specified criteria are listed in the written request. (See proposed §217.20(c)(3)(A-E)). This proposed rule also eliminates the requirement in the current rule that only the BNE-produced form be utilized to invoke Safe Harbor and outlines a time line for completion of Safe Harbor Peer Review proceedings.

Kathy Thomas, Executive Director, has determined that there are no fiscal implications for state or local government entities as a result of enforcing or administering these rules.

Ms. Thomas has also determined that the public benefit to enforcing these rules is to clarify the process and procedures regarding both Incident-Based Peer Review and Safe Harbor Peer Review. There will be no effect on small businesses. There is no anticipated increase in costs to persons required to comply with the proposed new rules; however, there is a potential personal cost to the RN being peer reviewed should he/she choose to retain personal legal counsel for the peer review proceeding. If the employing entity does not have full-time legal counsel, there is also a potential cost to the employer should the employer choose to seek legal counsel for the peer review proceeding.

Comments on the proposed rules must be made in writing to Kathy 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 adoption of new §217.19 and §217.20 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 Nursing Practice Act, including rules relating to Incident-Based Peer Review and Safe Harbor Peer Review. The proposed new rules affect the Nursing Practice Act, Texas Occupations Code §§301.403 and 301.405(c)-301.405(f), and chapter 303 as they pertain to registered nurses. The proposed new rules also affect Licensed Vocational Nurses, as defined in Texas Occupations Code chapter 302, and as specified in chapter 303.

§217.19. Nursing Peer Review.

(a) Minimum Due Process For Incident-Based Peer Review

(1) The provisions of this subsection (a) apply:

(A) to peer review for both registered nurses (RNs) and licensed vocational nurses (LVNs). Any reference to "nurse" is a reference to both RNs and LVNs. See Texas Occupations Code §303.001(1-3).

(B) only to peer review conducted for purpose of evaluating if a RN or LVN has engaged in unacceptable nursing practice.

(2) Texas Occupations Code, §303.001(5), states, "Peer review means the evaluation of nursing services, the qualifications of nurses, the quality of patient care rendered by nurses, the merits of complaints concerning nurses and nursing care, and determinations or recommendations regarding complaints". The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Once a decision is made that a nurse is subject to peer review, Texas Occupations Code, §303.002(e) provides that the nurse is entitled to minimum due process. The purpose of this Rule 217.19 is to define minimum due process, to provide guidance to facilities in developing peer review plans, to assure that nurses have knowledge of the plan, and to provide guidance to the peer review committee in its fact finding process.

(3) A facility conducting peer review shall have written policies and procedures that, at a minimum, address:

(A) level of participation of nurse or nurse's representative at peer review proceeding beyond that required by Subsection (a)(4)(F) of these rules (e.g., nurse's or representative's ability to question witnesses);

(B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by Texas Occupations Code, §§303.006 and 303.007;

(C) handling of cases involving nurses suspected of having problems with chemical dependency or mental illness in accordance with the Texas Occupations Code, §301.410;

(D) reporting of nurses to Board of Nurse Examiners and Board of Vocational Nurse Examiners by peer review committee in accordance with the Texas Occupations Code, §301.403; and

(E) effective date of changes to the policies which in no event shall apply to peer review proceedings initiated before the change was adopted unless agreed in writing by the nurse being reviewed.

(4) In order to meet the minimum due process required by the Texas Occupations Code, Chapter 303, the Nursing Peer Review Committee must:

(A) comply with the membership and voting requirements as set forth in Texas Occupations Code §303.003(a) - (d);

(B) exclude from the committee any person or persons with administrative authority for personnel decisions directly relating to the nurse;

(C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that his/her practice is being evaluated, that the peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice , unless otherwise agreed upon by the nurse and peer review committee. Said notice must include a written copy of the peer review plan, policies and procedures;

(D) include in the written notice:

(i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality but the nurse shall be provided the name of the patient/client;

(ii) name, address, telephone number of contact person to receive the nurse's response;

(E) provide the nurse the opportunity to review, in person or by attorney, the documents concerning the event under review, at least 15 calendar days prior to appearing before the committee;

(F) provide the nurse the opportunity to:

(i) submit a written statement regarding the event under review;

(ii) call witnesses, question witnesses, and be present when testimony or evidence is being presented;

(iii) be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of proceeding;

(iv) make an opening statement to the committee;

(v) ask questions of the committee and respond to questions of the committee; and

(vi) make a closing statement to the committee after all evidence is presented;

(G) conclude its review no more than fourteen (14) calendar days from the peer review proceeding;

(H) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility of the findings of the committee within ten (10) calendar days of when the committee's review has been completed; and

(I) permit the nurse to file a written rebuttal statement within ten (10) calendar days of the notice of the committee's findings and make the statement a permanent part of the peer review record to be included whenever the committee's findings are disclosed.

(5) Nurse's Right To Representation. A nurse shall have a right of representation as set out in this section. The rights set out in this section are minimum requirements and a facility may allow the nurse more representation. The peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required. The nurse has the right to be accompanied to the hearing by a nurse peer or an attorney. Representatives attending the peer review hearing must comply with the facility's peer review policies and procedures regarding participation beyond conferring with the nurse. If either the facility or nurse will have an attorney or representative present at the peer review hearing in any capacity, the facility or nurse must notify the other at least seven (7) calendar days before the hearing that they will have an attorney or representative attending the hearing and in what capacity. Notwithstanding any other provisions of these rules, if an attorney representing the facility or peer review committee is present at the peer review hearing in any capacity, including serving as a member of the peer review committee, the nurse is entitled to "parity of participation of counsel." "Parity of participation of counsel" means that the nurse's attorney is able to participate to the same extent and level as the facility's attorney; e.g., if the facility's attorney can question witnesses, the nurse's attorney must have the same right.

(6) Confidentiality of information presented to and/or considered by the peer review committee shall be maintained and not disclosed except as provided by Texas Occupations Code §§303.006 and 303.007. Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse.

(7) In evaluating a nurse's conduct, the committee shall review the evidence to determine the extent to which any deficiency in care by the nurse was the result of deficiencies in the nurse's judgment, knowledge, training, or skill rather than other factors beyond the nurse's control. A determination that a deficiency in care is attributable to a nurse must be based on the extent to which the nurse's conduct was the result of a deficiency in the nurse's judgment, knowledge, training, or skill.

(8) If a peer review committee finds that a nurse has engaged in conduct reportable to the Board of Nurse Examiners or Board of Vocational Nurse Examiners, the committee's report shall include:

(A) a description of any corrective action taken against the nurse and

(B) a statement as to whether the committee recommends that formal disciplinary action be taken against the nurse.

(9) Texas Occupations Code, Chapter 303, requires that peer review be conducted in good faith. A nurse who knowingly participates in peer review in bad faith is subject to disciplinary action by the Board under the Texas Occupations Code, §301.452(b). Examples of bad faith are taking action against a nurse without providing the nurse the rights provided by these rules or taking action based on personal animosity towards the nurse.

(10) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under proposed Rule §217.19(a)(4)(C). Texas Occupations Code 303.002(d) prohibits nullifying by contract any right a nurse has under the peer review process.

(b) Effect of RN Reporting to Peer Review Committee. If a registered nurse reports a nurse to a nursing peer review committee for conduct that the nurse has a duty to report to the Board, the report to the committee will satisfy the nurse's duty to report to the Board provided that the following conditions are met:

(1) The peer review committee shall report the nurse to the Board, if it finds the nurse engaged in reportable conduct. If the peer review committee finds that the conduct constitutes a minor incident as defined by Rule §217.16 (relating to reporting of minor incidents), it shall report in accordance with the requirements of that rule;

(2) The reporting nurse shall be notified of the peer review committee's findings and shall be subject to Texas Occupations Code, §303.006; and

(3) the reporting nurse accepts in good faith the findings of the peer review committee.

§217.20. Safe Harbor Peer Review for RNs.

(a) Texas Occupations Code, §303.005 requires a person who regularly employs, hires or contracts for the services of at least ten (10) RNs to permit a RN to request Peer Review when requested to engage in conduct that the RN believes is in violation of his/her duty to a patient. "Duty to a patient" means conduct, including administrative decisions directly affecting a registered RN's ability to comply with that duty, required by standards of practice or professional conduct adopted by the Board. A RN requesting safe harbor in compliance with §303.005 and these rules is afforded the protections outlined in §§301.352 and 303.005(c).

(b) Minimum Due Process The minimum due process requirements of Rule §217.19 do not apply to Safe Harbor Peer Review except in those circumstances outlined in Rule §217.20(e)(2). The RN requesting safe harbor shall be permitted to:

(1) appear before the committee;

(2) ask questions and respond to questions of the committee; and

(3) make a verbal and/or written statement to explain why he or she believes the requested conduct would have violated a RN's duty to a patient.

(c) Safe Harbor Protections To activate protections outlined in Texas Occupations Code §301.352 and §303.005, the RN shall:

(1) Invoke Safe Harbor in good faith. "Good faith" means that the RN believes that the requested conduct violates a RN's duty to a patient and that belief is one a reasonable RN could hold.

(2) At the time the RN is requested to engage in the activity, notify the supervisor making the assignment that the RN is invoking Safe Harbor.

(3) At the time of supervisor notification, also submit a written request for Safe Harbor utilizing the Safe Harbor form provided on the Board's web site or on a form that includes a minimum of the following information:

(A) the conduct assigned or requested, including the name and title of the person making the assignment or request;

(B) a description of the practice setting (e.g., the RN's responsibilities, resources available, extenuating or contributing circumstances impacting the situation):

(C) a detailed description of how the conduct would have violated the RN's duty to a patient or any other provision of the Nursing Practice Act and Board Rules. If possible, reference the specific standard (Rule §217.11) or other section of the Nursing Practice Act and/or Board rules the RN believes would have been violated;

(D) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and

(E) the RN's name, title, and relationship to the supervisor making the assignment or request.

(d) Safe Harbor Processes

(1) The following timelines shall be followed:

(A) the peer review committee shall complete its review and notify the nurse administrator within 14 days of when the RN requested Safe Harbor;

(B) within 48 hours of receiving the committee's determination, the nurse administrator shall review these findings and notify the RN requesting peer review of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect.

(2) If Safe Harbor was invoked to question the medical reasonableness of a physician's order, the medical staff or medical director shall determine whether the order was reasonable. Consideration for patient safety should contribute to the timeline for implementing a decision, but shall not exceed the time limits specified in this section.

(3) The RN invoking Safe Harbor is responsible for keeping a copy of the request for Safe Harbor, and shall be given a copy of the committee's determination and the nurse administrator's review, if separate from the Safe Harbor form.

(e) Exclusions to Safe Harbor Protections

(1) The protections provided under subsection (c) do not apply to the RN who invokes Safe Harbor in bad faith, or engages in activity unrelated to the reason for the request for Safe Harbor and that constitutes reportable misconduct of a professional nurse, even if this activity occurs during the time a peer review committee is considering the RN's request for Safe Harbor.

(2) In addition to consideration of the RN's request for Safe Harbor, the peer review committee may consider whether an exclusion to Safe Harbor peer review applies, and evaluate whether a professional nurse has engaged in reportable misconduct provided such review is conducted in accordance with the requirements of Rule §217.19.

(3) If the peer review committee determines that a RN's conduct was not related to the RN's request for Safe Harbor and would otherwise constitute misconduct reportable to the Board, the committee shall report the RN to the Board as required in Texas Occupations Code §301.403.

This 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 February 21, 2002.

TRD-200201060
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 305-6811

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 229. FOOD AND DRUG
SUBCHAPTER K. TEXAS FOOD ESTABLISHMENTS

The Texas Department of Health (department) proposes the repeal of §229.172, and new §229.172 concerning accreditation of food management programs, new §229.176 concerning certification of food managers, and new §229.177 concerning the

certification of food managers in areas under Texas Department of Health permitting jurisdiction.

Government Code, §2001.039 requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). Existing §229.172 has been reviewed and the department has determined that reasons for adopting the section continue to exist. However, because of substantial changes to the Texas Food Establishment rules and revisions to the recommendations of the Conference for Food Protection which serve as the guidance documents, existing §229.172 is being repealed and new §229.172 is proposed.

The department published a Notice of Intention to Review for §229.172 in the *Texas Register* on January 21, 2000 (25 TexReg 398). No comments were received as a result of the publication of the notice.

New §229.176 concerning certification of food managers enacts the provisions required by the passage of House Bill 251 during the 77th Legislative Session which added Health and Safety Code (HSC), §438.102. The department is required to establish a certification program for food managers based upon successful passage of a state approved examination. New §229.177 concerns the certification of food managers in areas under the Texas Department of Health permitting jurisdiction. The purpose of this section is to implement a food manager certification requirement as authorized in the Texas Health and Safety Code (HSC), Chapter 437, §437.0076(b).

Steve McAndrew, Director, Retail Foods Division, has determined that for each year of the first five-year period §229.172 is in effect, there will be fiscal implications as a result of administering the section as proposed. The proposed increase in license and student fees is estimated to generate additional revenues of approximately $168,200 each year for the first five years for state government. The new license fees will offset the cost associated with administering this section. There is no fiscal impact for local government. Mr. McAndrew has also determined that for each year of the first five-year period §229.176 is in effect, there will be fiscal implications as a result of administering this section as proposed. The effect on state government will be increased revenue to the department estimated to be $83,480 in FY 2002, $107,756 in FY 2003, $132,032 in FY 2004, $156,308 in FY 2005, and $180,584 in FY 2006. The new license fees will offset the costs associated with administering this section and the costs associated with the development of this rule and administrative oversight of the program. There will be no fiscal impact to local government. For each year of the first five-year period that §229.177 is in effect, the effect on state government will be an estimated additional annual revenue of approximately $51,000 in FY 2002, $137,100 in FY 2003, $158,100 in FY 2004, $142,800 in FY 2005, and $142,800 in FY 2006 to the department, and there will be no fiscal impact on local government.

Mr. McAndrew has also determined that for each of the first five years these rules are in effect, the public benefit will be an increase in food safety knowledge of food managers in food establishments throughout the state through application of food manager training standards. This should result in a decrease in the number of foodborne disease outbreaks because of improved food handling practices of trained managers. The anticipated economic cost to micro-businesses and/or small business will be an annual program fee of $300 per year for a certified food manager program license fee. Managers taking the department approved examination will be charged $17 for the manager's certification, which is valid for five years; therefore, the average cost per year will be approximately $3.40 per year per manager. Businesses wishing to register as certified test sites will incur a cost of from $200 to $1,000 per year based on the number of test sites the businesses will utilize. The fees are necessary in order for the department to recover costs associated with the operation of the certification program. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ione J. Wenzel, Chief, Accreditation and Training Branch, Retail Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512) 719-0232. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

25 TAC §229.172

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

The repeal is proposed under the Health and Safety Code, §438.042, which requires the department to adopt necessary regulations pursuant to the enforcement of Chapter 438; 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 repeal affects the Health and Safety Code, Chapters 438, and 12; and implements the Government Code §2001.039, as passed by the 76th Legislature.

§229.172. Accreditation of Food Protection Management Programs.

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

Filed with the Office of the Secretary of State on February 25, 2002.

TRD-200201155
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 458-7236

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25 TAC §§229.172, 229.176, 229.177

New §229.172 is proposed under the Health and Safety Code, §438.042, which requires the department to adopt necessary regulations pursuant to the enforcement of Chapter 438; 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. New §229.176 is proposed under the Health and Safety Code, §438.102, which requires the department to adopt necessary regulations pursuant to the enforcement of Chapter 438; 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. New §229.177 is

proposed under the Health and Safety Code, §437.0076, which provides the department with the statutory authority to adopt necessary regulations pursuant to the enforcement of Chapter 437; 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.

New §229.172 affects the Health and Safety Code, Chapters 438, and 12; and implements the Government Code §2001.039, as passed by the 76th Legislature. The proposed new §229.176 affects the Health and Safety Code, Chapter 438, and Chapter 12; and the proposed new §229.177 affects the Health and Safety Code, Chapter 437, and Chapter 12.

§229.172. Accreditation of Certified Food Management Programs.

(a) Purpose. This section is intended to provide the framework for accrediting manager level food safety programs in accordance with the Texas Health and Safety Code (HSC), Chapter 438, Subchapter D. A uniform standard governing the accreditation of food safety programs enhances the recognition of reciprocity among regulatory agencies and reduces the expense of duplicate education incurred when food establishment managers work in multiple regulatory jurisdictions. Education of the food establishment manager provides more qualified personnel, thereby reducing the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques.

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

(1) Accredited -- A program approved by the department that meets the standards set forth in this section.

(2) Alternative training methods - Training other than classroom, including but not limited to distance learning, comp-uterized training programs, and correspondence courses.

(3) Certificate -- The documentation issued by the department or an organization that administers a department approved examination verifying that an individual has complied with the requirements of this section.

(4) Certification -- The process whereby a certificate is issued.

(5) Certified food manager -- A person who has demonstrated that they have the knowledge, skills and abilities required to protect the public from foodborne illness by means of successfully completing a food safety examination as described in this section.

(6) Certified food management program -- A program accredited by the department that provides food safety education for food establishment managers and administers an approved examination for certification or recertification purposes.

(A) Certification program -- A program whose course work consists of a minimum of 14 hours of instruction on food safety topics which may include traditional or alternative methods of training, including distance education, and at least a one-hour proctored department approved examination.

(B) Recertification program -- A program whose course work consists of six hours of instruction on food safety topics, which may include traditional or alternative methods of training, including distance education, and a department approved proctored examination.

(7) Certified food management program instructor -- An individual whose educational background and work experience meet the requirements for approval as a certified food management instructor as described in this section.

(8) Certified food management program licensee -- The individual, corporation or company that is licensed by the department to operate certified food management programs.

(9) Certified food management program sponsor -- An individual designated in writing to the department, by the licensee, as the person responsible for administrative management of the program.

(10) Conference for Food Protection -- An independent national voluntary nonprofit organization to promote food safety and consumer protection.

(11) Continuing education -- Documented professional education or activities that provide for the continued proficiency of a certified food management program instructor.

(12) Department -- The Texas Department of Health.

(13) Examination administrator -- An individual or individuals who are designated in writing to the department, by the licensee, who is responsible for administering food manager certification examinations.

(14) Food -- A raw, cooked, or processed edible substance, ice, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(15) Food establishment -- An operation that stores, prepares, packages, serves, or otherwise provides food for human consumption such as: a food service establishment; retail food store; satellite or catered feeding location; catering operation, if the operation provides food directly to a consumer or to a conveyance used to transport people; market; remote catered operations; conveyance used to transport people; institution or food bank that relinquishes possession of food to a consumer directly or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(A) The term includes: an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location, unless the vending or feeding location is permitted by the regulatory authority; a restaurant; a grocery store; an operation that is conducted in a mobile, roadside, stationary, temporary, or permanent facility or location; group residence; outfitter operations; bed and breakfast extended and bed and breakfast food establishments where consumption is on or of the premises; and regardless of whether there is a charge for the food.

(B) The term does not include: an establishment that offers only prepackaged foods that are not potentially hazardous; a produce stand that only offers whole, uncut fresh fruits and vegetables; a food processing plant; a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function, such as a religious or charitable organization's bake sale; a bed and breakfast limited facility as defined in §229.162(4)(A) of this title; or a private home.

(16) Law -- Applicable local, state and federal statutes, regulations and ordinances.

(17) Person -- An association, corporation, individual, partnership or other legal entity, government or governmental subdivision or agency.

(18) Proctor -- The examination administrator or a person who is designated to assist the examination administrator.

(19) Psychometric -- Scientific measurement or quantification of human qualities, traits or behaviors.

(20) Reciprocity -- Acceptance by state and local regulatory authorities of a Department approved food manager certificate.

(21) Regulatory authority -- The state or local enforcement body or authorized representative having jurisdiction over the food establishment.

(22) Secure -- Access limited to the certified food manager licensee or examination administrator.

(23) Single entity -- A corporation that educates only its own employees.

(24) Traceable means -- A method of mailing documents, which can be tracked in the event of loss or delay.

(c) Certified food manager.

(1) Certified food manager responsibilities. Responsibilities of a certified food manager include:

(A) identifying hazards in the day-to-day operation of a food establishment that provides food for human consumption;

(B) developing or implementing specific policies, procedures or standards aimed at preventing foodborne illness;

(C) coordinating training, supervising or directing food preparation activities, and taking corrective action as needed to protect the health of the consumer;

(D) training the food establishment employees on the principles of food safety; and

(E) conducting in-house self-inspections of daily operations on a periodic basis to ensure that policies and procedures concerning food safety are being followed.

(2) Certification by training and food safety examination. To be certified, a food manager must complete an accredited certification or recertification program and pass an examination that has been administered through a department accredited food management program.

(3) Certificate reciprocity. Department issued food management certificates shall be recognized statewide by regulatory authorities as the only valid proof of successful completion of a department accredited food management course.

(4) Certificate availability. The original food manager certificate shall be conspicuously posted at each food establishment.

(d) Licensing of certified food management program licensee. The department shall issue a license of accreditation to each certified food management program licensee who has demonstrated compliance with this section. A license issued under these rules will expire one year from the date of issuance. This license is not transferable on change of ownership, or site location.

(1) Application. A person wishing to apply for a certification or recertification certified food management program license shall submit an application to the department.

(2) Certified food management program license fee. The license application shall include the appropriate non-refundable fee.

(3) Examination security agreement. The licensee shall submit a signed security agreement for each examination administrator using a department examination.

(4) Certified food management program sponsor. The licensee may designate a program sponsor as the person responsible for the administrative management of the program.

(5) Certified food management program instructor. A list of all department certified food management program instructors who plan to teach an accredited certification or recertification course shall be provided to the department. An instructor application, along with other necessary documentation must be submitted for all non-certified instructors.

(6) Training methods. Training methods shall be designated on the application. Documentation must be provided to the department verifying that the time required to complete an alternative training program is equivalent to 14 hours of training for certification and six hours for recertification.

(7) Certification examination. Department approved examination(s) utilized by the certified food protection management programs shall be designated on the application.

(e) Licensing of single entity certified food management programs. In addition to the licensing requirements as specified in subsection (d) of this section, a corporation wishing to use a single entity option, which defers course length and topic requirements as specified HSC, §438.043(a), shall submit to the department:

(1) a copy of the course guide; and

(2) an outline of each topic and sub-topics.

(f) Responsibilities of a certified food management program licensee.

(1) Compliance with certified food management program law and rules. The licensee is responsible for compliance with applicable certified food management program law and rules.

(2) Payment of fees. All fees shall be non-refundable and paid as specified in subsection (p) of this section.

(3) Change of ownership. A new licensing application, to include non-refundable fee(s) as described in this section, shall be submitted prior to a change of license ownership.

(4) Certified food management program course content. All food management programs must be taught utilizing the course content established in the Conference for Food Protection's Standards for Accreditation of Food Protection Manager Certification Programs, and must meet the training and time requirements in subsection (d)(6) of this section.

(5) Change of program sponsor. The licensee shall notify the department in writing of the name of the new program sponsor.

(6) Change of examination administrator. The licensee shall submit a signed security agreement for each new examination administrator prior to administering the department examination. New examination administrators must receive instruction on administrative responsibilities for examination security and processing.

(7) Change of certified food management instructor. The licensee shall ensure that only a department certified food management instructor serves as the instructor for the food management program. All new instructors must complete the application for new instructors that must be submitted by the licensee to the department with the applicable documentation. All new instructors must receive instruction on the applicable law and rules and administrative responsibilities.

(8) Mailing of answer sheets. The licensee shall ensure that the answer sheets used for computerized grading shall be mailed to the department by traceable means. The completed answer sheets must be

received by the department within seven working days of the examination date.

(g) Requirements for certification of certified food management program instructors. The instructors for all food management programs shall be department certified prior to teaching a class. Instructors meeting the qualifications will be approved for a five-year period. The application form shall be submitted to the department through the accredited certified food management program licensee.

(1) New food management instructors. A completed application for new instructors must be submitted to the department with the following documentation:

(A) the completed and signed application form;

(B) a copy of a valid food management certificate; and

(C) verification of education or experience in food safety documented by one of the following:

(i) an associate or higher college degree from an accredited institution in a major related to food safety or environmental health, evidenced by a copy of the candidate's diploma or transcript;

(ii) five years of food establishment work experience verified in an attached resume; or

(iii) one year of regulatory inspection experience verified in an attached resume.

(2) Nationally accredited program instructors. Nationally accredited program instructors who have met the minimum standards as set forth by this section shall be given reciprocity when instructing and administering a Conference for Food Protection accredited examination.

(h) Responsibilities of certified food management program instructors.

(1) Compliance with certified food management program law and rules. All certified instructors are responsible for compliance with applicable certified food management program law and rules.

(2) Training requirements. All certified instructors are responsible for instructing the course content as specified in subsection (f)(4) of this section, and meeting the training time requirements as specified in subsection (d)(6) of this section.

(3) Examination administrator. Instructors serving as the examination administrator must complete an examination security agreement prior to administering a department examination.

(i) Requirements for the renewal of certified food management program instructor certification. In order for an instructor to renew their instructor certification, they must comply with the requirements of this subsection.

(1) Instructor certification renewal. At least 60 days prior to the certificate expiration date, the department will mail instructors a renewal notice. In order for certification to be renewed, the instructor must return the completed renewal notice to the department prior to the expiration date along with required documentation.

(2) Continuing education requirements. An instructor must earn a minimum of 12 contact hours of continuing education credits before expiration of their certification.

(3) Accepted continuing education topics. Continuing education topics may include areas in food safety or instruction enhancement.

(4) Verification of continuing education. The following may be used for continuing education:

(A) a certificate of completion for a course or seminar with the participant's name, course name, date and number of contact hours earned;

(B) a college transcript with course description;

(C) a copy of a published professional research paper authored by the instructor that indicates the journal name and publication date;

(D) a signed and dated letter on official letterhead from an employer detailing the instructor's participation in company workshops or programs; or

(E) other documentation of attendance as approved by the department.

(5) Expiration of instructor certificate. Instructor certification expires upon the expiration date on the certificate. In order to be recertified, the instructor must submit a new food management instructor application.

(j) Responsibilities of the examination administrators.

(1) Compliance with certified food management program laws and rules. The examination administrator is responsible for compliance with the certified food management program laws and rules applicable to examination administration.

(2) Examination security agreement. An examination administrator must complete a security agreement and submit to the department through the certified food management program licensee. The department may not issue examinations to an examination administrator who does not have a signed security agreement on file with the department.

(3) Examination security. The examination administrator shall provide examination security at the examination site. All security measures shall be met and maintained at all times during examination storage, administration and issuance as described in this section.

(4) Mailing answer sheets. Answer sheets used for computerized grading shall be mailed to the department by traceable means. The completed answer sheets must be received at the department within seven working days of the examination date.

(5) Examination results. Candidates shall be informed of the process for receiving their certificate upon passing the examination. Candidates shall be informed of the reexamination process, in the event of examination failure.

(6) Replacement process for candidate certificate. Candidates shall be informed of the process for replacing lost or damaged certificates.

(k) Certified food manager certificates.

(1) Certificate issuance. Certified food manager certificates for candidates who complete an accredited program and pass the department examination will be mailed directly to the candidate at the address provided on the computerized grading sheet.

(2) Certificate period. A certified food manager certificate shall be valid for five years from the date of examination. All certificates issued prior to the effective date of these rules will expire on the expiration date as stated on the certificate.

(3) Certificate renewal. Renewal shall be achieved by completing a recertification program and passing a department approved

examination. A renewal certificate shall be valid for five years from date of issuance.

(4) Certificate replacement. An individual requesting a certified food manager certificate replacement must submit a written request to the department with the appropriate non-refundable fee. Replacement certificates will bear the same expiration date as the original certificate.

(5) Expired certificates. Certified food managers whose certification has expired shall complete an accredited certification course and pass the final examination.

(6) Certification through single entity corporations. Candidates from accredited single entity corporations will receive food management certificates as described in this section, except that the food management certificate shall:

(A) clearly indicate that the certificate is for the single entity only;

(B) be recognized by regulatory authorities for only that single entity; and

(C) not receive reciprocity or recertification.

(l) Department examination criteria. The department examination shall meet accepted psychometric standards for reliability, validity and passing score. The department certification examination shall consist of 75 statistically valid questions to be administered at one time following the required training which precedes the examination. The department recertification examination shall consist of 50 statistically valid questions to be administered at one time following the required training which precedes the examination.

(m) National examination criteria. National food manager examinations recognized by the Conference for Food Protection shall be considered department approved examinations. Examination administrators for national examinations must implement and maintain all of the administrative procedures as outlined in the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Programs.

(n) Site requirements for administration of the department examination and national examinations. Examination sites utilizing the department examination or a national examination must comply with all legal requirements for safety, health, and accessibility for all qualified candidates. Accommodations, lighting, space, comfort, and workspace for taking the examination must allow all candidates to perform at their highest level of competency. Requirements at each site include but are not limited to:

(1) accessibility in accordance with the requirements of the Americans with Disabilities Act must be available for all qualified examinees;

(2) sufficient spacing between each examinee in the area in which the actual testing is conducted, or other appropriate and effective methods, to preclude any examinee from viewing another candidate's examinations;

(3) acoustics that allow each examinee to hear instructions clearly, using an electronic audio system if necessary;

(4) adequate lighting at each examinee's work space for reading fine print; and

(5) appropriate ventilation and temperature for the health and comfort of examinees.

(o) Examination administration. Examination administrators shall implement and maintain the following examination administration procedures for a program utilizing the department examination.

(1) Security procedures shall be in place which protect the examination from compromise at all times. The examinations shall be stored and administered under secure conditions and shall be inventoried prior to and immediately following each administration of an examination. The examination may not be duplicated. Candidates shall have access to the examination only during examination administration.

(2) There shall be one proctor for every 35 candidates taking the examination. Proctors shall, by picture identification, confirm the accurate identity of each candidate. The examination administrator shall train and supervise the activities of any proctor(s).

(3) A candidate who speaks English as a second language may use a translation dictionary to translate English into their native language.

(4) An employee or a non-biased volunteer translator may be used as a translator of languages other than English to administer the examination orally. Translators shall be pre-approved by the examination administrator, and shall not compromise the integrity of the examination or the examination results of the candidate.

(5) Each candidate's examination results and personal information shall be held confidential. Such information may be made available only to the examinee and to persons designated in writing by the examinee in a dated document containing the examinee's original signature. The signed document must specify the name(s) of specific individuals the information may be released to and the exact information which may be provided. The department shall only release information in writing and only to appropriately designated and identified person(s).

(6) All completed answer sheets for the department examinations shall:

(A) be mailed by traceable means, and received by the department within seven working days of the examination date for grading and processing;

(B) be submitted in a condition acceptable for immediate scanning. Forms requiring extensive correction shall be returned to the examination administrator ungraded; and

(7) Only the department shall grade the department examination.

(p) Required fees. All fees are payable to the Texas Department of Health and are non- refundable. Fees must be submitted with the appropriate form that relates to the fee category.

(1) Certified food manager program license fee. A program fee shall be $300 per year for each certification or recertification program.

(2) Candidate fee. A candidate fee for those taking a department approved examination shall be $17. If the candidate fails the department examination, another candidate fee must be submitted to retake the examination.

(3) Replacement certificate. A replacement certificate fee for the department examination shall be $10.

(4) Late fee. Certified food manager licensees submitting a renewal application to the department after the expiration date shall pay an additional $100 as a late fee.

(q) Department examination related to late fees. Department examinations will not be provided to any licensee that is over 30 days delinquent in renewing a certified food management program license.

(r) Certified food management program registry. The department shall maintain a program registry of all accredited certification and recertification programs. The registry shall be made available on the department website.

(s) Department audits. Examination and classroom audits shall be conducted to assess program compliance. Audits may be based on analysis of data compiled by the department.

(t) Denial, suspension and revocation of program accreditation. An accredited food manager program license may be denied, suspended or revoked for the following reasons:

(1) an average quarterly candidate failure rate in any one quarter of 25% or higher on examinations;

(2) a licensee, examination administrator or proctor breaches the security agreement;

(3) a licensee is delinquent in payment of fees as described in this section; or

(4) violation of the provisions of this section.

(u) Denial, suspension and revocation procedures. Denial, suspension and revocation procedures under this section shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

§229.176. Certification of Food Managers.

(a) Purpose. This section is intended to provide the framework of certification programs for food managers in accordance with Texas Health and Safety Code (HSC), Chapter 438, Subchapter G. Certification of Food Managers supports demonstration of food safety knowledge, thereby reducing the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques.

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

(1) Certificate -- The documentation issued by the department or an organization that administers a department approved examination verifying that an individual has complied with the requirements of this section.

(2) Certification -- The process whereby a certificate is issued.

(3) Certified food manager -- A person who has demonstrated that he/she has the knowledge, skills and abilities required to protect the public from foodborne illness by means of successfully completing a food safety examination as described in this section.

(4) Certified food manager licensee -- The individual, corporation, or company that is licensed by the department to administer a department approved examination for food manager certification and who complies with the examination site requirements.

(5) Certified food manager examination -- A department approved examination for food manager certification.

(6) Conference for Food Protection -- An independent national voluntary nonprofit organization promoting food safety and consumer protection.

(7) Department -- The Texas Department of Health.

(8) Examination administrator -- an individual designated in writing to the department by the licensee who is responsible for administering food manager certification examinations.

(9) Examination site -- The physical location at which the department approved examination is administered.

(10) Food -- A raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(11) Food establishment -- An operation that stores, prepares, packages, serves, or otherwise provides food for human consumption such as: a food service establishment; retail food store; satellite or catered feeding location; catering operation, if the operation provides food directly to a consumer or to a conveyance used to transport people; market; remote catered operations; conveyance used to transport people; institution or food bank that relinquishes possession of food to a consumer directly or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(A) The term includes: an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location, unless the vending or feeding location is permitted by the regulatory authority; a restaurant; a grocery store; an operation that is conducted in a mobile, roadside, stationary, temporary, or permanent facility or location; group residence; outfitter operations; bed and breakfast extended and bed and breakfast food establishments where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(B) The term does not include: an establishment that offers only prepackaged foods that are not potentially hazardous; a produce stand that only offers whole, uncut fresh fruits and vegetables; a food processing plant; a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function, such as a religious or charitable organization's bake sale; a bed and breakfast limited facility as defined in §229.162(4)(A) of this title.

(12) Law -- Applicable local, state and federal statutes, regulations and ordinances.

(13) Nonprofit organization -- A civic or fraternal organization, charity, lodge, association, proprietorship or corporation possessing a 501(C) exemption under the Internal Revenue Code; or religious organizations meeting the definition of "church" under the Internal Revenue Code, §170(b)(1)(A)(I).

(14) Person -- An association, corporation, partnership, individual or other legal entity, government or governmental subdivision or agency.

(15) Personal validation question -- A question designed to establish the identity of the candidate taking a certified food manager examination by requiring an answer related to the candidate's personal information such as a driver's license number, address, date of birth, or other similar information that is unique to the candidate.

(16) Proctor -- The examination administrator or a person who is designated to assist the examination administrator.

(17) Psychometric -- Scientific measurement or quantification of human qualities, traits or behaviors.

(18) Reciprocity -- Acceptance by state and local regulatory authorities of a department approved food manager certificate.

(19) Regulatory authority -- The state or local enforcement body or authorized representative having jurisdiction over the food establishment.

(20) Secure -- Access limited to the licensee or examination administrator.

(21) Traceable means -- A method of mailing documents that can be tracked in the event of loss or delay.

(c) Certified food manager.

(1) Certified food manager responsibilities. Responsibilities of a certified food manager include:

(A) identifying hazards in the day-to-day operation of a food establishment that provides food for human consumption;

(B) developing or implementing specific policies, procedures or standards aimed at preventing foodborne illness;

(C) coordinating training, supervising or directing food preparation activities and taking corrective action as needed to protect the health of the consumer;

(D) training the food establishment employees on the principles of food safety; and

(E) conducting in-house self-inspection of daily operations on a periodic basis to ensure that policies and procedures concerning food safety are being followed.

(2) Certification by a food safety examination. To be certified, a food manager must pass a department approved examination or a national examination recognized by the Conference for Food Protection.

(3) Certificate reciprocity. A certificate issued to an individual who successfully completes a department approved examination shall be accepted as meeting the training and examination requirements under HSC, §438.046(b).

(4) Certificate availability. The original food manager certificate shall be conspicuously posted at each food establishment.

(d) Licensing of certified food manager licensee. The department shall issue a license to certified food manager licensees meeting the requirements of this subsection. A license issued under these rules shall expire one year from the date of issuance. A license is not transferable on change of ownership, or change of site location.

(1) Application. Persons wishing to apply for a certified food manager license shall submit an application to the department.

(2) Certified food manager licensee fee. The license application shall include the appropriate non-refundable fee as specified in subsection (o)(1) of this section.

(3) Examination security agreement. The licensee shall submit a signed security agreement for each examination administrator using a department examination.

(4) Certification examination. Department approved examination(s) utilized by the certified food manager licensee shall be designated on the application.

(5) Number of examination sites utilized. The license application shall indicate the number of examination sites to be utilized under the certified food manager license.

(e) Responsibilities of certified food manager licensee.

(1) Compliance with food manager laws and rules. The licensee is responsible for compliance with applicable food manager laws and rules.

(2) Payment of fees. All fees shall be non-refundable and paid as specified in subsection (o) of this section.

(3) Change of ownership or site location. A new licensing application package, to include non-refundable fee(s) as described in this section, shall be submitted prior to a change of licensee ownership or site location.

(4) Change of the examination administrator. The licensee shall submit a signed security agreement by a new examination administrator prior to administering the department examination.

(5) Examination administration. The licensee shall directly administer the department approved examination.

(f) Responsibilities of department examination administrators.

(1) Compliance with food manager laws and rules. The examination administrator is responsible for compliance with the food manager laws and rules applicable to examination administration.

(2) Examination security agreement. An examination administrator must complete, sign and date a security agreement and submit it to the department through the certified food manager licensee. The department may not issue examinations to examination administrators who do not have a signed security agreement on file with the department.

(3) Examination security. The examination administrator shall provide examination security at the examination site. All security measures specified in this section shall be met and maintained at all times during examination storage, administration and issuance.

(4) Mailing answer sheets. Answer sheets used for computerized grading shall be mailed to the department by traceable means. The completed answer sheets must be received at the department within seven working days of the examination date.

(5) Examination results. Candidates shall be informed of the process for receiving their certificate upon passing the examination. Candidates shall be informed of the reexamination process, in the event of examination failure.

(6) Replacement process for candidate certificate. Candidates shall be informed of the process for replacing lost or damaged certificates.

(g) Responsibilities for Internet examination providers.

(1) Compliance with food manager laws and rules. Internet examination providers are responsible for compliance with food manager laws and rules applicable to examination administration.

(2) Examination Security Agreement. Internet examination providers must submit the department security agreement signed by the certified food manager licensee.

(3) Examination Security. Candidates taking Internet examinations shall be advised on the application that outside training materials or assistance shall not be used during administration of the examination and that appropriate measures must be taken to assure that the examination is not compromised.

(h) Certified food manager certificates.

(1) General certificate issuance. Certificates shall be issued by the department or the organization that administers a department approved examination. Certificates issued after successful passage of a department approved examination shall be deemed to meet the requirements for food manager certification.

(2) Department certificate issuance. Certified food manager certificates for candidates who pass the department's examination will be mailed directly to the candidate at the address provided on the computerized grading sheets.

(3) Certificate period. A certified food manager certificate shall be valid for five years from the date of examination. All certificates issued prior to the effective date of these rules will expire on the expiration date as stated on the certificate.

(4) Certificate renewal. Renewal shall be achieved by passing an examination approved by the department. A renewal certificate shall be valid for five years from the date of issuance.

(5) Department certificate replacement. An individual requesting a certified food manager certificate replacement must submit a written request to the department with the appropriate non-refundable fee. Replacement certificates will bear the same expiration date as the original certificate.

(i) Department examination criteria. The department examination shall meet accepted psychometric standards for reliability, validity and passing score. The department examination shall consist of 75 statistically valid questions to be administered at one time following any voluntary training which may precede the examination.

(j) National examination criteria. National food manager examinations recognized by the Conference for Food Protection shall be considered department approved examinations. Examination administrators for national examinations must implement and maintain all of the administrative procedures as outlined in the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Programs.

(k) Internet examination criteria. Documentation that Internet examination questions meet accepted psychometric standards for reliability, validity, and passing score shall be submitted to the department. Each candidate shall receive a unique form of the examination with regard to question sequence. Internet examinations shall consist of 75 statistically valid questions that are administered at one time following any voluntary training that may precede the examination.

(l) Site requirements for administration of the department examination and national examinations. Examination sites utilizing the department examination or a national examination must comply with all legal requirements for safety, health, and accessibility for all qualified candidates. Accommodations, lighting, space, comfort, and workspace for taking the examination must allow all candidates to perform at their highest level of competency. Requirements at each site include but are not limited to:

(1) accessibility in accordance with the requirements of the Americans with Disabilities Act must be available for all qualified examinees;

(2) sufficient spacing between each examinee in the area where the actual examination is conducted, or other appropriate and effective methods, to preclude any examinee from viewing other candidates' examinations;

(3) acoustics that allow each examinee to hear instructions clearly, using an electronic audio system if necessary;

(4) adequate lighting at each examinee's workspace for reading fine print; and

(5) appropriate ventilation and temperature for the health and comfort of examinees.

(m) Department examination administration. Examination administrators shall implement and maintain the following examination administration procedures for a program utilizing the department examination:

(1) Security procedures shall be in place, which protect the examination from compromise at all times. The examinations shall be stored and administered under secure conditions and shall be inventoried prior to and immediately following each administration of an examination. The examination may not be duplicated. Candidates shall have access to the examination only during examination administration;

(2) There shall be one proctor for every 35 candidates taking the examination. Proctors shall, by picture identification, confirm the accurate identity of each candidate. The examination administrator shall train and supervise the activities of any proctor(s);

(3) A candidate who speaks English as a second language may use a translation dictionary to translate English into their native language;

(4) An employee or a non-biased volunteer translator may be used as a translator of languages other than English to administer the examination orally. Translators shall be pre-approved by the examination administrator, and shall not compromise the integrity of the examination nor the examination results of the candidate;

(5) Each candidate's examination results and personal information shall be held confidential. Such information may be made available only to the examinee and to persons designated in writing by the examinee in a dated document containing the examinee's original signature. The signed document must specify the name(s) of specific individuals the information may be released to and the exact information which may be provided. The department shall only release information in writing and only to appropriately designated and identified person(s);

(6) All completed answer sheets for the department examinations shall:

(A) be mailed by traceable means, and received by the department within seven working days of the examination date for grading and processing;

(B) be submitted in a condition acceptable for immediate scanning. Forms requiring extensive correction shall be returned to the examination administrator ungraded; and

(7) Only the department shall grade the department examination.

(n) Internet examination administration.

(1) Registration requirements for Internet examinations. The licensee shall register the candidates and require the candidates to:

(A) verify their identity;

(B) provide responses to ten personal validation questions; and

(C) maintain examination security.

(2) Licensee examination disclosure information. The licensee shall inform the candidate that:

(A) reference materials shall not be used during the examination;

(B) the candidate shall not receive assistance from anyone during the examination; and

(C) examination questions may not be replicated in any fashion.

(3) Personal validation questions. The licensee shall verify a candidate's identity throughout the examination. The personal validation process must include the following elements:

(A) a minimum of five personal validation questions selected from the ten questions provided during registration shall be incorporated at various times during the examination;

(B) the personal validation questions must be randomly generated with respect to time and order;

(C) the same personal validation questions shall not be asked more than once during the same examination; and

(D) the examination session shall cease and the candidate shall be automatically exited from the examination if a candidate answers a personal validation question incorrectly.

(4) System support. The licensee of an approved Internet examination must include the following system capabilities and security measures:

(A) capability to browse or review previously completed examination questions;

(B) capability to navigate logically and systematically through the examination;

(C) technical support personnel for Internet examination issues;

(D) security of personal candidate information in transit and at rest;

(E) a back-up and disaster recovery system capability; and

(F) assurance that examination data is maintained in a secure and safe environment and readily available to the department.

(5) Reporting requirements for non-proctored Internet examination administrators. Internet examination administrators who administer examinations in non-proctored locations shall submit a semi-annual report to enable the department to evaluate examination security and system performance. The report shall include:

(A) statistical data to enable measurement of central tendency, ranges of examination scores, standard deviation, standard error of measurement, and examination cut score;

(B) the number of personal validation questions used; and

(C) the number of examinations discontinued due to incorrect responses to personal validation questions.

(6) Time allotment for non-proctored Internet examination providers. Time allotted for administration of non-proctored examinations shall not exceed 90 minutes.

(o) Required fees. All fees are payable to the Texas Department of Health and are non- refundable. Fees must be submitted with the appropriate form that relates to the fee category. Fees shall be:

(1) Certified food manager licensee fee. Certified food manager licensee fees shall be based on the number of sites at which the certified food manager licensee administers the examinations based on the following scale:

(A) one site - $200;

(B) two to ten sites - $500; or

(C) over ten sites - $1,000.

(2) Candidate fee. A candidate fee for those taking the department examination shall be $17. If the candidate fails the department examination, another candidate fee must be submitted to retake the examination.

(3) Replacement certificate fee. A replacement certificate fee for the department examination shall be $10.

(4) Late fee. A certified food manager licensee submitting a renewal application to the department after the expiration date shall pay an additional $100 as a late fee.

(p) Department examination related to late fees. Department examinations will not be provided to any licensee that is over 30 days delinquent in renewing a license.

(q) Certified food manager licensee registry. The department shall maintain a registry of all licensed certified food manager licensees. The registry shall be made available on the department website.

(r) Department audits. Audits of certified food manager licensees shall be conducted to assess compliance with these rules. Audits may be based on analysis of data compiled by the department.

(s) Denial, suspension and revocation of certified food manager license. A certified food manager license may be denied, suspended or revoked for the following reasons:

(1) a licensee, examination administrator, or proctor breaches the security agreement;

(2) a licensee is delinquent in payment of fees as described in this section; or

(3) violation of the provisions of this section.

(t) Denial, suspension and revocation procedures. Denial, suspension and revocation procedures under this section shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

§229.177. Certification of Food Managers in Areas Under Texas Department of Health Permitting Jurisdiction.

(a) Purpose. The purpose of this section is to implement a food manager certification requirement as authorized in the Texas Health and Safety Code (HSC), Chapter 437, §437.0076(b). Certification of food managers after testing on food safety principles reduces the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques.

(b) Food manager certification required. One certified food manager must be employed by each food establishment permitted under HSC, §437.0055. Certification must be obtained by passing a department approved examination at an approved examination site, and meeting all requirements in HSC, Chapter 438, Subchapter G, and §229.176 of this title (relating to Certification of Food Managers).

(c) Food manager certification exemptions. The following food establishments are exempt from the requirements in subsection (b) of this section:

(1) establishments that handle only prepackaged food and do not package food as exempted in HSC, §437.0076(c);

(2) child care facilities as exempted by HSC, §437.0076(f);

(3) establishments that do not prepare or handle exposed potentially hazardous foods as defined §229.162(66) of this title; or

(4) nonprofit organizations as defined in §229.371(9) of this title (relating to Permitting Retail Food Establishments).

(d) Responsibilities of a certified food manager. Responsibilities of a certified food manager include:

(1) identifying hazards in the day-to-day operation of a food establishment that provide food for human consumption;

(2) developing or implementing specific policies, procedures or standards to prevent foodborne illness;

(3) supervising or directing food preparation activities and ensuring appropriate corrective actions are taken as needed to protect the health of the consumer;

(4) training the food establishment employees on the principles of food safety; and

(5) performing in-house self-inspections of daily operations on a periodic basis to ensure that policies and procedures concerning food safety are being followed.

(e) Certificate reciprocity. A certificate issued to an individual who successfully completes a department approved examination shall be accepted as meeting the training and testing requirements under HSC, §438.046(b).

(f) Certificate posting. The original food manager certificate shall be posted in a location in the food establishment that is conspicuous to consumers.

This 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 February 25, 2002.

TRD-200201156
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER O. LICENSING OF WHOLESALE DISTRIBUTORS OF DRUGS-INCLUDING GOOD MANUFACTURING PRACTICES

25 TAC §§229.251 - 229.255

The Texas Department of Health (department) proposes amendments to §§229.251 - 229.255, concerning the licensing of wholesale distributors of drugs - including good manufacturing practices.

Specifically, the sections cover licensing fees and procedures; minimum standards for licensure; refusal, revocation, or suspension of license; and provisions for the Wholesale Drug Distributors Advisory Committee. Amended §229.251 will alphabetize the defined terms to make them consistent with other division rules. Amended §229.252 will clarify licensing fees for out-of-state wholesale drug distributors. Amended §229.253 will clarify that drug distributors will have to be in compliance with the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, and will implement Title 21, Code of Federal Regulations (CFR), Part 203, titled "Prescription Drug Marketing." The new language is pursuant to recent amendments to the Federal Prescription Drug Marketing Act of 1987 and the Prescription Drug Amendments of 1992, which were enacted to protect the public against drug diversion by establishing procedures, requirements, and minimum standards for distribution of prescription drugs and prescription drug samples. Amended §229.254 will clarify language for consistency with other programs within the Drugs and Medical Devices Division. Amended §229.255 will update the language of the section to be consistent with other sections of the rule.

Government Code, §2001.039 requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). The current rules have been reviewed and the department has determined that reasons for adopting the sections continue to exist; however, the rules need revisions as described in this preamble.

The department published a Notice of Intention to Review §§229.251 - 229.255 in the *Texas Register* on November 30, 2001 (26 TexReg 9933). No comments were received as a result of the publication of the notice.

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 licensing of wholesale distributors of drugs - including good manufacturing practices. 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 John L. Gower, Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0237, e-mail address: John.Gower@tdh.state.tx.us. 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 the Health and Safety Code, Chapter 431 and Chapter 12.

§229.251. Definitions.

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

(1) (No change.)

(2) Flea market - A location at which two or more booths or similar spaces are rented or otherwise made available temporarily and at which persons offer tangible personal property for sale.

(3) [~~(2)~~] Manufacturer - A person who manufactures, prepares, propagates, compounds, processes, packages, repackages, or changes the container, wrapper, or labeling of any drug package.

(4) [~~(3)~~] Place of business - Each location at which drugs are distributed at wholesale as defined in the Health and Safety Code, Chapter 431.

(5) [~~(4)~~] Wholesale distribution - Distribution to a person other than a consumer or patient, including, but not limited to distribution to any person by a manufacturer, repacker, own label distributor, jobber, or wholesaler.

~~[(5) 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.]~~

§229.252. Licensing Fee and Procedures.

(a) License fee.

(1) All wholesale distributors of drugs who are not manufacturers of drugs in Texas shall obtain a license annually with the Texas Department of Health (department). Except as provided for in paragraph (2) of this subsection, wholesale distributors of drugs who are not manufacturers of drugs in Texas shall pay a non-refundable licensing fee for each place of business operated as follows:

(A) - (D) (No change.)

~~[(E) $750 per out-of-state wholesale distributor, unless an audited statement is provided which demonstrates gross annual drug sales of less than $20 million which would require a licensing fee of $500; and]~~

(E) [~~(F)~~] $0.00 per wholesale distributor engaged in the distribution of an over-the-counter drug by a charitable organization, as described in the Internal Revenue Code of 1986, §501(c)(3), to a nonprofit affiliate of the organization to the extent otherwise permitted by law.

(2) A wholesale distributor of drugs who is not a manufacturer of drugs, who is required to be licensed under this section and who is also required to be licensed as a device distributor under §229.439(a)(1) of this title (relating to Licensure Fees) or as a [~~wholesale~~] food wholesaler [~~distributor~~] under §229.182(a)(3) of this title (relating to Licensing Fee and Procedures) shall pay a combined non-refundable licensing [~~licensure~~] fee for each place of business. The licensing [~~licensure~~] fee shall be based on the combined gross annual sales of these regulated products (foods, drugs, and/or devices) as follows:

(A) - (E) (No change.)

(3) All wholesale distributors of drugs who are manufacturers of drugs in Texas shall obtain a license annually with the department and shall pay a non-refundable licensing fee for each place of business operated as follows:

(A) - (C) (No change.)

(4) All out-of-state wholesale distributors of drugs who distribute drugs into the State of Texas must pay an annual non-refundable license fee as follows:

(A) $750 per out-of-state wholesale drug distributor; or

(B) $500 per out-of-state wholesale drug distributor with gross annual sales of $20 million or less, provided an outside audited statement demonstrating gross annual sales are less than $20 million is provided to the department.

(5) [~~(4)~~] If the United States Food and Drug Administration (FDA) 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 drug, a person who engages in wholesale distribution of the product is subject to licensing [~~licensure~~] as described in this section.

(6) For the purpose of collecting licensing fees under this section, a person that distributes both its own manufactured drugs and drugs it does not manufacture must obtain only a wholesale distributor of drugs (manufacturing) license. However, when calculating the amount of the licensing fee, the manufacturer must include the total for all drugs manufactured and distributed from the place of business. In addition, drug warehousing locations operated by a drug distributor, including locations from which drugs are held for limited periods of time for distribution, and which are totally separate from any manufacturing location, must be individually licensed as drug distributors.

(7) A firm that has more than one business location may request a one-time prorating of fees when applying for a license for each new location. Upon approval by the department, the expiration date of the license for the new location will be the same as the expiration date of the firm's other licensed locations.

(b) (No change.)

(c) License statement. The wholesale distributors' licensing statement shall be signed and verified by the owner, partner, president, or corporate designee [~~(copy of Resolution must accompany application)~~], shall be made on the department furnished license form, and shall contain the following information:

(1) - (6) (No change.)

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

(f) Issuance of license. The department may license a wholesale distributor of drugs who meets the requirements of this section and §229.253 of this title (relating to Minimum Standards for Licensing).

(1) The initial license shall be valid for one year from the start date of the regulated business activity [~~issuance~~] which becomes the anniversary date.

(2) (No change.)

(g) - (i) (No change.)

§229.253. Minimum Standards for Licensing [~~Licensure~~].

(a) - (b) (No change.)

(c) Requirements for wholesale prescription drug distributors.

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

(4) Legend drugs and controlled substances. A wholesale drug distributor may not possess, sell, or transfer drugs whose labels bear the legend "Caution: Federal law prohibits dispensing without a prescription" or "Rx Only" unless that person is authorized to possess, sell or transfer such drugs in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, Subchapter I; the Texas Controlled Substance Act, Health and Safety Code, Chapter 481; and the Texas Dangerous Drug Act, Health and Safety Code, Chapter 483.

(d) - (f) (No change.)

(g) Drugs general, drug advertising, specific requirements for special drugs, official names and established names, and labeling and packaging requirements for controlled substances.

(1) The department adopts by reference and will enforce Title 21, Code of Federal Regulations:

(A) - (B) (No change.)

(C) Part 203, §§203.1 - 203.60, titled "Prescription Drug Marketing";

(D) [~~(C)~~] Part 250, §§250.10 - 250.250, titled "Special Requirements For Specific Human Drugs";

(E) [~~(D)~~] Part 299, §§299.3 - 299.5, titled "Drugs; Official Names and Established Names"; and

(F) [~~(E)~~] Part 1302, §§1302.01 - 1302.08, titled "Labeling and Packaging Requirements For Controlled Substances."

(2) (No change.)

(h) - (p) (No change.)

§229.254. Refusal, Revocation, or Suspension of License.

(a) After an opportunity for a hearing, the commissioner may refuse an application for a license or may refuse to license a wholesale distributor of drugs, or may revoke or suspend the license if the commissioner determines after providing an opportunity for hearing that the applicant or licensee:

(1) has been convicted of a felony or misdemeanor that involves moral turpitude, including but not limited to the illegal use, sale, or transportation of intoxicating liquors, narcotic drugs, barbiturates, amphetamines, desoxyephedrine, their compounds or derivatives, or any other dangerous or habit-forming drugs;

(2) is an association, partnership, or corporation and any officer or management employee, partner, or any officer or director of the corporation has been convicted of a felony or misdemeanor that involves moral turpitude, including but not limited to the illegal use, sale, or transportation of intoxicating liquors, narcotic drugs, barbiturates, amphetamines; desoxyephedrine, their compounds or derivatives, or any other dangerous or habit-forming drugs;

(3) has violated any provisions of the Texas, Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 or these sections;

(4) has failed to pay a license fee or an annual renewal fee for a license;

(5) has obtained or attempted to obtain a license by fraud or deception;

(6) has violated the Health and Safety Code, §431.021(1)(3), concerning the counterfeiting of a drug or the sale or holding for sale of a counterfeit drug;

(7) has violated the Health and Safety Code, Chapter 481 (Texas Controlled Substance Act), or the Health and Safety Code, Chapter 483 (Dangerous Drug Act); or

(8) has violated the rules of the director of the Department of Public Safety, including responsibility for a significant discrepancy in the records that state law requires the applicant or licensee to maintain.

[~~(a) Basis. The Texas Department of Health (department) may, after providing opportunity for hearing, refuse to license a wholesale distributor of drugs, or may revoke or suspend the license for violations of the requirements in §§229.251 - 229.253 of this title (relating to Definitions, Licensing Fee and Procedures, and Minimum Standards for Licensing) or for any of the reasons described in the Texas Health and Safety Code, Chapter 431.~~]

(b) [~~Hearings.~~] Any hearings for the refusal, revocation, or suspension of a license are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to Texas Board of Health) and the Administrative Procedure Act, Government Code, Chapter 2001.

(c) If the department suspends a license, the suspension shall remain in effect until the department determines that the reason for the suspension no longer exists. If the suspension overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in §229.252(g) of this title (relating to Licensing Fee and Procedures); however, the department may choose not to renew the license until the department determines that the reason for suspension no longer exists.

(d) If the department revokes or does not renew a license, a person may reapply for a license by complying with the requirements and procedures in §229.252(a) and (c) of this title at the time of reapplication. The department may refuse to issue a license if the reason for revocation or non-renewal continues to exist.

§229.255. Wholesale Drug Distributors Advisory Committee.

(a) - (b) (No change.)

(c) Purpose. The purpose of the committee is to provide advice to the board in the area of licensing [~~licensure~~] of wholesale drug distributors.

(d) - (p) (No change.)

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

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201084
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 458-7236

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TITLE 28. INSURANCE

PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 116. GENERAL PROVISIONS--SUBSEQUENT INJURY FUND

28 TAC §116.11, §116.12

The Texas Workers' Compensation Commission (the commission) proposes amendments to §116.11, concerning Request for Reimbursement or Refund from the Subsequent Injury Fund and §116.12, Subsequent Injury Fund Payment/Reimbursement

House Bill 2600 (HB-2600) passed by the 77th Texas Legislature amended Texas Labor Code §403.006 to include new liabilities for the subsequent injury fund (SIF) for claims based on compensable injuries that occur on or after July 1, 2002. The statutory amendments provided for reimbursement from the SIF for the portion of income benefits that are attributable to multiple employment and are paid pursuant to §408.042. Reimbursement was also provided for medical benefits for initial pharmaceutical services, that are paid pursuant to §413.0141 for claims later found to be non-compensable. Amendments to §116.11 and §116.12 are proposed to add these new eligible types of

carrier requests for SIF reimbursement to the rules and to govern the documentation, application process, and other administrative requirements to implement the statutory provisions. The proposed amended rules address carrier requests for reimbursement, and establish the criteria for making these requests. Other commission rules address, or will address, the entitlement to the income or medical benefits.

An additional liability added to the SIF through this legislation is the payment of an assessment of feasibility and the development of regional networks established under §408.0221 of the Texas Labor Code. The cost for this liability is a one-time expense and is limited to an amount not to exceed $1.5 million. Any on going regional network administration and management services shall be included in the fees for health care services paid by insurance carriers participating in the regional networks.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed Amendments to §116.11 - Request for Reimbursement or Refund from the Subsequent Injury Fund

Proposed amendments to §116.11(a) add multiple employment and initial pharmaceutical coverage to the list of eligible payments for which carriers may request reimbursement from the Subsequent Injury Fund. The statutory provision for reimbursement for multiple employment applies only to a compensable injury that occurs on or after July 1, 2002, and the rule reflects this.

Proposed §116.11(c) establishes a timeframe for submitting requests related to multiple employment benefits. Rather than requiring carriers to provide multiple employment benefit payments until the exhaustion of income benefits prior to submitting a request for reimbursement from the SIF, carriers will be required to file these requests annually. Carriers must submit requests for reimbursement for multiple employment claims to the Subsequent Injury Fund no later than the end of the fiscal year following the fiscal year in which such benefits were paid by the carrier. For example, requests for reimbursement for benefits paid by the carrier during fiscal year 9/1/02 through 8/31/03 must be submitted prior to 8/31/04. Requests for reimbursement may be submitted in the fiscal year in which they were paid by the carrier.

Proposed §116.11(d) establishes a timeframe for submitting requests related to initial pharmaceutical coverage. Requests pursuant to §413.0141 shall be submitted in the same or in the following fiscal year after final resolution of any dispute that determines the injury is not compensable.

Requests for reimbursement related to multiple employment and initial pharmaceutical benefits that are not submitted within the required timeframe will not be reviewed for reimbursement. In accordance with Texas Labor Code §413.0141 and HB-2600, the commission may adopt rules regarding initial pharmaceutical coverage on or after September 1, 2002. As a result, 116.11(a)(4) will not apply unless and until such a rules are adopted.

Proposed new §116.11(e)(6) describes the information and documentation required for submitting a request for reimbursement to the SIF for amounts paid pursuant to the Texas Labor Code §408.042 (relating to Average Weekly Wage for Employees with Multiple Employment). Specifically, an insurance carrier will be required to submit wage information from all multiple employment held at the time of the injured employee's on-the-job injury as well as information documenting the wage amounts and the difference, if any, between wages paid by the claim employer as defined in proposed Rule 122.5 (relating to Employee's Multiple Employment Wage Statement) and total wages from all employment

Similarly, proposed new §116.11(e)(7) outlines the requirements for requests for reimbursement pursuant to Texas Labor Code §413.0141 (relating to Initial Pharmaceutical Coverage). This subsection will require insurance carriers to submit information and documentation of payment for pharmaceuticals within the first seven days following the date of injury as well as documentation of the final resolution of any dispute which determines the injury is compensable.

In accordance with Texas Labor Code §413.0141, the commission may adopt rules regarding initial pharmaceutical coverage on or after September 1, 2002. As a result, the provisions of proposed new §116.11(e)(7) are not applicable unless and until such a rule is adopted.

Proposed Amendments to §116.12 - Subsequent Injury Fund Payment/Reimbursement Schedule

Proposed amendments to §116.12(a) add and prioritize the reimbursement of requests by carriers made pursuant to §408.042(g) of the Act relating to multiple employment and §413.0141 of the Act relating to initial pharmaceutical coverage. These two additional types of requests for reimbursement have been assigned a lesser priority as a result of the authority provided by Texas Labor Code §403.006(d) which allows the commission to make partial payment of these requests based on actuarial assessment of available funding.

Proposed subsection (e) describes the process the commission will use to calculate partial payment of requests for reimbursement for multiple employment and/or initial pharmaceutical coverage, if partial payments are necessary. If requests for reimbursements under this subsection are reimbursed with partial payment, no further future recovery will be available from the SIF for any non-reimbursed portion.

Brent Hatch, Director of Customer Services, has determined that for the first five-year period the proposed amended rules are in effect the fiscal implications for state and local governments as a result of enforcing or administering the rules are as follows: there will be an increase in administrative costs to the commission resulting from a significant increase in the number of requests for reimbursement from the SIF, which will likely require additional SIF staff to process. In addition, pursuant to §403.006(d) of the Act, the commission will also incur the cost of an actuary to provide biennial assessments of the amount of funding available prior to a commission determination that partial payments of insurance carrier claims are required. There will be no impact on state revenue.

According to the fiscal note for HB-2600, the five-year cost to the SIF in benefits is expected to be $60.8 million. The analysis of the SIF costs for that t fiscal note were based on a total of 4,387 claims eligible for such reimbursement each year.

The increase in SIF reimbursement obligations as a result of changes to the Texas Labor Code and the requirement to maintain 120% of the projected unfunded balance will likely require the assessment of an additional maintenance tax on insurance carriers. Presently, the existing assessment of maintenance tax on insurance carriers is 1.63% with a 2% statutorily established cap.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the amended rules as proposed.

Any potential fiscal impact is largely a result of the new statutory provisions providing for reimbursements from the SIF for additional types of payments.

The need for partial payment of insurance carrier claims related to multiple employment and initial pharmaceutical coverage will be based on an actuarial assessment of the funding available for the next biennium. The rate of this assessment must be adequate to provide 120 percent of the projected unfunded liabilities. The commission's actuary or financial advisor shall report the financial condition and projected assets and liabilities of the SIF biannually (every 6 months) to the Research and Oversight Council on Workers' Compensation.

Mr. Hatch has also determined that for each year of the first five years the amended rules as proposed are in effect the public benefits anticipated as a result of enforcing the rule will be as follows.

System participants will benefit from the amended rules as proposed as a result of compliance with the changes to the Texas Labor Code and the establishment of requirements for requests for reimbursements and payment priorities.

Employees who hold multiple employment will experience an increased benefit rate as a result of the inclusion of lost wages from the multiple employment in the event they experience a compensable work-related injury. Provisions for reimbursement for initial pharmacy services payments that are made in a non-compensable injury, should reduce the likelihood that a pharmacy may decline to fill an initial prescription. This should benefit employees by securing timely medical treatment and should benefit employees and employers to the extent that timely treatment facilitates an faster return to productive work and full wages.

The proposed amended rules should reduce the number of disputes/refusals to pay for initial pharmacy services. To that extent, health care providers such as pharmacies will benefit from timely payment from carriers.

All system participants (employees, employers, health care providers, carriers) should benefit from reduced inconveniences and disputes associated with securing timely and appropriate treatment and medical benefits.

Although insurance carriers will face the potential of paying additional benefits for lost wages attributable to non-claim employment and for payment of initial seven day pharmacy services, this should not result in significant increase in costs to carriers because the additional costs are potentially reimbursable from the SIF. However, if SIF funds are not sufficient to reimburse carriers for these multiple employment and initial pharmacy payments, benefit payments by carriers will increase and this may ultimately increase premium rates for some or all employers. Insurance carriers will likely experience increased administrative costs to keep track of the carrier's payments and file requests for reimbursement, but those costs should be minimal.

There will be no anticipated economic cost for injured employees and healthcare providers as a result of this proposed rule.

There will be no difference in the costs of compliance for small businesses or micro-businesses as compared to larger businesses. There will be no adverse economic impact on small businesses or micro-businesses (see the previous economic impact analysis).

Any potential fiscal impact is largely a result of the new statutory provisions providing for reimbursements from the SIF for additional types of payments.

Comments on the proposal must be received by 5:00 p.m., April 8, 2002. You may comment via the Internet by accessing the commission's website at*www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Nell Cheslock, Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters are requested to clearly identify by number the specific rule and subsection commented upon. The commission may not be able to respond to comments that are not linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held on March 21, 2002, at the Austin central office of the commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

The amendments are proposed under the Texas Labor Code, §401.011, which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code, §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form, manner and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code §§403.002 - 403.007, which address maintenance tax and the subsequent injury fund; the Texas Labor Code §406.010, which authorizes the commission to adopt rules regarding claims service, the Texas Labor Code §408.042, which pertains to average weekly wage for part-time employees or employees with multiple employment and provides for reimbursement to insurance carriers for payments attributable to multiple employment; and the Texas Labor Code §413.0141, which provides initial pharmaceutical coverage and provides for reimbursement to insurance carriers of payments made for such coverage.

The amendments are proposed under the Texas Labor Code, §401.011, §401.024, §402.042, §402.061, §§403.002 - 403.007, §406.010, §408.042, §413.0141.

No other statute, code, or article is affected by the proposed rule amendments.

§116.11. Request for Reimbursement or Refund from the Subsequent Injury Fund.

(a) A carrier may request:

(1) reimbursement from the Subsequent Injury Fund ("SIF") for an overpayment of income, death, or medical benefits when the carrier has made an unrecoupable overpayment pursuant to decision of a hearing officer or the appeals panel or an interlocutory order, and that decision or order is reversed or modified by final arbitration, order, or decision of the Commission, the State Office of Administrative Hearings, or a court of last resort; or

(2) a refund of death benefits paid to the SIF pursuant to §132.10 of this title (relating to Payment of Death Benefits to the Subsequent Injury Fund) prior to a beneficiary being eligible to receive death benefits;

(3) for a compensable injury that occurs on or after July 1, 2002: a reimbursement from the SIF for the amount of income benefits paid to a worker that is attributable to multiple employment and is paid pursuant to §408.042 relating to Multiple Employment; or

(4) a reimbursement from the SIF made in accordance with rules adopted by the Commission pursuant to §413.0141, Initial Pharmaceutical Coverage for injuries later determined not to be compensable.

(b) The amount of reimbursement that the carrier may be entitled to is equal to the amount of unrecoupable overpayments paid and does not include any amounts the carrier overpaid voluntarily or as a result of its own errors. An unrecoupable overpayment of income benefits for the purpose of reimbursement from the SIF only includes those benefits that were overpaid by the carrier pursuant to an interlocutory order or decision which were finally determined to be not owed and which, in the case of an overpayment of income benefits to the employee, were not recoverable or convertible from other income benefits.

(c) Requests for reimbursement pursuant to §408.042(g) shall be submitted on an annual basis for the payments made during the same or previous fiscal year. The fiscal year begins each September 1st and ends on August 31st of the next calendar year. For example, carrier payments made during the fiscal year from 9/1/02 through 8/31/03 must be submitted prior to 8/31/04. Any claims for carrier payments related to multiple employment that are not submitted within the required timeframe will not be reviewed for reimbursement.

(d) Requests for reimbursement pursuant to §413.0141 shall be submitted in the same or in the following fiscal year after final decision of the Commission or the court of last resort determines the injury is not compensable. The fiscal year begins each September 1st and ends on August 31st of the next calendar year. For example, if a carrier receives a final order determining a claim is not compensable during the fiscal year from 9/1/02 through 8/31/03, the request for reimbursement pursuant to §413.0141 must be submitted prior to 8/31/04. Any claims for carrier payments related to initial pharmaceutical coverage that are not submitted within the required timeframe will not be reviewed for reimbursement.

(e) [~~(c)~~]The request for reimbursement or refund from the SIF shall be filed with the SIF administrator and shall be in writing and include:

(1) a claim-specific summary of the reason the carrier is seeking reimbursement or refund;

(2) a detailed payment record showing the dates of payments, the amounts of the payments, the payees, and the periods of benefits paid, as well as documentation that shows that the overpayment was unrecoupable as described in subsection (b), if applicable;

(3) the name, address, and federal employer identification number of the payee for any reimbursement or refund that may be due;

(4) for requests for reimbursement of an unrecoupable overpayment made pursuant to a modified or overturned decision or interlocutory order pursuant to subsections (a)(1) and (b) of this section:

(A) a copy of the decision or interlocutory order under which the carrier made the unrecoupable overpayment and the final decision of the Commission, State Office of Administrative Hearings, or the judgment of the court of last resort that modified or overturned the decision or interlocutory order;

(B) copies of all reports by the employer including, but not limited to, the Employer's First Report of Injury, the Wage Statement, and all Supplemental Reports of Injury for overpayments of income benefits; and

(C) if an overpayment of medical benefits, copies of all medical bills and preauthorization request forms associated with the overpayment for overpayments of medical benefits;

(5) if the request is for a refund of death benefits paid to the SIF pursuant to §132.10 prior to a beneficiary being eligible to benefits, the requestor must provide copies of:

(A) the documentation the beneficiary provided with the claim for death benefits under §122.100 of this title (relating to Claim for Death Benefits); and

(B) the agreement, the final award of the Commission, or the final judgment of a court of competent jurisdiction determining that the beneficiary is entitled to the death benefits, if entitlement to benefits had been disputed; and

(6) if the request is for reimbursement for the income benefits attributable to multiple employment and paid by the carrier pursuant to Texas Labor Code §408.042 (relating to Average Weekly Wage for Employees with Multiple Employment; Collection of Wage Information), in addition to the requirements in subsection (e)(1) through (e)(3) of this section, the requestor must also include the following information and documentation :

(A) Wage information from all multiple employment held at the time of the work related injury pursuant to §122.5 of this title (relating to Employee's Multiple Employment Wage Statement);

(B) All information documenting the wage amounts and the difference, if any, between wages paid by the claim employer (as defined in §122.5 of this title) and total wages from all employment.

(7) if the request is for reimbursement for the amounts paid pursuant to Texas Labor Code §413.0141 (relating to Initial Pharmaceutical Coverage), in addition to requirements in subsection (e)(1) through (e)(3) of this section, the requestor must also include the following information and documentation :

(A) documentation of payment of Initial Pharmaceutical Coverage (first seven days following the date of injury);

(B) documentation of the final resolution of any dispute which determines the injury is not compensable either from the Commission or court of last resort.

(8) [~~(6)~~]Any other documentation reasonably required by the SIF administrator to determine entitlement to reimbursement or payment from the SIF and the amount of reimbursement to which the carrier is entitled.

§116.12. Subsequent Injury Fund Payment/Reimbursement Schedule.

(a) Claims against the Subsequent Injury Fund (SIF) shall be paid in the following priority:

(1) claims by carriers for reimbursement made pursuant to §403.007 of the Act and §132.10(g) of this title (relating to Payment of Death Benefits to the Subsequent Injury Fund);

(2) claims by injured workers for lifetime benefits, as provided by §408.162 of the Act; [~~and~~]

(3) claims by carriers for reimbursement, made pursuant to §410.209 and §413.055 of the Act and §116.11 of this title (relating to Request for Reimbursement or Refund from the Subsequent Injury Fund).; and

(4) claims by carriers for reimbursement made pursuant to §408.042(g) of the Act relating to multiple employment and those in accordance with commission rule(s) adopted pursuant to §413.0141 of the Act relating to initial pharmaceutical coverage.

(b) The SIF uses the fiscal year September 1 through August 31.

(c) Claims described in section (a)(1), [~~and~~](a)(2) and (a)(3) may be reviewed and ordered paid by the SIF administrator at any time during the fiscal year.

(d) Following the end of the fiscal year, the administrator of the SIF shall review:

(1) the SIF available balance and projected revenues and liabilities;

(2) the current claims against the SIF, in the order of priorities set out in subsection (a) of this section; and

(3) all completed requests for reimbursement as described in §116.11 and §132.10 of this title, received during the prior fiscal year, except as provided in subsection (g) of this section.

(e) In accordance with §403.006(d) of the Act, if the commission determines that partial payments of the claims described in subsection (a)(4) of this section is necessary, partial payments shall be calculated in the following manner:

(1) The total amount of completed eligible requests for reimbursement submitted under subsection (a)(4) that are received during the previous fiscal year will be used to establish a baseline amount.

(2) The baseline amount will be divided by the total amount of SIF funding available as determined in accordance with the Act.

(3) The resulting fraction will be equally applied to all claims submitted under subsection (a)(4) to determine the partial reimbursement amount.

(4) If reimbursements requests are paid with partial payments, no further future recovery is available from the subsequent injury fund for the non-reimbursed portion of that particular request.

(f) [~~(e)~~] Following the end of each fiscal year, [~~After review~~] the SIF administrator shall, no later than October 30, enter appropriate orders for claims described in subsection (a)(3). The order shall specify the amount the SIF shall pay to the carrier.

(g) [~~(f)~~]The SIF administrator shall submit orders to the state comptroller for payment and send a copy of the order to the requesting carrier.

(h) [~~(g)~~] The SIF administrator will refrain from acting on a carrier's request for reimbursement or refund from the SIF until final resolution of the claim by a final decision of the Commission, State Office of Administrative Hearings or the court of last resort.

This 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 February 22, 2002.

TRD-200201098
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 804-4287

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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER K. TREATMENT GUIDELINES

28 TAC §§134.1000 - 134.1003

(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 Workers' Compensation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Workers' Compensation Commission (the commission) proposes repeal of current §134.1000, concerning the Mental Health Treatment Guideline; §134.1001, concerning the Spine Treatment Guideline; §134.1002 concerning the Upper Extremities Treatment Guideline; and §134.1003, concerning the Lower Extremities Treatment Guideline.

The repeal of §§134.1000-134.1003 is necessitated by House Bill 2600 (HB-2600), adopted during the 77th Texas Legislative Session, 2001, which states that treatment guidelines adopted under Chapter 413 of the Texas Labor Code and in effect immediately before September 1, 2001, are abolished on January 1, 2002. Sections 134.1000-134.1003 contain the treatment guidelines referred to by HB-2600. Although these treatment guidelines have already been abolished by statute effective January 1, 2002, these proposed repeals implement this legislative action by removing these guidelines from the Texas Administrative Code.

Bill DeCabooter, Acting Director of the Medical Review Division, has determined that for the first five-year period the proposed repeals are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Local government and state government as covered regulated entities, will be impacted in the same manner as persons required to comply with the repeals as proposed.

Mr. DeCabooter has determined that for each year of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule will be the implementation of legislative action abolishing these treatment guidelines.

There will be no anticipated economic costs to persons who are required to comply with the proposed repeals. There will be no costs of compliance for small businesses. There will be no adverse economic impact on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

The repeal of existing §134.1000, §134.1001, §134.1002, and §134.1003 complies with statutory mandates in the Texas Labor Code as amended by HB-2600, adopted during the 77th Texas Legislative Session. These treatment guidelines have been abolished by statute effective January 1, 2002. These repeals implement this legislative action by removing these guidelines from the Texas Administrative Code. Any impact on medical costs is due to the statute.

Comments on the proposed repeals must be received by 5:00 p.m., April 8, 2002. You may comment via the Internet by accessing the commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments. You may also email your comments to *RuleComments@twcc.state.tx.us* or mail or deliver your comments to Nell Cheslock, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters are requested to clearly identify by number the specific section commented upon. The commission may not be able to respond to comments, which cannot be linked to a particular proposed repeal. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations. Unspecified comments submitted will not be addressed.

A public hearing on this proposal will be held on March 21, 2002, at the Austin central office of the commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us.*

The repeals are proposed under: the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §413.011 that requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control and to enhance a timely and appropriate return to work; the Texas Labor Code §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary. HB-2600, 77th Texas Legislative Session, 2001, Article 6, Section 6.09(b), which provides that the treatment guidelines adopted under Chapter 413, Texas Labor Code, in effect immediately before September 1, 2001 are abolished on January 1, 2002

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

The repeals are proposed under: the Texas Labor Code §402.061, §413.011, §413.012, House Bill 2600, 77th Texas Legislative Session, 2001, Article 6, Section 6.09(b).

§134.1000. Mental Health Treatment Guideline.

§134.1001. Spine Treatment Guideline.

§134.1002. Upper Extremities Treatment Guideline.

§134.1003. Lower Extremities Treatment Guideline.

This 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 February 22, 2002.

TRD-200201095
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 804-4287

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

SUBCHAPTER D. BOARD ACTION ON APPLICATION

31 TAC §371.52

The Texas Water Development Board (the board) proposes amendments to 31 TAC §371.52 concerning lending rates under the Drinking Water State Revolving Fund program. The amendments will set interest rates for loans from the board to private and other entities for which the interest on the bonds are subject to the federal income tax (taxable entities). The current method for setting interest rates for taxable entities is to subtract 185 basis points from the prime lending rate. The prime lending rate is a base rate for corporate loans made by commercial banks and it does not follow the conventional indices and scales normally utilized by the board for establishing interest rates.

The board proposes by this amendment to establish the interest for loans to these private and other taxable entities to be 140% of the rate charged on loans by the board to entities the interest on whose bonds is not subject to the federal income tax (tax exempt entities). This percentage is the average percentage between the rates published by Bloomberg Taxable Index for BBB rated bonds and the rates for tax-exempt, general obligation, 20 year maturity, mixed quality bonds published by Bond Buyer Index tax-exempt for the period of March 1999 through November 2001. Concurrently with these amendments, the board is proposing amendments to chapter 375 of the board's rules. Taken together, these amendments will establish a uniform method by which interest rates are calculated for private and taxable applicants, in each respective program.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period the section is in effect, there is no change in cost to state government. The loss or increase in revenue to state government from the implementation of the rule cannot be accurately projected because the losses or increases will vary depending on market interest rate fluctuations. A study of the previous 147 weeks shows that under the new provision the state would receive a higher interest rate from borrowers in a majority of the instances. There will be no fiscal impact on local government as a result of enforcement and administration of the section.

Ms. Callahan has also determined that for the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to provide greater stability of interest rates for the board and for eligible applicants by moving away from a reliance on commercial rates, which are volatile, and moving to reliance on municipal rates which are found to be more stable. Ms. Callahan has determined there will be no adverse impact on small business. The costs to individuals or entities which access the board's programs cannot be accurately projected because savings or costs will vary depending on market interest rate fluctuations. A study of the previous 147 weeks shows that under the new provision the individual or entity would be assessed a higher interest rate in a majority of the instances.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Srin Surapanani, Staff Attorney, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to srin.surapanani@twdb.state.tx.us or by fax @ 512/463-5580.

The amendments are proposed under the authority of the Texas Water Code §6.101 and §15.605 which provide the Texas Water Development with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

The statutory provisions affected by the proposed amendments are Texas Water Code Chapter 15, Subchapter J.

§371.52. Lending Rates.

(a)-(c) (No change)

(d) Private and taxable borrowers. The interest rate for loan agreements for those borrowers receiving financial assistance who are determined to be private or taxable issuers will be 140% of the rate pursuant to subsections (a), (b) and (c) of this section. [~~Notwithstanding the provisions of subsections (b) and (c) of this section, the interest rate for loan agreements for those borrowers receiving financial assistance from the community/noncommunity water systems financial assistance account will be the rate derived by subtracting 185 basis points from the prime lending rate. For the purpose of this subsection, prime lending rate is defined to be the base interest rate on corporate loans posted by at least 75% of the nation's 30 largest banks as published in the nationally published Wall Street Journal and which is in effect as of the date the interest rate is set by the development fund manager.~~]

(e)-(f) (No change.)

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

Filed with the Office of the Secretary of State on February 21, 2002.

TRD-200201061

Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: April 17, 2002
For further information, please call: (512) 463-7981

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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND
SUBCHAPTER C. NONPOINT SOURCE POLLUTION LOAN AND ESTUARY MANAGEMENT PROGRAM

31 TAC §375.306

The Texas Water Development Board (the board) proposes new 31 TAC §375.306 concerning lending rates under the Nonpoint Source Pollution Loan and Estuary Management Program of the Clean Water State Revolving Fund. The new section will provide for a methodology to calculate interest rates for applicants utilizing the Nonpoint Source Pollution Loan and Estuary Management Program. There is currently no rule detailing the method, but rather a guideline on setting rates that requires staff to evaluate a market equivalent rate. There have been only limited circumstances in the past where this method needed to be applied because water supply corporations, the primary TWDB taxable borrowers, are not eligible applicants in the Clean Water State Revolving Fund. The possibility for taxable borrowers in the Clean Water State Revolving Fund increased in September 2001 when rules were adopted authorizing the board to make loans to "persons" for nonpoint source pollution control.

The new section will set interest rates for persons at 140% of the rate for tax exempt applicants. This percentage is the average ratio between the rates published by Bloomberg Taxable Index for BBB rated bonds and the rates for tax-exempt, general obligation, 20 year maturity, mixed quality bonds published by Bond Buyer Index tax-exempt for the period of March 1999 through November 2001. Concurrently, the board is proposing amendment to Chapter 371 of the board's rules. Taken together, these amendments will establish a uniform method by which interest rates are calculated for private and taxable applicants, in each respective program.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period the section is in effect, there is no change in cost to state government. The loss or increase in revenue to state government from the implementation of the rule cannot be accurately projected because the losses or increases will vary depending on market interest rate fluctuations. A study of the previous 147 weeks shows that under the new rule the state would receive a higher interest rate from borrowers in a majority of the instances. There will be no fiscal impact on local government as a result of enforcement and administration of the sections.

Ms. Callahan has also determined that for the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to provide greater stability of interest rates for the board and for eligible applicants by moving away from a reliance on commercial rates, which are volatile, and moving to reliance on municipal rates which are found to be

more stable. Ms. Callahan has determined there will be no adverse impact on small business. The costs to individuals or entities which access the board's programs cannot be accurately projected because savings or costs will vary depending on market interest rate fluctuations. A study of the previous 147 weeks shows that under the new provision the individual or entity would be assessed a higher interest rate in a majority of the instances.

Comments on the proposed new section will be accepted for 30 days following publication and may be submitted to Srin Surapanani, Staff Attorney, Northern Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to srin.surapanani@twdb.state.tx.us or by fax @ 512/463-5580.

The new section is proposed under the authority of the Texas Water Code §6.101 and §15.605 which provide the Texas Water Development with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

The statutory provisions affected by the proposed new section are Texas Water Code Chapter 15, Subchapter J.

§375.306. Lending Rates.

The interest rate for applicants receiving funding pursuant to this subchapter will be the 140% of the rate pursuant to §375.52 of this title (relating to Lending Rates).

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

Filed with the Office of the Secretary of State on February 21, 2002.

TRD-200201062
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: April 17, 2002
For further information, please call: (512) 463-7981

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 163. COMMUNITY JUSTICE ASSISTANCE DIVISION STANDARDS

37 TAC §§163.3, 163.5, 163.21, 163.31, 163.33 - 163.35, 163.37, 163.39 - 163.43, 163.46, 163.47,

The Texas Board of Criminal Justice, on behalf of the Texas Department of Criminal Justice-Community Justice Assistance Division (CJAD), proposes amendments to §§163.3, 163.5, 163.21, 163.31, 163.33 - 163.35, 163.37, 163.39 - 163.43, 163.46, and 163.47, standards for Community Supervision and Corrections Departments (CSCDs). Sections 163.3, 163.5, 163.21, 163.35, and 163.46, contain non-substantive changes for clarification purposes. The amendments to §§163.31, 163.33, 163.34, 163.37, 163.39 - 163.43, and 163.47, are more substantive and are summarized by section as follows. Section 163.31 provides for interagency relationships. Section 163.33 clarifies training hour documentation procedures and sets forth circumstances in which CSOs must re-certify. Section 163.34 clarifies definitions of lethal and non-lethal weapons; sets policies on weapon issues and TDCJ Emergency Action Center notification. Section 163.37 requires sex offender registration documentation be maintained in case file. Section 163.39 expands sentencing options for judges; requires supporting records be submitted by judicial districts interested in establishing a CCF; clarifies Community Corrections Facility (CCF); adds public meeting restrictions to contracted private vendors desiring TDCJ-CJAD funds to lease, purchase or construct buildings for correctional or rehabilitation facilities; requires CCF capacity revisions be approved through the community justice plan amendment process; requires Contract Residential Facilities to comply with applicable competitive bidding laws, contract terms and conditions and requires monitoring and auditing of the facility operations; revises timeframe on employee TB screening; requires criminal history and arrest records be obtained prior to employment on each CCF employee, volunteer or intern to be maintained in their personnel file; requires compliance with any state, federal, local law or building code related to safety, sanitation, and health and requires maintenance of such records and prompt written notification of any non-compliance; requires compliance with applicable laws and regulations regarding water supply; requires compliance with health regulations and codes regarding sanitation; requires compliance regarding waste; requires compliance with building codes regarding buildings; requires compliance standards regarding fire evacuation plans; requires written plans for emergency evacuation; restricts commingling of residents and jail inmates; requires a housekeeping and maintenance plan be in effect; requires Guidelines be dated and revises the review period on Operation Manuals; requires all CCFs have written policies, procedures, and practices that restrict the use of physical force and requires written UOF reports be submitted promptly; added the Grievance Procedure to be made available to all CCF offenders; extends the requirements involving incident notification; deletes the eligibility criteria for placement into a CCC; clarifies capacity constraints and affect on pending placement; expanded Health Care Section to cover emergency health care, health screening and medical examinations; serious and infectious diseases, dental care, medications, female offenders, mental health, suicide prevention; personnel, informed consent; research participation, notification and health records; requires CCF director to ensure compliance with Texas Government Code and applicable laws regarding notification to crime victims of facility residents; and adds the term non-emergency to discharge criteria. §163.40 clarifies who signs a diagnostic summary; added reference to deadline in Discharge Summary; sets forth level of treatment requirements; clarifies the admission intake process; deleted modality and of treatment in Modified Therapeutic Community; clarifies actions of substance abuse counselors at intake; deleted Section regarding Therapeutic Communities; adds requirements regarding staffing for modified therapeutic community; revises offender treatment plan requirements; added reference to outpatient treatment levels and clarifies notification to TCOMI. Section 163.41 extends confidentiality requirements regarding HIV and medical and psychological information. Section 163.42 clarifies and extends definition of substantial noncompliance. Section 163.43 clarifies financial procedures regarding requested information from CSCDs and other potentially eligible TDCJ-CJAD funding recipients; clarifies

restrictions on CSCD generated revenue and available records; clarifies the intent of TDCJ-CJAD funding; revises intended usage of CSCD generated revenue; clarifies agency and duty titles and types of record files maintained; adds scheduling timeframe for budget approvals and requires use of Financial Management Manual for TDCJ-CJAD Funding regarding inventory. Section 163.47 adds hearing expectations regarding contested matters; requires prepaid postage on contested matters; provides option for further hearing before the Judicial Advisory Council and clarifies procedure and timeframe for submission of request for JAC hearing and extends testimony in contested matters to include affidavit.

Brad Livingston, Chief Financial Officer for TDCJ has determined that there may be minimal fiscal implication resulting from amendments on CSCDs for the first five year period of operations. He has further determined that there may be minimal fiscal effect on local government for the next five year period, and that the implementation of the amendments will have no effect on small businesses, as they will not have to comply with the rules.

The Department of Criminal Justice has determined that the public benefit and cost the proposals represent are an effort to improve Community Supervision and Corrections Departments resulting in increased public safety.

Comments should be directed to Mr. Carl Reynolds, TDCJ-OGC P.O. Box 13084, Austin, Texas 78711, or Carl.Reynolds@TDCJ.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under Texas Government Code §492.013, which grants general rulemaking authority to the Board of Criminal Justice, and §509.003, which authorizes the Board to adopt reasonable rules establishing minimum standards for the operations and programs of community supervision and corrections departments.

Cross-Reference to statute: Government Code §492.013 and §509.003.

§163.3. Objectives.

The objectives of the Texas Department of Criminal Justice-Community Justice Assistance Division (TDCJ-CJAD) standards are:

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

(3) to assist CSCDs [~~community supervision and corrections departments (CSCDs)~~] in providing protection to the community and rehabilitation services for the offender;

(4) - (10) (No change.)

§163.5. Waiver to Standards.

The TDCJ-CJAD director may grant a waiver to a CSCD, or other state-aid recipient, from a standard or standards upon receipt, examination and approval of a request for waiver by TDCJ-CJAD. The request for waiver must include a plan to comply with said standard or standards by a certain date, and an explanation as to why the CSCD [~~agency~~] is not currently in compliance with said standard or standards. When out of compliance with any standard, the request for waiver of standards must immediately be submitted by the CSCD [~~agency~~] director to the TDCJ-CJAD director. If the waiver is approved by the TDCJ-CJAD director, the waiver becomes part of the audit record for compliance with that standard.

§163.21. Administration

(a) CSCD Director. The district judge or judges shall appoint a CSCD director, who shall meet, at a minimum, the same eligibility criteria as a community supervision officer (CSO) as cited in the Texas Government Code §76.005, and §163.33 of this title (relating to CSOs). [~~community supervision officers).~~] It is the responsibility of the CSCD director to apply state, local, and other available resources to employ a sufficient number of officers and other employees to perform the professional and clerical work of the department as required by law, TDCJ-CJAD standards, and local community corrections needs as identified in the local community justice plan. The TDCJ-CJAD director is to be notified by the administrative judge of the appointment of a CSCD director.

(b) - (h) (No change.)

(i) Compliance with statutes and TDCJ-CJAD policy statements. CSCD directors shall ensure that all CSCD operations comply with all applicable local, state, and federal laws and TDCJ-CJAD policy statements and official manuals pertaining to CSCDs.

(j) (No change.)

§163.31. Sanctions, Programs, and Services.

(a) Core services. All CSCDs shall provide the following core services:

(1) (No change.)

(2) Basic supervision:

(A) - (H) (No change.)

(I) provide access to assessment and access to treatment services for sex offenders and violent offenders and maintain[~~. Also,~~] appropriate levels of supervision [~~should be maintained~~] for both of these types of offenders.

(3) (No change.)

(b) (No change.)

(c) Local/regional planning. CSCD directors participating in regional programs and services shall work with the directors of other CSCDs impacted by those regional efforts in the planning, development, and implementation of regional programs/services to address offender needs. Regional programs/services shall be designed to address regional needs as identified in each jurisdiction's community justice plan [~~plans~~] and as the more efficient economical response to specific offender issues for each of the participating jurisdictions.

(d) Community service restitution (CSR). CSCD directors shall maintain written agreements with governmental and/or nonprofit agencies and organizations to provide offenders opportunities to comply with court-ordered community service restitution according to the Texas Code of Criminal Procedure, art. [~~Article~~] 42.12, §16, CSR programs and referrals.

(e) (No change.)

(f) Methods for measuring the success of community supervision and corrections program [~~programs~~]. For purposes of Texas Government Code §509.007(b), the method for measuring program completion is defined as the completion of all required components of the program, and/or an offender's release from the program that is not related to any non-compliant behavior; an inappropriate placement; or death. The method for measuring recidivism is defined as a rearrest for a new separate offense that is punishable by incarceration (i.e., Class B Misdemeanors and up). This definition does not include arrests for Motions To Revoke community supervision and bond forfeitures.

(g) Conflicts of interest. The CSCD director shall ensure that there is a written policy concerning conflicts of interest. The policy

shall address the prohibition of possible conflicts of interest affecting [~~between~~] the CSCD, its supervision officers or employees [~~and any other groups or individuals~~].

(h) Partnerships with Law Enforcement Agencies, etc. At the direction of the district judge or judges, CSCDs shall cooperate and provide assistance to municipal, county and state law enforcement agencies or peace officers related to offender supervision, absconder apprehension, victim services, and other community-based criminal justice activities.

§163.33. Community Supervision Officers

(a) Eligibility. In accordance with Texas Government Code §76.005, to [~~To~~] be eligible for employment as a CSO [~~community supervision officer~~] who supervises offenders, a person:

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

(3) cannot be employed as a peace officer or work as a reserve or volunteer peace officer; and

(4) (No change.)

(b) Training. CSCD directors, assistant directors, CCF [~~residential~~] directors, assistant CCF [~~residential~~] directors, CSO supervisory staff and CSOs [~~community supervision officers~~] shall obtain not less than 80 documented hours of professional skill-based training each biennium. Forty hours are to be approved by the CSCD director and 40 hours to be approved by the TDCJ-CJAD director, or her/his designee. Up to 40 hours, in excess of the 80 hours, may be carried over from one biennium to the next. A certified CSO who fails to obtain the required 80 hours of training within a biennium will be ineligible to serve as a CSO. A CSO, exempt from certification, who fails to obtain the required 80 hours of training within a biennium, will be ineligible to serve as a CSO until the required hours are obtained. The CSCD director or his/her designee shall ensure that training records are maintained and available for TDCJ-CJAD auditors. Those records shall reflect the following: [~~number of training hours accrued, and the type of training attended, for all employees required to have any TDCJ-CJAD training hours. A community supervision officer failing to obtain the required 80 hours of training within a biennium will be ineligible to serve as a community supervision officer.~~]

(1) the number of training hours accrued;

(2) the type of training attended with supporting documentation;

(3) specification of the number of accrued hours that are approved by the CSCD director;

(4) the number of accrued hours that are approved by the TDCJ-CJAD director; and

(5) the number of training hours carried over from one biennium to another.

(c) Certification. Any CSO [~~community supervision officer~~] who is first employed by a CSCD director or judicial district in this state after September 1, 1987, is required to complete the certification course work and obtain a passing grade on the certification examination within one year of the beginning date of employment as a CSO [~~community supervision officer~~]. An officer failing to achieve certification within one year of their employment date may not continue to be employed as a CSO [~~community supervision officer~~] beyond the specific date by which they are to have achieved certification, unless TDCJ-CJAD has granted an extension for completion of course work [~~coursework~~] and examination as allowed by law. A CSO [~~community supervision officer~~] who was employed by any CSCD in this state on or at any time before September 1, 1987, is exempt from the requirements of the certification program.

(d) Certification examination. A new CSO [~~community supervision officer~~], employed on or after September 2, 1987, who completes the certification course work but fails the examination, will be allowed to take the examination one more time. An officer failing the examination a second time, will be required to complete the certification course work again before being allowed to take the examination a third and final time. CSOs will be eligible to pursue the certification requirements two years after the last testing date, and are ineligible to supervise direct cases until certification is achieved.

(e) Exempt officers certification. Certification course work and the certification examination will be available to CSOs [~~community supervision officers~~] appointed prior to September 2, 1987. An exempt officer who wishes to be certified will be given one opportunity to pass the certification examination in order to be certified. If the CSO [~~officer~~] fails the examination, the officer must complete the certification course work before attempting to pass the examination again.

(f) Residential officer certification. A residential CSO [~~community supervision officer~~], employed or appointed as such on or after September 2, 1989, shall satisfactorily complete the course work and examination for residential certification offered by TDCJ-CJAD not later than the first anniversary of the date on which the officer begins employment with the department's residential facility. Provisions of subsections (c)-(h) of this section shall also apply to residential CSO [~~community supervision officer~~].

(g) Recertification. Once an officer is certified, if the CSO [~~officer~~] fails to maintain certification, recertification will be immediately required by successful completion of the certification examination. An officer who fails the examination[~~,~~] must complete the certification course work [~~coursework~~] for recertification. If a CSO who is subject to the certification provisions of CJAD Standard subsection (c) of this section, and who has been employed as a CSO for one year or longer, leaves the employment of a Texas CSCD for more than one year the CSO is required to become recertified. Such recertification must be accomplished within one year of re-appointment by taking and successfully passing the CSO Certification exam. An officer who fails the exam must complete the CSO certification course and pass the exam to be recertified. A CSO subject to the certification provisions of CJAD Standard subsection (c) of this section, and who has been employed as a CSO for less than one year and leaves the employment of a Texas CSCD for more than one year, is required to become recertified by completing the CSO certification course and successfully passing the exam.

(h) Certification status. An officer who fails to maintain his/her CSO certification or residential certification by not obtaining 80 hours of training in accordance with subsection (b) of this section, is immediately ineligible to supervise direct cases until recertification is achieved.

(i) Dual certifications. Residential CSOs [~~community supervision officers~~] are required to be certified as a CSO [~~community supervision officer~~] and to further obtain certification in residential service. They must complete both certification courses as noted by the time frames specified in subsections (c) and (f) of this section. However, they only need to complete 80 hours of skill-based training related to community supervision and residential programs per biennium as specified in subsection (b) of this section to maintain both certifications.

(j) Residential personnel training. All CSCD direct care staff of a residential facility shall be provided at least 40 hours of documented professional skill-based training per biennium. At least 20

training hours per biennium shall be applicable to the needs of the population served by the facility. All of the hours shall be approved by the CSCD director. At least 20 of the hours per biennium must be approved by the TDCJ-CJAD director or his/her designee. The CSCD director shall have written policy regarding training records for each employee that are maintained to reflect the following: the number of training hours accrued, the type of training attended with supporting documentation, specification of the number of accrued hours that are approved by the CSCD director, the number of accrued hours that are approved by the TDCJ-CJAD director, and the number of training hours carried over from one biennium to another. A maximum of 20 hours earned per biennium, which are in excess of the 40 required hours that biennium, may be carried over to the next biennium. All direct care staff of a residential facility shall receive training in the reintegration model training programs offered by the TDCJ-CJAD.

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

(k) (No change.)

§163.34. Carrying of Weapons.

(a) In accordance with Texas Government Code §76.0051, a CSO [~~A Community Supervision and Corrections Department (CSCD) officer~~] is authorized to carry a handgun or other firearm [~~weapon~~] while engaged in the actual discharge of the officer's duties only if:

(1) (No change.)

(2) The CSCD director [~~Director of the CSCD~~] and the judges participating in the management of the CSCD grant the authorization.

(b) This section does not authorize a CSO [~~CSCD officer~~] to carry a firearm [~~weapon~~] while off-duty. [~~A CSCD officer is engaged in the actual discharge of the officer's duties when he is acting within the course and scope of his employment and he is actually authorized to engage in the work that is being performed. A CSCD officer that is on "on-call" status is not considered as being engaged in the actual discharge of the officer's duties. The CSCD, judicial district, Agency, and State assume no liability or responsibility for such conduct that exceeds the scope of this section.~~]

(c) The carrying of a handgun or other firearm [~~weapons~~] by CSOs [~~CSCD officers~~] shall be done strictly in accordance with Texas Government Code §76.5001 and the authorization, policy and procedures promulgated by the Director and judge(s) participating in the management of the CSCD as set forth in subsection (e) of this section. [~~for self-defense as defined in the Texas Penal Code and in no way grants any additional law enforcement powers not already authorized by law.~~]

(d) Prior to undergoing training to carry a firearm [~~weapon~~], a CSO [~~CSCD officer~~] must meet the following qualifications.

(1) The CSO [~~A CSCD officer~~] must be examined by a licensed psychologist or psychiatrist and declared in writing by the psychologist or psychiatrist to be in satisfactory psychological and emotional health for the carrying of a weapon in the performance of their duties [~~to be the type of CSCD officer~~] for which a certificate of firearms proficiency is sought [~~appropriate~~].

(2) The CSO must execute an instrument wherein the CSO acknowledges: [~~It is a violation of law for an individual to possess any firearm or ammunition if the individual has been convicted of a misdemeanor or felony crime of domestic violence. If a CSCD officer has been convicted of a misdemeanor crime of domestic violence, he shall not been allowed to carry a weapon while engaged in the actual discharge of his duties and he shall not be allowed to participate in firearm training. It is the employee's responsibility to inform his supervisor immediately of any conviction.~~]

(A) it is unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year or any crime, misdemeanor or felony, of domestic violence to possess any firearm or ammunition; and

(B) it is the officer's responsibility to immediately inform his supervisor and the CSCD director of any arrest, charges or conviction related to such crimes.

(e) Each CSCD that elects to authorize certain, or all, of its CSOs to carry firearms in accordance with the foregoing requirements must adopt written policies and procedures defining which of its officers have authority to carry firearms and the limitations that apply to their carrying and use of firearms. Such written policies and procedures shall be submitted by the CSCD to CJAD and specify: [~~Policy and Procedures.~~]

[~~(1) Each CSCD shall adopt written policies and procedures that clearly define what authority, if any, the CSCD's officers have to carry firearms and submit those policies to CJAD for documentation purposes and that specify:~~]

(1) [~~(A)~~] the firearm training and qualification requirements;

(2) [~~(B)~~] the handling, use, and storage of firearms;

(3) [~~(C)~~] the types of firearms authorized; and,

(4) [~~(D)~~] the process for reporting and investigation of incidents related to the possession or use of firearms by CSOs.

(f) Each CSCD that elects to authorize CSOs to carry or utilize less than lethal weapons (aerosol sprays, chemical agents, restraining devices, stun guns, etc) must adopt written policies and procedures defining which of its officers have authority to carry same and the limitations that apply to their carrying and use. Such written policies and procedures shall be submitted for review and approval by the TDCJ-CJAD director:

(1) the training, qualification and certification requirements;

(2) the handling, use, and storage of the particular weapons and devices involved;

(3) the types and relevant specifications that apply to the less than lethal weapons that are authorized; and

(4) the process for reporting and investigation of incidents related to the possession or use of less than lethal weapons (aerosol sprays, restraining devises. stun guns, etc).

(g) [~~(2)~~] CSCDs that elect [~~choose~~] not to authorize CSOs [~~allow CSCD officers~~] to carry firearms or use less than lethal weapons in the performance of their duties shall adopt a written policy statement disallowing such practices, as applicable [~~practice~~]. Each new officer hired shall be notified of these policies prior [~~this policy prior~~] to an offer of employment by the CSCD.

(h) [~~(f)~~] Requirements of the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) [~~TCLEOSE Requirements~~]

(1) CSOs [~~CSCD officers~~] authorized by the CSCD to make application to TCLEOSE for certification in firearms proficiency in accordance with the above provisions must utilize TCLEOSE approved forms and provide copies to both TDCJ-CJAD and the CSCD.

(2) CSCDs shall conduct a comprehensive background check on all CSOs [~~CSCD officers~~] seeking firearms certification.

(3) CSCDs shall maintain records of background information obtained on all CSOs [~~CSCD officers~~] seeking firearms certification.

(4) CSCDs shall maintain records of annually required requalification on all CSOs [~~CSCD officers~~] obtaining firearms certification.

(5) CSCDs shall notify TCLEOSE if a CSO's [~~CSCD officer's~~] authority to carry a firearm is rescinded.

(6) CSCDs authorizing CSOs [~~CSCD officers~~] to carry firearms shall notify TCLEOSE of the name, address, [~~and~~] telephone and fax numbers [~~number~~] of the CSCD Director.

(7) Each CSCD shall allow TCLEOSE and other law enforcement agencies access to records pertaining to firearms for auditing and investigation purposes.

(i) [~~(g)~~] CSOs Training and Qualification requirements.

(1) No CSO [~~CSCD officer~~] shall be granted permission to carry a firearm in the performance of their [~~his~~] duties unless that officer has completed a firearms training program approved by TCLEOSE and has been issued a certificate of firearms proficiency by TCLEOSE as provided in subsection (a) of this section.

(2) Firearms training provided to CSOs [~~Training~~] shall be designed to prepare such CSOs [~~CSCD officers~~] to carry such weapons in the context of conducting field visits, participating in community based criminal justice initiatives with law enforcement agencies, and in dealing with the safety and self-defense considerations related to such activities. [~~and to deal with safety issues that may arise in that context for reasons of self-defense.~~]

(3) CSO [~~A~~] qualification of weapons usage, a periodic proficiency test, and documentation of training shall be done on a yearly basis in addition to the required TCLEOSE certificate of firearms proficiency.

(4) Specific firearms and other weapons training course guidelines and recommendations shall be published in the *TDCJ-CJAD Weapons Procedures Guidebook* as amended from time to time.

(j) [~~(h)~~] Handling, Use, and Storage of Firearms.

(1) CSOs [~~CSCD officers~~] authorized to carry weapons shall provide their own weapons.

(2) CSCDs shall appoint an individual within their department to be responsible for yearly [~~monthly~~] inspection and maintenance programs for firearms [~~weapons~~] used by CSOs [~~CSCD officers~~].

[~~(3) Unless the CSCD officer is carrying a weapon as a private citizen under the Concealed Handgun law or other applicable law, and while off-duty, any firearm shall be stored at the CSCD officer's home when not being carried in the actual discharge of the officer's duties.~~]

(k) [~~(i)~~] Types of Firearms Authorized.

(1) CSOs [~~CSCD officers~~] are authorized to carry the following weapons:

(A) Double Action Revolvers; or

(B) Semi-automatic Pistols.

(2) Barrel length of weapon must be between 2" to 5" [~~2 inches to 5 inches~~].

(3) Approved cartridges shall be:

(A) 9mm Luger (9x19);

(B) .38 Special;

(C) .357 Magnum;

(D) 357 Sig;

(E) .40 Smith and Wesson;

(F) 10mm Auto;

(G) .45 Auto;

(H) .380 Auto

(4) Ammunition. All carried ammunition will be factory original loads of bullet weight between 85 [~~115~~] and 230 grains, per Sporting Arms Ammunition Manufacturer Institute (SAAMI) [~~(SAMMI)~~] Guidelines.

(l) [~~(j)~~] Reports to TDCJ-CJAD. [~~Reporting and Investigation of Uses of Force and Notification of Incidents.~~]

(1) Each CSCD shall have a written Use of Force policy and a written procedure for reporting and investigating each incident where a firearm or less than lethal weapon is discharged, utilized or drawn on an individual. The term "to draw" means to unholster a firearm [~~weapon~~] in preparation for use and/or as self-defense against a perceived threat.

(2) Such procedure shall include:

(A) notification of incidents;

(B) procedures for interaction with outside entities (i.e., local law enforcement, media);

(C) internal investigation procedures; and

(D) employee support components.

(3) Notification of Incidents to the Texas Department of Criminal Justice-Emergency Action Center (TDCJ-EAC). Serious incidents, such as a CSO's [~~the~~] drawing of a firearm [~~weapon~~] on an individual or the unauthorized use of a less than lethal weapon by an officer, shall be promptly reported to TDCJ-EAC (936) 437-1448 and in all events [~~(409-294-2448)~~] within 24 hours of the incident. Incidents involving a CSOs [~~and the~~] shooting of an individual shall be reported to TDCJ-EAC immediately, if possible, and in all circumstances within three hours of occurrence. A preliminary written report of each of the above-described incidents shall be sent to CJAD within ten days of the occurrence.

§163.35. Supervision

(a) Definitions. The following words and terms, when used in this section, shall be defined as follows and apply to both felonies and misdemeanors, unless the context clearly indicates otherwise.

(1) Case--An offender assigned to a CSO [~~community supervision officer~~] for supervision.

(2) Direct supervision--Offenders who are legally on community supervision and who work or [~~and/or~~] reside in the jurisdiction in which they are being supervised and receive a minimum of one face-to-face contact with a CSO [~~community supervision officer~~] every three months. Direct supervision begins at the time of initial face-to-face contact with an eligible CSO. Local CSCDs may maintain direct supervision of offenders living and/or working in adjoining jurisdictions if the CSCD has documented approval from the adjoining jurisdictions.

(3) Face-to-face contact--A CSO [~~community supervision officer~~] communicates in person with the offender.

(4) Field visit--A CSO [~~community supervision officer~~] communicates in person with the offender at the offender's place of residence or at another location outside the CSCD office.

(5) Indirect supervision--Maintenance of a file and/or record of an offender under supervision who meets one of the following criteria:

(A) - (B) (No change.)

(C) an offender who has absconded or who has not contacted his CSO [~~community supervision officer~~] in person within three months;

(D) - (E) (No change.)

(b) (No change.)

(c) Supervision process. CSOs [~~Community supervision officers~~] shall provide direct supervision for cases to include, but not be limited to, the following tasks.

(1) Orientation/intake. An orientation/intake session with the offender shall be conducted after the court has placed the defendant under supervision. This session shall include a thorough discussion of the conditions of community supervision and terms of release. The CSO [~~community supervision officer~~] shall determine that the offender has received a copy of the conditions of community supervision or terms of release ordered by the court as provided by law.

(2) Assessments. An assessment process that gathers relevant and valid information shall be completed on every offender. This process shall specifically address the offender's risk factors, need areas, obstacles to meeting those needs, offender strengths, and offender resources. The CSO [~~community supervision officer~~] shall request specialized assessments for offenders when it is determined that alcohol or drug abuse contributed to the offense and pursue specialized evaluations when they would significantly assist in the development of appropriate supervision plans for special needs offenders.

(3) Case classification. Within two months of the date of community supervision placement, acceptance of a transfer case, or discharge from any residential facility, jail, or institution, the CSO [~~community supervision officer~~] shall complete an approved TDCJ-CJAD case classification instrument to assist in the evaluation of the degree of supervision needed by each individual based on the offender's risk and/or needs. Within ten working days of the date of an offender's admission to a CCF [~~or a CCC~~], the CSO assigned to supervise the offender in the facility shall complete the TDCJ-CJAD case classification/assessment instrument.

(4) Strategies for case supervision (SCS) assessments. Within two months of the date of community supervision placement, acceptance of a transfer case, or discharge from any residential facility, jail, or institution, the CSO [~~community supervision officer~~] shall conduct a SCS assessment on each felony offender classified as maximum on case classification, unless a SCS was previously completed. While the SCS assessment may be a useful case management tool, it is not required for offenders during participation in residential programs.

(5) Case supervision or treatment plan. Within two months of the date of the most recent community supervision placement, acceptance of a transfer case, or discharge from any residential facility, the CSO [~~community supervision officer~~] shall develop a written individualized case supervision or treatment plan based on the offender's risk and need factors to address specific problem areas and assist the offender to achieve responsible behavior. The supervision or treatment plan shall be completed within ten working days from the date of an offender's admission to a CCF [~~or a CCC~~].

(6) Reassessments. CSOs [~~Community supervision officers~~] shall reevaluate risk and need factors and supervision plans at least every 12 months for all direct cases. An approved TDCJ-CJAD reassessment shall be completed any time a significant change occurs in the status of the offender. Any necessary modification of the supervision plan shall be indicated in writing in the case file. Upon discharge from a residential facility, the CSO assigned to supervise the offender in the facility shall complete a discharge plan.

(7) Supervision contacts. CSOs [~~Community supervision officers~~] shall make face-to-face, field visit, telephone, and collateral contacts with the offender, family, community resources, or other persons pursuant to and consistent with a supervision plan and the level of supervision on which the offender is being supervised. Each CSCD director shall establish supervision contact and casework standards at a level appropriate for that jurisdiction, but in all cases, offenders at increased levels of supervision because of assessments of greater risk or special needs [~~higher levels of supervision~~] shall receive a higher level of contacts than offenders at lower levels of supervision. The nature and extent for supervision [~~Supervision~~] contacts with offenders shall be specified in the CSCD's written policies and procedures.

(8) Documentation in supervision case files. CSOs [~~Community supervision officers~~] shall use a problem oriented record keeping system to document all significant actions, decisions, services rendered, and periodic evaluations in the offender's case file, including, but not limited to, the offender's status regarding the level of supervision, compliance with the conditions of community supervision, progress with the supervision plan, and responses to intervention.

(9) Violations. CSCD directors shall work in conjunction with the local judiciary to specify written policies and procedures under Texas Code of Criminal Procedure, art 42.12, §10 wherein CSOs [~~Community supervision officers~~] may make recommendations to the courts regarding violations of conditions of community supervision, as well as when violations may be handled administratively. The availability of the continuum of sanctions or alternative to incarceration shall be considered by the CSO [~~community supervision officer~~] and recommended to the court in eligible cases as determined appropriate by the jurisdiction.

(10) Courtesy supervision. Except in cases of non-CSCD residential facility placements, courtesy supervision shall be requested if an offender will be in another jurisdiction for more than 30 days, except when good cause can be shown. Only the court retaining jurisdiction over a defendant has the authority to modify or alter a condition of community supervision. CSCD directors shall ensure that CSOs [~~community supervision officers~~] providing direct supervision to offenders transferred from other Texas jurisdictions shall fully enforce the order of the court that placed the individual on community supervision. It is the responsibility of the offender to comply with the conditions of community supervision as imposed by the court. CSCD directors shall ensure that CSOs [~~community supervision officers~~] provide the same level of supervision to courtesy cases as they do for the offenders in their jurisdiction. When transferring a case for courtesy supervision, the documents necessary for transfer shall include, at a minimum, the transfer form, the court order placing the person on community supervision citing all conditions of community supervision, the offense report, criminal history, tracking number (TRN) [~~TRN~~] and state identification (SID) [~~SID~~] number, the pre/post-sentence investigation report where legally mandated, and any assessments that have been completed. CSCD directors who decline to provide courtesy supervision to

offenders from other jurisdictions shall immediately notify the original jurisdiction of the reasons for declining courtesy supervision.

(11) Transporting offenders. CSOs [~~Community supervision officers~~] shall not transport offenders held in a county jail pursuant to an arrest warrant. All other transportation of offenders shall be in accordance with the CSCD's policies and/or pursuant to a court order.

§163.37. Reports and Records.

(a) Case records. CSCD directors shall develop and maintain a case record management system on offenders receiving any type of supervision by the CSCD. [~~Each case record shall contain a chronological recording of all significant actions, decisions, services rendered, assessments, pre/post-sentence investigation reports (PSIR), and periodic evaluations.~~] Confidential items relating to medical and psychological information from any of these documents shall be handled in accordance with § 163.41 of this title (relating to HIV-AIDS, Medical and Psychological Information). All case records shall contain a written criminal history record or summary issued by a law enforcement agency. Confidentiality of case records shall be maintained in accordance with federal and state laws. Information may only be released under the circumstances as authorized by law or as directed by the court. Documentation of all sex offender registration shall be maintained as required by the Records Retention Act, Chapter 441, Texas Government Code. Each case record shall contain:

(1) court order placing the person on community supervision citing all conditions of community supervision;

(2) a chronological listing of all significant actions, decisions, services rendered, assessments;

(3) the pre/post-sentence investigation report (PSIR);

(4) periodic evaluations; and

(5) other additional documents or information related to the offender as deemed appropriate by the CSO or CSCD Director.

(b) PSIR confidentiality. Each PSIR [~~All PSIRs~~] prepared or approved by a CSO [~~community supervision officer~~], and all information obtained in connection with PSIRs, is [~~the pre/post-sentence investigations, are~~] confidential and may be released only to those persons and under those circumstances as authorized by Texas Code of Criminal Procedure, art 42.12, §9 [~~law~~] or as directed by the court having jurisdiction over the defendant [~~judge~~].

(c) Pre/post-sentence investigation reports (PSIRS). Pursuant to Texas Code of Criminal Procedure, art 42.12, §9 the [~~The~~] CSCD director shall ensure a CSO prepares, (or approves, [~~that a community supervision officer(s) will prepare, (or approve,~~] if prepared by others) a [~~(PSIR)~~] pre-sentence [~~presentence~~] investigation report on a felony defendant [~~offender~~] unless the defendant's punishment is to be assessed by a jury, the defendant is convicted of or enters a plea of guilty or nolo contendere to capital murder, the only available punishment is imprisonment, or the judge is informed that a plea bargain agreement exists, under which the defendant agrees to a punishment of imprisonment, and the judge intends to follow the agreement. The CSCD director shall ensure that CSOs [~~a community supervision officer(s) will~~] prepare (or review and approve), if prepared by another a post-sentence [~~a postsentence~~] investigation report if the judge has requested the preparation of such a report in accordance with the provisions of Texas Code of Criminal Procedure, art 42.12 §9(k). A CSO[~~. A community supervision officer~~] shall prepare (or review and approve, if prepared by another [~~approve~~]) a PSIR on all misdemeanor defendants [~~offenders~~] unless the defendant requests a report not be made and the court agrees, or if the court finds there is sufficient information in the record to permit the meaningful exercise of sentencing discretion. [~~The PSIR shall provide the court with accurate, objective, and relevant elements in accordance with statutory requirements.~~]

(d) PSIR format. CSCD directors shall ensure that CSOs and any other designated individuals who prepare, complete, review or approve [~~community supervision officers (or designated others) completing~~] PSIRs follow, at a minimum, an approved TDCJ-CJAD PSIR format in preparing felony PSIRs. CSOs [~~PSI reports. Community supervision officers~~] may use a format other than the TDCJ-CJAD PSIR format as long as the content requirements outlined in Texas Code of Criminal Procedure, art 42.12, §9(a) and the preceding subsection (c) of this section are met and are in the format as [~~is~~] approved both by TDCJ-CJAD and the court having jurisdiction of the defendant.

(e) Staffing for PSIRS. CSCD directors shall have the necessary trained staff and resources to conduct pre-sentence [~~presentence~~] investigations on all cases and shall provide written reports of the results for the courts for all felony and misdemeanor cases as required by the law and the court.

(f) (No change.)

(g) Transfer to the TDCJ. If a PSIR has been prepared as set forth in subsections (c) and (d) of this section, the CSCD director [~~directors~~] shall forward to the [~~a~~] county that transfers a defendant [~~an offender~~] to the TDCJ that defendant's [~~offender's~~] PSIR [~~prepared according to the TDCJ-CJAD format for PSIRs~~], as well as any other information required by law. To the extent it is available, CSOs shall also forward to the county that transfers the defendant any additional information that has been, [~~, if a PSIR has been prepared. Additional information, if~~] prepared by a CSO [~~community supervision officer~~] for a revocation or other hearing updating information in the PSIRs[~~, shall also be forwarded to the county for the offender's transfer to the TDCJ~~].

(h) (No change.)

§163.39. Residential Services.

(a) General administration.

(1) Purpose. Residential facilities and contract residential beds funded by TDCJ-CJAD shall provide the courts with a sentencing alternative for the purpose of:

(A) confining offenders placed on community supervision and others who are eligible in accordance with statutes; [~~and~~]

(B) providing sanctions, services, and programs to modify criminal behavior, deter criminal activity, protect the public and restore victims of crime; and [~~.~~]

(C) strengthening and expanding the options that are available to judges to impose alternatives other than imprisonment for offenders who violate court-ordered conditions of community supervision.

(2) Feasibility studies. A judicial district [~~The CSCD/agency~~] interested in establishing a residential Community Corrections Facility (CCF) [~~or County Correctional Center~~] shall first conduct and prepare a feasibility study in accordance with the TDCJ-CJAD Feasibility Study Guidelines-Community Corrections Facility (January 2002). The product and results of such feasibility study shall be submitted to TDCJ-CJAD. After the receipt by TDCJ-CJAD of the initial feasibility study related to a proposed CCF, the CSCD/agency may be required to provide supplemental information or additional materials for further review and consideration [~~TDCJ-CJAD residential guidelines for feasibility studies and provide the results to TDCJ-CJAD~~].

(3) Notice of Construction or Operation of a CCF or Other Facilities [~~Facility~~].

(A) If a CSCD or private vendor operating under a contract with a CSCD or judicial district proposes to construct or operate a CCF or other correctional or rehabilitation facility within 1,000 feet of a residential area, a primary or secondary school, property designated as a public park or public recreation area by the state or a political subdivision of the state, or a church, synagogue, or other place of worship, the CSCD must prominently post an outdoor sign at the proposed location of the facility. The sign must be at least 24 by 36 inches in size written in lettering at least two inches in size. The sign must state that a correctional or rehabilitation facility is intended to be located on the premises, and provide the name and business address of the CSCD. The municipality or county in which the CCF or other correctional or rehabilitation facility is to be located may require the sign to be both in English and a language other than English if it is likely that a substantial number of the residents in the area speak a language other than English as their familiar language.

(B) The CSCD must provide notice of the proposed location of the CCF [~~facility~~] to the commissioners court of the county and/or governing body of the municipality where the facility is intended to be located if the commissioners court or governing body has submitted, by resolution, a written request to receive notice.

(4) Public Meetings. A CSCD or private vendor having a contract with a CSCD or judicial district may not establish a CCF or other correctional or rehabilitation facility [~~community corrections facility~~] unless the community justice council serving the CSCD has held a public meeting before the action is taken. In addition, a CSCD may not expend funds provided by TDCJ-CJAD to lease or purchase [~~the Community Justice Assistance Division,~~ acquire] real property, construct buildings, or use a facility or real property acquired or improved with state funds for a CCF [~~community corrections facility~~] unless the community justice council serving the CSCD has held a public meeting before the action is taken. The public meeting must be held at a site as close as practicable to the location at which the proposed action is to be taken. The meeting must not be held on a Saturday, Sunday, or legal holiday. The meeting must begin after 6:00 p.m. More than 30 days before the date of the meeting, the department that the facility is to serve, or a vendor proposing to operate a facility, at a minimum must:

(A) publish by advertisement in three consecutive issues of a newspaper of, or in newspapers that collectively have, general circulation in the county in which the proposed facility is to be located a notice that is not less than 3 1/2 inches by 5 inches containing the following information:

(i) the date, hour, place, subject of the hearing;

(ii) address of the facility or property on which a proposed action is to be taken; and

(iii) a description of the proposed action[~~; and~~]

(B) (No change.)

(5) Maximum Resident Capacity and Facility Utilization. The maximum resident capacity of a CCF [~~or CCC~~] shall be defined as the total number of offenders who can be housed at the facility at any given time as delineated [~~determined~~] by the operating agency in the most current community justice plan and approved by the TDCJ-CJAD director. CCFs [~~and CCCs~~] funded through TDCJ-CJAD shall reach 90% capacity within the first six months of operation and maintain a minimum of 90% thereafter, utilizing appropriate and eligible placements only. Any revisions to the maximum and minimum resident capacities for the CCF shall be subject to the approval by TDCJ-CJAD through the community justice plan amendment process.

(6) Contract Residential Services. Business entities, agencies or persons contracting with CSCDs or judicial districts for residential services shall comply with all applicable competitive bidding and other laws and regulations. CSCDs or judicial districts contracting with business entities, agencies or persons for residential services shall comply with any applicable competitive bidding and other laws and regulations. The CSCD director shall monitor, audit, and inspect the performance and compliance of the service provider and vendor with the terms and conditions of their contract with the CSCD and with applicable laws and regulations. [~~Contract Residential Facilities (CRF). CSCD directors or designees contracting for residential services to operate CCFs and CCCs with TDCJ-CJAD funds shall ensure that the contract residential service provider adheres to all applicable statutes, TDCJ-CJAD standards, policies, guidelines, and terms of the contract between the CSCD and the said provider.~~]

(7) Mission Statement. The CSCD director and CCF director [~~or designee~~] shall prepare and maintain a mission statement that describes [~~reflects~~] the general purposes [~~purpose~~] and overall goals of the CCF's programs [~~program~~].

(b) Personnel.

(1) Screening for Tuberculosis Infection. The CSCD director or CCF director [~~designee~~] shall ensure that as soon as practicable but not later than within 7 calendar days of [~~prior to~~] assuming any duties within a CCF [~~or CCC,~~] all staff undergo a screening for tuberculosis infection. Follow-up screening for tuberculosis infection shall be conducted on all staff, at a minimum, once every year from the anniversary date of the initial screening. The results of all screenings shall be maintained on file.

(2) (No change.)

(3) Criminal Histories and Arrest Records. Prior to employment, and on at least an annual or more frequent basis thereafter, criminal histories and arrest records shall be obtained from both the Texas Department of Public Safety and National Crime Information Center on each of the CCF's employees, contract vendor staff (if applicable) and volunteers. This requirement shall apply to both vendor contract and CSCD operated CCFs. Copies of the criminal history and arrest information and records shall be retained in the individual's personnel file.

(c) Building, Safety, Sanitation and Health Codes [~~Building and Safety Codes~~].

(1) Compliance. The CSCD director and CCF director and personnel [~~directors or designees~~] shall ensure that facility's construction, maintenance, and operations complies with all applicable state, federal and local laws, building codes and regulations related to safety, sanitation and health. [~~facility construction is in compliance with state statutes, codes, applicable federal laws, and local building and safety codes.~~] Records of compliance inspections, [~~or~~] audits, or written reports by internal and external sources shall be kept on file for examination and review by TDCJ-CJAD and other governmental agencies and authorities for all time periods from project or program inception forward. The CSCD director and CCF director [~~or designee~~] shall promptly notify the TDCJ-CJAD in writing of any circumstances wherein the facility or its operations do not [~~if the facility does not~~] maintain such compliance.

(2) Water supply. The CSCD directors or designees shall ensure that the facility's potable water source and supply must be sanitary and be approved by an independent, qualified agency or individual to be in compliance with the applicable governmental laws and regulations. [~~Fire, Safety, and Health and Sanitation Codes. The CSCD directors or designees shall ensure that the facility complies with the applicable governmental regulations of the fire, safety, and health and sanitation authorities. Facility personnel shall plan and execute all reasonable procedures for the prevention and prompt control of fire so as to ensure the safety of staff, offenders, and visitors. Documentation of fire, safety, and health and sanitation inspections shall be provided to TDCJ-CJAD upon request. In the event that no applicable local, city, or county codes exist, state codes shall prevail. The facility shall also maintain compliance with minimum guidelines established by TDCJ-CJAD for physical plants of CCFs. Fire prevention regulations and practices to ensure the safety of staff, offenders, and visitors shall include, but are not limited to:~~]

[~~(A) provision of an adequate fire protection service;~~]

[~~(B) a system of fire inspections and testing of equipment at least quarterly;~~]

[~~(C) an annual inspection by local or state fire officials or other qualified persons(s); and~~]

[~~(D) available fire protection equipment at appropriate locations throughout the facility.~~]

(3) Sanitation. The facility audits operations shall conform with the applicable sanitation and health regulations and codes. [~~Contract Residential Services (CRS). CSCDs, sheriffs' departments, or other governmental entities that contract for residential beds/services shall ensure that CRS providers under contract through TDCJ-CJAD funds maintain compliance with local and state safety, health, and sanitation codes, and ordinances.~~]

(4) Waste. The liquid and solid wastes related to the facility audits operations shall be collected, stored and disposed of in accordance with an approved plan by the appropriate regulatory authority, agency, or department.

(5) Physical plant. The facility's buildings, including the improvements, fixtures, electric, and heating and air conditioning, shall conform to all applicable building codes of federal, state and local laws, ordinances, regulations, and minimum guidelines established by the TDCJ-CJAD for physical plants and facilities housing offenders.

(6) Fires. The facility, its furnishings, fire protection equipment and alarm shall comply with the regulations of the fire authority having jurisdiction. There shall be a written evacuation plan to be used in the event of a fire. The plan is to be certified by an independent qualified governmental agency or department or individual trained in the application of national and state fire safety codes. Such plan shall be reviewed annually, updated if necessary, and reissued to the local fire jurisdiction. The facility shall have a qualified person conduct a fire inspection at least quarterly or at other intervals approved by the fire authority having jurisdiction. Fire safety equipment located at the facility shall be tested as specified by the manufacturer or the fire authority, whichever is more frequent. An annual inspection of the facility shall be secured from the fire authority having jurisdiction or other qualified person(s).

(7) Emergency plans. There shall be written emergency plans for the facility and its operations, which include an evacuation plan, to be used in the event of a major flood, storm, or other emergencies. This plan is reviewed annually and updated, if necessary. Evacuation drills are to be conducted at least monthly. Each shift at least every quarter must have conducted an evacuation drill when the majority of offenders are present. All facility personnel must be trained in the implementation of written emergency plans. The evacuation plan should specify preferred evacuation routes, subsequent dispositions and temporary housing of offenders, and provision for access to medical care or hospital transportation for injured offenders and/or staff. The facility's emergency plan(s) shall be distributed to local authorities such as law enforcement, state police, civil defense, etc. to keep them informed of their roles in the event of an emergency. Such emergency plan(s) shall include the following:

(A) location of buildings/room floor plan;

(B) use of exit signs and directional arrows that are easily seen and red; and

(C) location(s) of publicly posted plan.

(d) Separate Inmate Housing. The CSCD director and CCF director [~~directors or designees~~] shall ensure that a facility that is part of or attached to a detention facility or a correctional institution shall house facility offenders separately from the inmates. At no time shall CCF residents/offenders be co-mingled with inmates.

(e) Program and Service Areas.

(1) Space and Furnishings. CCFs [~~The facility~~] shall have space and furnishings to accommodate activities such as group meetings, private counseling, classroom activities, visitation, and recreation.

(2) Housekeeping and Maintenance. The CSCD director and CCF director [~~or designee~~] shall ensure that the facility is clean and in good repair, and a housekeeping and maintenance plan is in effect.

(3) Other Physical Environment and Facilities Issues [~~Sanitation~~]. There shall be written policy and procedures to ensure the following with respect to the CCF:[~~.~~]

(A) -(G) (No change.)

(f) Supervision.

(1) Operations Manual. An [~~The~~] operations manual[~~, which~~] shall be prepared for and used by each CCF which shall contain information and specify procedures and policies for offender census, contraband, supervision, physical plant inspection and emergency procedures, including detailed implementation instructions. Such operation manual shall be accessible to all employees and volunteers [~~contain all procedures for facility security and supervision with detailed implementation instructions, shall be accessible to all employees and volunteers~~]. The operations manual shall include, at a minimum, the matters set forth [~~guidelines as noted~~] in the Guidelines for the Policies and Procedures of TDCJ-CJAD Funded Residential Facilities, dated October 31, 2001. The operations manual shall be submitted to the TDCJ-CJAD Director for review and approval, and such manual must have been approved by the TDCJ-CJAD director at least 60 days prior to acceptance of offenders into the facility [~~and upon request thereafter~~]. Offenders cannot be accepted into the facility until approval is granted by the TDCJ-CJAD. The CSCD director and CCF director [~~or designee~~] shall ensure that the operations manual is reviewed at least every two years, and new or revised policies and procedures are made available, including all changes, prior to implementation to designated staff and volunteers. This manual shall be submitted to TDCJ-CJAD upon request or for auditing purposes [~~annually and updated as necessary~~].

(2) Staffing Availability. The CSCD director and CCF director [~~or designee~~] shall ensure that the CCF [~~facility~~] has the staff needed to provide coverage of designated security posts, surveillance of offenders and to perform ancillary functions. The facility shall have

at least one staff member, on duty, who is the same gender as the resident population.

(3) Activity Log. The CSCD director and CCF director [~~or designee~~] shall ensure that CCF staff maintain an activity log and prepare shift reports that record, at a minimum, emergency situations, unusual situations, unusual incidents and record all absences of offenders from a facility.

(4) Use of Force. The CSCD director and CCF director [~~or designee~~] shall ensure that a CCF has written policies, procedures, and practices that restrict the use of physical force [~~policy defines the use of force~~] to instances of self-protection, protection of offenders or others or[~~,~~] prevention of property damage [~~and only as a last resort in accordance with statutory authority~~]. In no event is the use of physical force against an offender justifiable as punishment. A written report shall be prepared following all uses of force, and all such written reports [~~and~~] shall be promptlysubmitted to the CSCD director and CCF director [~~or designee~~] for review and follow-up. The application of restraining devices, aerosol sprays, chemical agents, etc. [~~devices/chemical agents~~] shall be accomplished in an emergency by any individual in self-protection, protection of others or other circumstances as described previously [~~self-defense or in the defense of another~~].

(5) Use of Firearms. The CSCD director and CCF director [~~or designee~~] shall ensure that the possession of firearms by staff is banned and use of firearms is prohibited in or on facility property except in the execution of official duties by certified peace officers or other duly licensed law enforcement personnel [~~court orders by law enforcement personnel~~].

(6) Access to Facility. The facility shall be secured [~~to provide that offenders remain within the facility and~~] to prevent unrestricted access thereto by the general public or others without proper authorization.

(7) (No change.)

(8) Levels of Security. The CSCD director and CCF director must ensure that levels of security appropriate for the population served by the facility are maintained at all times. These levels of security must create, as a minimum, a monitored and structured environment in which a resident's interior and exterior movements and activities can be supervised by specific destination and time. The facility director or designee may, in his or her discretion, grant offenders exterior movements. Exterior movements include, but are not limited to employment programs, community service restitution, support/treatment programs, and programmatic incentives. The following minimum requirements must be met for all exterior movements:

(A) the CCF [~~facility~~] director or designee approves the exterior movement;

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

[~~(D) a staff member makes random announced and/or unannounced personal or telephone contact(s) with the offender during the exterior movement;~~]

(D) [~~(E)~~] exterior movements involving programmatic incentives may only be granted if the following additional requirements are met:

(i) the offender meets all established requirements for the programmatic incentive, as determined by the supervisor of the program, and submits a written request for the exterior movement;

(ii) the requested absence will not exceed 72 hours unless there are unusual circumstances;

(iii) the offender provides an itinerary for the absence including method of travel, departure and arrival times, and locations during the exterior movement; [~~and~~]

(iv) the CCF [~~facility~~] director or designee approves the itinerary and establishes the conditions of the exterior movement involving programmatic incentives; and [~~.~~]

(v) a staff member makes random contacts with the offender during the exterior movement.

(9) Emergency furloughs. The CCF [~~facility~~] director or designee may, in his or her discretion, grant an emergency furlough to an offender for the purpose of allowing the offender to attend a funeral, visit a seriously ill person, obtain medical treatment, or attend to other exceptional business. Emergency furloughs may only be granted if the following conditions are met:

(A) the offender submits a written request for the emergency furlough;

(B) the CCF [~~facility~~] director [~~or designee~~] verifies through an independent source including, but not limited to a physician, Red Cross representative, minister, rabbi, or a priest, that the presence of the offender is appropriate;

(C) the offender provides proposed itinerary including method of travel, departure and arrival times, and locations during the emergency furlough;

(D) the requested absence will not exceed 72 hours unless there are unusual circumstances;

(E) the court of original jurisdiction approves the travel if the offender will depart the State of Texas;

(F) the CCF [~~facility~~] director [~~or designee~~] approves the itinerary and establishes the conditions of the emergency furlough; and

(G) a staff member makes random announced and/or unannounced personal or telephone contacts with the offender to verify the location of the offender during the emergency furlough.

[~~(g) Safety and Emergency Procedures. A comprehensive written plan shall be formulated and implemented to ensure that offenders, as well as employees, shall remain protected in the event of emergencies, including mental/emotional aberrations, physical acting out, medical situations, riots, escapes, fires, and both natural and civil disasters.~~]

[~~(1) Evacuation Plans. A written emergency evacuation plan shall be posted. The plan shall be reviewed annually and updated as necessary.~~]

[~~(2) Evacuation Drills. The facility shall conduct, at a minimum, quarterly emergency evacuation drills, at different hours, under varied conditions.~~]

(g) [~~(h)~~] Client Abuse, Neglect, and Exploitation. The facility must protect the offender residents [~~clients~~] from abuse, neglect and exploitation.

(h) [~~(i)~~] Rules and Discipline. There shall be documentation of program rule violations and the disciplinary process.

(1) Rules of Conduct. All incoming offenders and staff shall receive written rules of conduct which specify acts prohibited within the facility and penalties that can be imposed for various degrees of violation.

(2) Limitations of Corrective Actions. Specific limits on corrective actions and summary punishment shall be established and

strictly adhered to in an effort to reduce the potential of staff participating in abusive behavior towards participants. Limits shall include:

(A) no physical contact by staff shall be made on a participant;

(B) no profanity, sexual, or racial comments shall be directed by staff at participants;

(C) program participants shall not be utilized to impose corrective actions on other participants;

(D) the severity of the corrective action imposed shall be commensurate with the participant's program status;

(E) the severity of the corrective action shall be commensurate with the severity of the infraction; and,

(F) the duration of corrective action shall be limited to the minimum time necessary to achieve effectiveness.

(3) Grievance Procedure. A grievance procedure shall be available to all offenders in CCFs. Such grievance procedure shall include at least one level of appeal, and shall be evaluated at least annually to determine its efficiency and effectiveness. [~~Incident Notification. The TDCJ-CJAD director shall be notified in writing, within 24 hours, when the following incidents occur at the facility: offender or staff member's death while at the facility; any incident which results in serious bodily injury to a resident or staff member while at the facility or on assignment away from the facility; and, riot/major facility disturbance.~~]

(i) Incident Notification. Within 24 hours of occurrence, the CSCD director and CCF director shall notify and report by telephone or fax all serious or unusual events pertaining to the CCF's operations, staff, and residents to: the judge or one of the judges supervising the department and the TDCJ Emergency Action Center (EAC) in Huntsville, Texas. The EAC shall be responsible for notifying the TDCJ-CJAD Director and appropriate CJAD management staff. Such serious and unusual events for this purpose shall include, but are not limited to the following:

(1) the death of an offender or staff member while at the facility and

(2) any incident which results in life threatening or serious bodily injury to a an offender resident or staff member while at the facility or on assignment (including emergency furloughs or programmatic incentives) away from the facility; and

(3) major disturbance or riot at the facility or in its vicinity.

(j) Offenders' Rights. Offenders [~~The offender~~] shall be granted access to courts, counsel, and confidential contact with attorneys and their authorized representatives. Such contacts include, but are not limited to: telephone communications, uncensored correspondence, and visits.

(k) Offender Eligibility. A CSCD[~~, sheriff's department,~~] or other governmental entity that operates a residential facility, contracts for the operation of a residential facility, or contracts for beds/services, shall define a specific target population of offenders to be served. Placement of offenders in a CCF shall only be by an order of the court and shall meet minimum eligibility criteria as outlined in this section.

(1) (No change.)

(2) Offenders are eligible for placement into a CCF [~~Community Corrections Facility (CCF)~~]:

(A) - (C) (No change.)

(3) (No change.)

[~~(4) Offenders are eligible for placement into County Correctional Centers (CCC):~~]

[~~(A) if convicted of a misdemeanor and sentenced to a term of confinement in the county jail;~~]

[~~(B) in lieu of jail time as a condition of misdemeanor or felony community supervision;~~]

[~~(C) in lieu of jail time as a punishment for violation of conditions of community supervision; or,~~]

[~~(D) if required as a condition of community supervision to participate in a work program or counseling program through a CCC.~~]

(4) [~~(5)~~] Offenders are eligible for placement into a Boot Camp:

(A) if prior to placement, or within seven days after admission, the offender undergoes a physical examination to determine any medical problems that may prevent the offender from satisfactorily participating in the program. The physical examination report shall be maintained in the offender's medical file; and

(B) if prior to placement, or within seven days after admission, the offender undergoes a psychological screening to determine any psychological problems that may prevent the offender from satisfactorily participating in the program. The psychological screening report shall be maintained in the offender's medical file.

(l) Courtesy Supervision. CCFs [~~or CCCs~~] shall, on a space available basis, accept eligible adult offenders needing the residential services on courtesy supervision from other jurisdictions. CSCDs that manage CCFs [~~or CCCs~~] are responsible for the direct supervision of all offenders in the CCF [~~or CCC~~] while in the residential placement.

(m) Denying Admission or Continued Placement. If an offender is placed into a CCF [~~community corrections facility or a county correctional center~~] as a condition of community supervision and the offender is an inappropriate placement, by statute or standard, or does not meet eligibility criteria of the facility as approved by the TDCJ-CJAD, the CSCD[~~/agency director~~] or CCF director [~~designee~~] who is responsible for the management of the CCF[~~/CCC~~] shall notify, in writing, the court of original jurisdiction of these circumstances. If a CCF facility has reached capacity at the time of the eligible offender's placement to that facility, such offender[~~. If placement occurs as a condition of community supervision, an eligible offender for residential placement~~] may be placed on a waiting list for that facility and [~~or~~] returned to the court of original jurisdiction for further instructions or an alternative sanction [~~for an alternative sanction if the facility has reached capacity~~].

(n) Food Service. The food preparation and dining area must provide space for meal service based on the population size and need.

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

(3) Food Service Management. Food service operations shall be supervised by a staff member who is experienced in institutional food preparation or mass food management. All food services staff, including offenders assigned to work in the facility kitchen, shall meet all requirements established [~~be certified as required~~] by the local health authorities [~~authority~~].

(4) (No change.)

(5) Meal Requirements. CSCD directors or CCF director [~~designees~~] shall ensure that at least three meals (including two hot meals) are provided during each 24-hour period. Variations may be allowed based on weekend and holiday food service demands, or in the

event of emergency or security situations, provided basic nutritional goals are met.

(o) Health Care. [~~Each facility shall maintain written policy and procedure to provide access to health care services, including medical, dental and mental health services, under the control of a designated health authority. When this authority is other than a physician, final medical judgments rest with a single designated responsible physician licensed in the state. Arrangements shall be made with health care providers in advance of need.~~]

(1) Access To Care. [~~Public and Private Agencies. The facility shall have a written policy providing residents access to routine medical services, and/or emergency medical services as necessary with a licensed general hospital, clinic or physician.~~]

(A) Offenders shall have unimpeded access to health care and to a system for processing complaints regarding health care.

(B) The facility has a designated health authority with responsibility for health care pursuant to a written agreement, contract, or job description. The health authority may be a physician, health administrator, or health agency.

(C) Each CCF shall have a policy defining the level, if any, of financial responsibility to be incurred by the offender who receives the medical or dental services.

(2) Emergency Health Care. [~~Twenty-four Hour Emergency Care. The CSCD director or designee shall have a written policy providing access to 24 hour emergency medical, psychiatric and dental care, which includes contingency plans and alternate hospitals or a physician "on call" service.~~]

(A) Twenty-four hour emergency health care is provided for offenders, which included arrangements for the following:

(i) On site emergency first aid and crisis intervention;

(ii) Emergency evacuation of the offender from the facility;

(iii) Use of an emergency vehicle;

(iv) Use of one or more designated hospital emergency rooms or other appropriate health facilities;

(v) Emergency on-call physician, dentist, and mental health professional services when the emergency health facility is not located in a nearby community; and

(vi) Security procedures providing for the immediate transfer of offenders, when appropriate.

(B) A training program for Direct Care personnel is established by a recognized health authority in cooperation with the CCF director that includes the following:

(i) Signs, symptoms, and action required in potential emergency situations;

(ii) Administration of first aid and cardiopulmonary resuscitation (CPR);

(iii) Methods of obtaining assistance;

(iv) Signs and symptoms of mental illness, retardation, and chemical dependency; and

(v) Procedures for patient transfers to appropriate medical facilities or health-care providers.

(C) First aid kits are available in designated areas of the facility. Contents and locations are approved by the health authority.

(3) Health Screening and Medical Examinations. Medical, dental and mental health screening exam is performed by health-trained or qualified health-care personnel on all offenders prior to placement or within 10 days of placement. The screening includes the following: [~~Health Screening. Prior to residential placement or within seven days of admission of offenders into residential facilities, a health screening or physical exam shall be conducted to identify any physical/mental ailments or contagious/communicable diseases that would affect placement and/or endanger other residents or staff.~~]

(A) Inquiry into:

(i) Current illness and health problems, including venereal diseases and other infectious diseases;

(ii) Dental problems;

(iii) Mental health problems, including suicide attempts or ideation;

(iv) Use of alcohol and other drugs, which includes types of drugs used, mode of use, amounts used, frequency of use, date or time of last use, and a history of problems that may have occurred after ceasing use (for example, convulsions); and

(v) Other health problems designated by the responsible physician.

(B) Observation of:

(i) Behavior, which includes state of consciousness, mental status, appearance, conduct, tremor and sweating;

(ii) Body deformities, ease of movement, and so forth; and

(iii) Conditions of skin, including trauma markings, bruises, lesions, jaundice, rashes and infestations, and needle marks or other indications of drug abuse.

(C) Medical examinations are conducted for any employee or offender suspected of having a communicable disease.

(4) Serious and Infectious Diseases.

(A) The facility provides for the management of serious and infectious diseases.

(B) CCF's shall have policies and procedures to direct actions to be taken by employees concerning offenders who have been diagnosed with HIV, including, at a minimum, the following:

(i) When and where offenders are to be tested;

(ii) Appropriate safeguards for staff and offenders;

(iii) Staff and offender training;

(iv) Issues of confidentiality; and

(v) Counseling and support services.

(5) Dental Care. Access to dental care is made available to each offender.

(6) Medications.

(A) Policy and procedure direct the possession and use of controlled substances, prescribed medications, supplies, and over-the-counter drugs. Prescribed medications are administered according to the directions of the prescribing physician.

(B) If medications are distributed by facility staff, records are maintained and audited monthly, and include the date, time, and name of the resident receiving the medication, and the name of the staff distributing it.

(7) Female Offenders. If female offenders are housed, access to pregnancy management services is made available.

(8) Mental Health. Access to mental health services is made available to offenders.

(9) Suicide Prevention. There is a written suicide prevention and intervention program that is reviewed and approved by a qualified medical or mental health professional. All staff with offender supervision responsibilities are trained in the implementation of the suicide prevention program.

(10) Personnel.

(A) If treatment is provided to offenders by health-care personnel other than a physician, dentist, psychologist, optometrist, podiatrist, or other independent provider, such treatment is performed pursuant to written standing or direct orders by personnel authorized by law to give such orders.

(B) If the facility provides medical treatment, personnel who provide health-care services to offenders are qualified and appropriately licensed. Verification of current credentials and job descriptions are on file in the facility. Appropriate state and federal licensure, certification, or registration requirements, and restrictions apply.

(11) Informed Consent. If the facility provides medical treatment, offenders make medical decisions with informed consent. All informed consent standards in the jurisdiction are observed and documented for offender care.

(12) Participation in Research. Offenders do not participate in medical, pharmaceutical, or cosmetic experiments. This does not preclude individual treatment of an offender based on his or her need for a specific medical procedure that is not generally available.

(13) Notification. Individuals designated by the offender are notified in case of serious illness or injury.

(14) Health Records.

(A) If medical treatment is provided by the facility, accurate health records for offenders are maintained separately and confidentially.

(B) If medical treatment is provided by the facility, the method of recording entries in the records, the form and format of the records, and the procedures for their maintenance and safekeeping are approved by the health authority.

(C) If medical treatment is provided by the facility, for the offenders being transferred to other facilities, summaries or copies of the medical history record are forwarded to the receiving facility prior to or at arrival.

(p) Discharge.

(1) Victim Notifications [~~Notification~~]. The CSCD director and CCF director [~~or designee~~] shall ensure there are procedures, policies and practices that comply with Texas Government Code §76.016 and other applicable laws as to the notifications to be made to certain crime victims of offenders who are residents in its facilities or subject to its programs. [~~is a system for providing notification to the victim(s) of offenders convicted of family domestic violence crimes prior to the imminent release of the offender or subsequent to the offender's escape from custody. Follow-up notification to victim(s) shall occur whenever an escapee is returned to the facility.~~]

(2) Discharge. Discharge from residential facilities shall be based on the following criteria:

(A) - (D) (No change.)

(E) the offender manifests a non-emergency medical problem that prohibits participation and/or completion of the residential program requirements;

(F) - (G) (No change.)

(3) Discharge Report. The CSCD director and CCF director [~~or designee~~] shall ensure that a report is prepared at the termination of program participation that reviews the offender's performance. A copy of the report shall be provided to the receiving CSCD supervision officer.

(q) (No change.)

(r) Mail, Telephone, and Visitation. The CSCD director and CCF director [~~or designee~~] shall have written policies which govern the facility's mail, telephone, and visitation privileges for offenders, including mail inspection, public phone use, and routine and special visits. The policies shall address compelling circumstances in which an offender's mail both incoming and outgoing may be opened, but not read, to inspect for contraband.

(s) Religious Programs.

(1) The CSCD director and CCF director [~~or designee~~] shall have written policies that govern religious programs for offenders. The policies shall provide that offenders have the opportunity [~~address the provision of opportunities for offenders~~] to voluntarily practice the requirements of their religious [~~respective~~] faith, have access to worship/religious services, and the use or contact with [~~and the use of~~] community religious resources, when appropriate.

(2) Under Texas Civil Practice & Remedies Code, chapter 110, a [~~A~~] CSCD or CCF may not substantially burden an offender's free exercise of religion except with the least restrictive measures in furtherance of a compelling interest. Pursuant to Texas Government Code §76.018, [~~In court,~~] there is a presumption that a policy or practice that applies to an offender in the custody of a CCF [~~CSCD residential facility~~] is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The presumption may be rebutted with evidence provided by the offender.

§163.40. Substance Abuse Treatment Standards.

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

(1) (No change.)

(2) Chemical Dependency Counselor--A qualified, credentialed counselor or counselor intern working under direct supervision.

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

(5) Counselor Intern--A person pursuing a course of training in chemical dependency counseling at a regionally accredited institution of higher education or a registered clinical training institution who has been designated as a counselor by the institution. The activities of a counselor intern shall be performed under the direct supervision of a qualified, credentialed counselor in accordance with rules adopted by the Texas Commission on Alcohol and Drug Abuse.

(6) - (19) (No change.)

(b) - (c) (No change.)

(d) Admissions. There shall be documentation of specific admission criteria and procedures. Offenders are eligible for substance abuse treatment programs:

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

(3) if the program allows readmissions and the offender meets the admission criteria. For offenders who are placed in treatment programs who do not meet admission criteria, a mechanism or procedure shall be developed for offender removal. A review and justification explaining the reason [~~reason(s)~~] the offender does not meet admission criteria shall be required.

(e) (No change.)

(f) Assessment procedures. Acceptable and recognized assessment tools (tests and measurements) shall be used in all substance abuse treatment programs. Assessment policies and procedures shall require the use of approved clinical measurements and screening tests. Assessment procedures shall include the following:

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

(4) specified time-frames for initial and ongoing assessments; and

(5) (No change.)

(g) Assessments. The assessment shall include:

(1) a summary of the offender's [~~offenders~~] alcohol or drug abuse history including substances used, date of last use, date of first use, patterns and consequences of use, types of and responses to previous treatment, and periods of sobriety;

(2) (No change.)

(3) vocational and employment status, including skills or trades learned, work record, and current vocational plans;

(4) - (5) (No change.)

(6) a diagnostic summary signed and dated [~~by the chemical dependency counselor, followed~~] by a [~~Licensed Chemical Dependency Counselor (LCDC) or~~] Qualified Credentialed Counselor (QCC).

(h) (No change.)

(i) Offender Rights. The offender's basic rights shall be respected and protected, free from abuse, neglect, and exploitation. Each provider shall have written policy and procedure to ensure protection of the offender's rights according to federal and state guidelines.

(j) (No change.)

(k) Offender Records. There shall be written policies and procedures regarding the content of offender records. Case records shall include[~~, at a minimum,~~] the following information at a minimum:

(1) - (9) (No change.)

(10) court order placing the [~~placement of~~] offender into the program[~~, if applicable~~].

(l) Offender Records Review Policy. There shall be written policy and procedures to govern the access of offenders to their own substance abuse treatment records in accordance with Texas Health and Safety Code [~~§611.0045~~]. This access does not apply to criminal justice records. Restrictions to access to treatment records shall be specified and explained to offenders upon request. Exceptions must involve the potential for harm to the offender or others.

(m) (No change.)

(n) Treatment Progress Notes. There shall be written policies and procedures to require all programs to record and maintain progress notes on all offender case records, to document counseling sessions, and to summarize significant events that occur throughout the treatment process. Progress notes shall be documented at a minimum of once each [~~per~~] week.

(o) - (p) (No change.)

(q) Discharge Summary A discharge summary shall be prepared by the primary counselor for each offender prior toleaving any substance abuse program. The discharge summary shall provide a summation of:

(1) (No change.)

(2) the problems or needs and [~~,~~] strengths or weaknesses identified on the master treatment plan;

(3) - (6) (No change.)

(r) General Program Services Provisions. Specific services shall be required of all substance abuse treatment programs. Written policy and procedures shall ensure the following:

(1) All substance abuse services shall be delivered according to a written treatment plan;[~~.~~]

(2) All programs shall employ a Qualified Credentialed Counselor as the Program Director, Clinical Director, Senior Counselor, or the counselor in a similar supervisory position;[~~.~~]

(3) The program shall include culturally diverse curriculum applicable to the population served and[~~. This~~] shall be accomplished through demonstrated, appropriate counseling and instructional materials;[~~.~~]

(4) Members of the offender treatment team shall demonstrate effective communications and coordination, as evidenced in staffing, treatment planning and case-management documentation;[~~.~~]

(5) There shall be written policies and procedures regarding the delivery and administration of prescription and nonprescription medication which provide for:

(A) conformity with state regulations; and

(B) (No change.)

(6) Chemical dependency education shall follow a course outline that identifies lecture topics and major points to be discussed;[~~.~~]

(7) The program shall provide education about the health risks of tobacco products and nicotine addiction;[~~.~~]

(8) The program shall provide HIV education based on the Model Workplace Guidelines for Direct Service Providers developed by the Texas Department of Health;[~~.~~]

(9) Offenders shall have access to HIV counseling and testing services directly or through referral;[~~.~~]

(A) -(C) (No change.)

(10) The program shall make testing and[~~, as well as~~] information, for tuberculosis and sexually transmitted diseases available to all offenders, unless the program has access to test results obtained during the past year;[~~.~~]

(A) - (C) (No change.)

(11) (No change.)

(s) Levels of treatment. All CCFs providing substance abuse treatment shall designate in the current facility's CJP program proposal

levels of treatment to be provided as described in subsections (t) - (x) of this section. If the program utilizes a Modified Therapeutic Community modality of treatment, it shall include the following as minimal components.

(1) a structure board;

(2) encounter, counseling and family groups;

(3) utilization of a three phase process. (Offenders shall transition from Phase 1, to Phase 2 to Phase 3 by meeting objectives and program goals.);

(4) graduated treatment sanctions for incidents of non-compliance in coordination with the transitional treatment team; and

(5) other peer-support groups.

(t) [~~(s)~~] Detoxification. Written policies and procedures shall ensure the following:[~~.~~]

(1) All offenders admitted to Detoxification programs shall need detoxification.

(2) Every offender shall have a completed medical history and physical.

(A) Residential offenders shall have a completed physical and medical history and a physical within 24 hours of admission. If the facility cannot meet this deadline because of exceptional circumstances, the circumstances shall be documented in the offender record. Until an offender's medical history and physical is complete, staff shall observe offenders closely (no less than every 15 minutes) and monitor vital signs (no less than once each hour).

(B) Outpatient offenders shall have the medical history and physical completed before admission.

(3) The program shall provide continuous supervision for offenders.

(A) In residential programs, direct care staff shall be awake and on site 24 hours a day.

(i) During day and evening hours, at least two awake staff shall be on duty for the first 12 offenders, with one more person on duty for each additional one to 16 offenders.

(ii) At night, at least one awake staff member shall be on duty for the first 12 offenders, with one more person on duty for each additional one to 16 offenders.

(B) In outpatient programs, direct care staff shall be awake and on site whenever an offender is on site. Offenders shall have access to on-call staff 24 hours a day.

(4) If the program accepts offenders with acute detoxification symptoms or a history of acute detoxification symptoms, the program shall have:

(A) a licensed vocational nurse or registered nurse on duty during all hours of operation;

(B) a physician on-call 24 hours a day.

(5) Level of observation shall be based on medical recommendations and program design, or not less than that described in paragraph (2)(A) of this subsection.

(6) A physician shall approve all medical policies, procedures, guidelines, tools, and forms, which shall include:

(A) screening instruments (including a medical risk assessment) and procedures;

(B) treatment protocol or standing orders for each chemical the program is prepared to address in detoxification; and

(C) emergency procedures.

(7) The clinical supervisor shall be a physician, physician assistant, advanced practice nurse, or registered nurse.

(8) The program shall:

(A) ensure continuous access to emergency medical care;

(B) provide offenders access to mental health evaluation and linkage with mental health services when indicated;

(C) use written procedures to encourage offenders to seek appropriate treatment after detoxification.

(9) Direct care staff shall complete detoxification training provided by a physician, physician assistant, advanced practice nurse, or registered nurse that includes instruction in the following areas:

(A) signs of withdrawal;

(B) pregnancy-related complications (if the program admits females of child-bearing age);

(C) observation and monitoring procedures;

(D) appropriate intervention; and

(E) complications requiring transfer;[~~.~~]

(10) Staff shall assist each offender in developing an individualized post-detoxification plan that includes appropriate referrals.

(u) [~~(t)~~] Relapse/Intensive Residential Treatment. Written policies and procedures shall ensure the following:

(1) All offenders admitted to relapse intensive residential treatment shall be medically stable, and able to participate in treatment.

(2) The program shall provide adequate staff for close supervision and individualized treatment with counselor caseloads not to exceed ten (10) offenders.

(3) There shall be direct care staff alert and on site during all hours of operation. There shall be an appropriate number of direct care staff to provide all required program services, maintain an environment that is conducive to treatment, and ensure the safety and security of the offenders, according to the design of the facility and with the approval of the funding sources.

(4) For programs 45 days or less counselors [~~Counselors~~] shall complete a comprehensive offender assessment and individual treatment plan within five (5) [~~three~~] working days of admission. All other programs shall complete a comprehensive offender assessment and individual treatment plan within ten (10) working days.

[~~(5) An individualized treatment plan shall be completed for all offenders within five working days of admission.~~]

(5) [~~(6)~~] The facility shall deliver not less than 20 hours of structured activities per week for each offender, including:

(A) ten (10) hours of chemical dependency counseling, with no less than one hour of individual counseling;

(B) seven hours additional education, counseling, life skills, or rehabilitation activities; and

(C) three hours of structured social or recreational activities.

(6) [~~(7)~~] Counseling and education schedules shall be submitted to the funding entity for approval.

(7) [~~(8)~~] Each offender shall have an opportunity to participate in physical recreation at least weekly.

(8) [~~(9)~~] Program staff shall offer chemical dependency education or services to identified significant others.

(9) [~~(10)~~] The program shall provide each offender with opportunities to apply knowledge and practice skills in a structured, supportive environment.

[~~(11) If the program utilizes a Modified Therapeutic Community modality of treatment it shall include the following as minimal components:~~]

[~~(A) a Structure Board;~~]

[~~(B) encounter, counseling and family groups;~~]

[~~(C) utilization of a three phase process. (Offenders shall transition from Phase 1, to Phase 2, to Phase 3, by meeting objectives and program goals);~~]

[~~(D) graduated treatment sanctions for incidents of noncompliance in coordination with the Transitional Treatment Team; and~~]

[~~(E) other peer-support groups.~~]

(v) [~~(u)~~] Primary Care[~~/Modified Therapeutic Community~~] Treatment. Written policies and procedures shall ensure the following:[~~.~~]

(1) All offenders admitted to primary care [~~modified therapeutic community~~] treatment shall be medically stable, and able to participate in treatment.

(2) The program shall provide adequate staff for close supervision and individualized treatment with counselor caseloads not to exceed sixteen (16) [~~20~~] offenders.

(3) There shall be direct care staff alert and on site during all hours of operation. There shall be an appropriate number of direct care staff to provide all required program services, maintain an environment that is conducive to treatment, and ensure the safety and security of the offenders, according to the design of the facility and with the approval of the funding source.

(4) Counselors shall complete a comprehensive offender assessment within ten (10) [~~five (5)~~] working days of admission for all offenders admitted to a primary care treatment program, and an individualized treatment plan shall be completed for all offenders within ten (10) working days of admission [~~therapeutic community program~~].

[~~(5) An individualized treatment plan shall be completed for all offenders within seven working days of admission.~~]

(5) [~~(6)~~] Length of stay shall be offender-driven based upon:

(A) the offender's successful completion of treatment goals;

(B) medical and psychological appropriateness for the program;

(C) the offender's compliance with the programs rules and regulations.

(6) [~~(7)~~] The facility shall deliver no [~~not~~] less than twenty (20) hours of structured activities per week for each offender, including:

(A) ten (10) hours of chemical dependency counseling, with no less than one hour of individual counseling per month;

(B) seven hours additional education, counseling, life skills, or rehabilitation activities; and

(C) three hours of structured social or recreational activities.

(7) [~~(8)~~] Counseling and education schedules shall be submitted to the funding entity for approval.

(8) [~~(9)~~] Each offender shall have an opportunity to participate in physical recreation at least four hours per week.

(9) [~~(10)~~] Program staff shall offer chemical dependency education or services to identified significant others.

(10) [~~(11)~~] The program shall provide each offender with opportunities to apply knowledge and proactive skills in a structured, supportive environment.

[~~(12) All Therapeutic Communities shall have the following as minimal components:~~]

[~~(A) a Structure Board;~~]

[~~(B) encounter, counseling, and family groups;~~]

[~~(C) Utilization of a three phase process. (Offenders shall transition from Phase 1, to Phase 2, to Phase 3, by meeting objectives and program goals); ~~]

[~~(D) graduated treatment sanctions for incidents of noncompliance in coordination with the Transitional Treatment Team; and~~]

[~~(E) other peer-support groups.~~]

(w) [~~(v)~~] Community Residential Treatment. Written policies and procedures shall ensure the following: [~~.~~]

(1) All offenders admitted to community [~~intensive~~] residential treatment shall be medically stable, able to function with limited supervision and support, and be able to participate in work release or community service/restitution programs.

(2) The program shall have adequate staff to meet treatment needs within the context of the program description, with counselor caseloads not to exceed 16 offenders, or twenty (20) for modified therapeutic community.

(3) There shall be direct care staff alert and on site during all hours of operation. There shall be an appropriate number of direct care staff to provide for the safety and security of the offenders, according to the design of the facility and with the approval of the funding.

(4) Counselors shall complete a comprehensive offender assessment and individualized treatment plan within ten (10) [~~five~~] working days of admission for all offenders.

(5) The facility shall deliver no less than ten (10) hours of structured activities per week for each offender, including at least five hours of chemical dependency counseling and programming of no less than four hours of chemical dependency counseling and four hours of structured activities per week shall be provided in a modified therapeutic community program.

(6) Counseling and education schedules shall be submitted to the funding entity for approval.

(7) The program design and application shall include increasing levels of responsibility for offenders and frequent opportunities for offenders to apply knowledge and practice skills in structured and unstructured settings.

[(8) If the program utilizes a Modified Therapeutic Community modality of treatment, it shall include the following components:]

[(A) a Structure Board;]

[(B) encounter, counseling and family groups;]

[(C) utilization of a three phase process. (Offenders shall transition from Phase 1, to Phase 2, to Phase 3, by meeting objectives and program goals);]

[(D) graduated treatment sanctions for incidents of noncompliance in coordination with the Transitional Treatment Team;]

[(E) other peer-support groups;]

[(F) counselor caseloads not to exceed 20 offenders per counselor; and]

[(G) programming of no less than four hours of chemical dependency counseling and four hours of structured activities per week.]

(x) [(w)] Outpatient treatment. Written policies and procedures shall ensure the following:

(1) All offenders admitted to outpatient programs shall be medically stable, and have appropriate support systems in the community to live independently with minimal structure.

(2) The program shall have adequate staff to provide offenders support and guidance to ensure effective service delivery, safety, and security. Staffing patterns shall be submitted to the funding entity.

(3) The program shall set limits on counselor caseload size to ensure effective, individualized treatment and rehabilitation. Criteria used to set the caseload size shall be documented and approved by the funding entity.

(4) Didactic groups shall not exceed 30 offenders in a group.

(5) Therapeutic groups shall not exceed 16 offenders in a group.

(6) For offenders in supportive outpatient programs, counselors shall complete a comprehensive offender assessment within 30 calendar days of admission for all offenders.

(7) For offenders in intensive outpatient programs, counselors shall complete a comprehensive offender assessment within ten (10) calendar days of admission for all offenders.

(8) Intensive outpatient programs shall deliver no less than ten (10) hours of structured activities per week for each offender, including at least five (5) hours of chemical dependency counseling.

(9) Supportive outpatient programs shall deliver no less than two hours of structured activities per week for each offender, including at least one hour of chemical dependency counseling.

(10) Counseling and education schedules shall be submitted to the funding entity for approval.

(11) The program design and application shall include increasing levels of responsibility for offenders and frequent opportunities for offenders to apply knowledge and practice skills in structured and unstructured settings.

(12) The outpatient treatment levels may be utilized for residents in the work release phase of any residential substance abuse treatment program.

(y) [(x)] Special Populations. Written policies and procedures shall ensure the following:[.]

(1) Programs that address the special mental health, intellectual capacity, or medical needs of offenders must provide appropriate treatment either by program staff or through contracted services.

(2) Admission to a special needs program must be based on a documented mental health, intellectual capacity, or medical need.

(3) When the assessment process indicates that the offender has coexisting disabilities/disorders, the Treatment Plan shall specifically address those issues that might impact treatment, recovery, relapse, and/or [and or] recidivism.

(4) Personnel shall be available who are qualified in the treatment of coexisting disabilities/disorders.

(5) Within 96 hours of admission to a special needs residential program, offenders shall be administered a medical and psychological evaluation.

(6) Within ten (10) days of admission to a residential program for special needs offenders, the program administrator or designee shall contact the Texas Council on Offenders with Mental Impairments [(TCOMI)] regarding the offender's status. As soon as discharge date is projected, TCOMI shall be notified in writing of [and] plans for a continuum of care after discharge, regardless of whether or not the discharge is for successful completion of the program.

(7) Residential facilities providing services for special needs populations shall have procedures to provide access to health care services, including medical, dental, and mental health services, under the control of a designated health authority. When this authority is other than a physician, final medical judgments must rest with a single designated responsible physician licensed by the state.

(A) Services/treatment shall be directed toward maximizing the functioning and reducing the symptoms of offenders.

(B) There shall be written policies and procedures regarding the delivery and administration of prescription and nonprescription medication which provide for:

(i) conformity with state regulations;

(ii) documentation of the rationale for use and goals of service/treatment consistent with the individual plan of treatment;

(iii) documentation of the administration of medications, medication errors, and drug reactions; and

(iv) procedures to follow in case of emergencies.

(8) There shall be procedures for documenting that the offender has been informed of medication management procedures.

(9) Offenders shall be actively involved in decisions related to their medications.

(10) Programs for special needs offenders must follow the same staffing for treatment levels as the levels for other offenders, except all residential programs shall maintain caseloads of no greater than 16 offenders for each counselor.

(11) Programs operating in residential facilities shall ensure that offenders will have no less than ten (10) days of appropriate medication for use after discharge.

(z) [(y)] Residential Physical Plant Requirements. Facilities (Physical Plants) providing substance abuse treatment to offenders shall have written policies and procedures to ensure the following:

(1) The physical plant shall be located either within one [~~a~~] mile of public transportation or other means of available transportation.

(2) There must be documentation indicating that ventilation conforms with the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) Standard 62 and ASHRAE Standard 55 requiring 20 CFM per person minimum outside air and ventilation for each occupant or facility sleeping quarters. The facility/sleeping quarters must also meet Smoke Management Standards 92A, 92B and 204M established by the National Fire Prevention Association (NFPA). Consultation with trade associations specializing in the area of ventilation can provide alternative methods of mechanical ventilation if windows are absent or not operable. Documentation for meeting proper ventilation requirements can be obtained through a local public health agency, an engineering consultant, or a trade association such as the American Society of Heating, Refrigeration and Air-Conditioning Engineers [~~Engineer~~], Inc.

(3) There must be documentation that all sleeping quarters have lighting of at least 20 foot-candles in reading and grooming areas. Sleeping quarters shall be safe and provide the resident with adequate lighting which is conducive to reading and grooming.

(4) An adequate amount of floor space must be provided per resident in the facility's [~~facility(ies)~~]sleeping area to meet the safety and security requirements of the facility.

(5) In the sleeping area, each resident must be provided at a minimum: a bed, mattress, and pillow; supply of bed linen; and closet/locker space for the storage of personal items.

(6) Private counseling space with adequate furniture must be provided in the facility.

(7) Space and furnishings for activities such as group meetings and visits shall be provided in the facility.

(8) At a minimum, the facility shall have one operable toilet for every eight residents or increment thereof, or as approved by the funding entity. Urinals may be substituted for up to one-half of the toilets in male-populated facilities.

(9) At a minimum, the facility shall have one operable wash basin with temperature controlled hot and cold running water for every eight residents, or as approved by the funding agency.

(10) At a minimum, the facility shall have one operable shower or bathing facility with temperature controlled hot and cold running water for every twelve residents or as approved by funding entity. The water shall be thermostatically controlled to temperatures ranging from 100 to 108 degrees Fahrenheit to ensure the safety of residents.

(11) The facility shall have the ability to handle the laundry needs on a daily basis for all residents.

(12) Facilities of more than 200 residents shall be subdivided into units of not more than 60 residents. Each unit will be [~~, each of which are~~] staffed with the number and variety of staff personnel required to provide the program services and custodial supervision needed based on contractual requirements. Units with 50 or fewer residents shall be permitted to conduct manageable, scaled programs based on decisions by facility management and contractual requirements.

(13) Resident population shall not exceed the rated space of the facility. The original facility plan shall be examined to determine its rated bed capacity. If remodeled since original construction, the latest blueprints or plans for each resident housing shall be used.

(14) When males and females are housed in the same facility, there shall be separate sleeping quarters with adequate supervision.

(15) There shall be identifiable exits in each housing area and other high density areas to permit the prompt evacuation of residents and staff under emergency conditions as approved by the local or state fire inspector/marshall [~~inspector/marshal~~] having jurisdiction.

(16) Where applicable, there shall be a separate day room (leisure time space) for each housing unit, and an outside recreation area shall be provided.

(17) There shall be a visiting room or area for contact visitation which is adequate to meet the needs and size of the facility.

(18) Space must be provided for administrative, custodial, professional, and clerical staff.

(19) Preventative maintenance of the physical plant which provides for emergency repairs or replacements in life threatening situations shall be documented and conducted on a timely and routine basis.

(20) There shall be documentation by a qualified source that the interior finishing material in resident living areas, exit areas, and places of public assembly are in accordance with [~~applicable local ordinances or state laws as certified by~~] the local or state fire inspector/marshall having jurisdiction.

(21) Exits in the facility must be in compliance with either state or local fire safety authorities.

(aa) [~~(z)~~] Special Physical Plant Provisions. There shall be written policy and procedures to ensure access for handicapped residents in a manner which provides for their safety and security. In accordance with the Americans with Disabilities Act (ADA), areas of the facility which are accessible to the public shall be also accessible to handicapped staff and visitors.

§163.41. Medical and Psychological Information.

(a) Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) policies. CSCD directors shall develop and implement policies relevant to HIV-AIDS in accordance with guidelines established by the Texas Department of Health and adopted by the TDCJ-CJAD. These policies will[~~, to~~] be incorporated in the CSCD's administrative manuals and[~~,~~] shall include, but not be limited to, the following:

(1) - (4) (No change.)

(b) (No change.)

(c) HIV confidentiality. Information regarding HIV-AIDS testing and results is confidential. HIV-AIDS information shall be maintained in a safe and secure manner with access to this confidential information restricted to only those persons who have been authorized to receive this information by law or with a duly executed release and waiver of confidentiality. The CSCD may disclose HIV-AIDS information relating to special offenders in accordance with Texas Health and Safety Code, Chapter 614 and the other statutes and authorities set forth in TDCJ-CJAD's *Community Supervision and Corrections Department Records* manual (October 10, 2000), as amended from time to time.

(d) Medical and psychological information. All records and other information concerning an offender's physical or mental state, including all information pertaining to an offender's HIV-AIDS status, are confidential in accordance with the statutes and other authorities set forth in the above-referenced TDCJ-CJAD's Community Supervision and Corrections Department Records manual. Medical and psychological information shall be maintained in a safe and secure manner with access to this confidential information restricted to only those persons who have been authorized to receive this information by law or with a

duly executed release and waiver of confidentiality from the offender. The CSCD may disclose medical and psychological information relating to special needs offenders in accordance with Texas Health and Safety Code, Chapter 614 and the other statutes and authorities identified in the aforementioned TDCJ-CJAD manual. [A department may be required to take additional measures to restrict access to information concerning the offender's HIV-AIDS status, depending on the extent to which an offender limits the access to specific personnel.]

§163.42. Substantial Noncompliance.

(a) Definition. Substantial noncompliance with TDCJ-CJAD standards, for purposes of [§509.012,] Texas Government Code §509.012, is defined as:

(1) intentional diversion, theft or misapplication of TDCJ-CJAD funding or grants for purposes other than the state funding award or allocation;

(2) violations of laws, regulations or official manuals specific to the operations of CSCDs;

(3) intentional refusal to implement TDCJ-CJAD approved Action Plans that are a result of audits, reviews, or inspections; [or]

(4) for purposes of qualifying for state aid by complying with the Open Meetings Act under §163.43(a)(1)(F) of this title (relating to Funding and Financial Management), failing to hold the meeting to finalize the CSCD budget as required by Texas Local Government Code §140.004[, Local Government Code,] in compliance with the Texas Open Meetings Act; and[.]

(5) interference, obstruction, or hindrance with any efforts by the State Comptroller, County Auditor of the county that manages the CSCD's funds, CJAD, or Criminal Justice Policy Council, to examine or audit the records, transactions and performance of the subject CSCD or facilities.

(b) (No change.)

§163.43. Funding and Financial Management.

(a) Funding.

(1) Qualifying for TDCJ-CJAD formula and grant funding. CSCDs qualify for TDCJ-CJAD state aid by:

(A) - (D) (No change.)

(E) having appointed by the district judge(s) managing the CSCD as set forth in subsection (b) of this section; [the district judge(s) designating] a fiscal officer and [to account for, disburse, and report on all CSCD funds;]

(F) except for CSCDs that can legally be managed by no more than one judge, the district judges complying with the Open Meetings Act, Chapter 551, Texas Government Code, when meeting to finalize the CSCD budget as required by Texas [§140.004,] Local Government Code §140.004.

(2) Other entities qualifying [Qualifying] for TDCJ-CJAD grant funding. In addition to CSCDs, counties, [Counties] municipalities, and nonprofit organizations [whose judicial districts' CSCDs substantially comply with TDCJ-CJAD standards] qualify for TDCJ-CJAD grant funding by:

(A) being in substantial compliance with TDCJ-CJAD grant conditions; [standards]

[(B) having a community justice council that serves the jurisdiction as required by law;]

(B) [(C)] having [a TDCJ-CJAD approved community justice plan with related] budgets related to the program proposal; [and the grant proposal contained within the community justice plan] and

(C) [(D)] the grant funding recipient designating a chief fiscal officer to account for, protect, disburse, and report on all TDCJ-CJAD grant funding, and to prescribe the accounting procedures related thereto.

(3) Allocating state aid. State aid will be made available to eligible funding recipients [CSCDs] in accordance with the applicable statutory requirements and items [requirements as] set forth in the Financial Management Manual for TDCJ-CJAD Funding issued by TDCJ-CJAD.

(4) Awarding TDCJ-CJAD grant funding. CSCDs, counties, municipalities, and nonprofit organizations who are eligible to receive grant funding must meet requirements as set forth in the Financial Management Manual for TDCJ-CJAD Funding and [to] be approved by the TDCJ-CJAD Director [director] to receive such funds. Grant funding will be made available in accordance with statutory requirements and items [requirements] as set forth in the Financial Management Manual for TDCJ-CJAD Funding.

(b) Financial procedures.

(1) Requested information from CSCDs and other potentially eligible TDCJ-CJAD funding recipients. Each funding [The director of a CSCD or other eligible TDCJ-CJAD funding] recipient shall present data, documents, and information requested by the TDCJ-CJAD as necessary to determine the amount of state financial aid to which the funding [CSCD or other eligible] recipient is entitled. A funding [CSCD or other] recipient receiving TDCJ-CJAD funding shall submit such reports, records, and other documentation as required by the TDCJ-CJAD.

(2) Deposit of TDCJ-CJAD funding. In accordance with Texas Local Government Code § 140.003, each [Each] CSCD, county, or municipality shall deposit all TDCJ-CJAD funding received in a special fund of the county treasury or municipal treasury, as appropriate, to be used on behalf of the department and as the CSCD directs [solely for the provision of services, programs, and facilities]. Nonprofit organizations shall deposit all TDCJ-CJAD funding received in a separate fund, to be used solely for the provision of services, programs, and facilities approved by TDCJ-CJAD.

(3) Fee deposit. Community supervision fees [collected by the court] and payments by offenders [program participants] shall be deposited into the same special fund of the county treasury receiving state financial aid, to be used for community supervision and correction services.

(4) Restrictions on CSCD generated revenue. [No] CSCD generated revenue shall be used [to]: in accordance with statutory requirements and with the items set forth in the Financial Management Manual for TDCJ-CJAD Funding (October 1, 1999), as amended from time to time.

[(A) provide physical facilities, utilities, and equipment for CSCDs unless approved by the district judge(s) in accordance with Government Code §76.009 and §76.010, and/or as provided for in the Financial Management Manual for TDCJ-CJAD Funding; or]

[(B) support religious-oriented activities or services whose principle or primary effect is to advance a sectarian or doctrinal belief or practice. No offender can be required to participate in a religious-oriented activity or service arranged through the CSCD unless the offender signs a waiver to this effect.]

(5) Available records. The funding recipient [~~CSCD~~] and/or the [~~designated chief~~] fiscal officer accounting for, disbursing, and reporting on the TDCJ-CJAD funding shall make financial, transaction, contract, computer and other records available to [~~the~~] TDCJ-CJAD. Funding [~~CSCDs and/or other TDCJ-CJAD funding~~] recipients shall provide financial reports and other records to TDCJ-CJAD as set forth in the referenced Financial Management Manual for TDCJ-CJAD Funding.

(6) Budgets. Funding [~~TDCJ-CJAD funding~~] recipients shall prepare and operate from a budget(s) developed and approved within the guidelines set forth in the referenced Financial Management Manual for TDCJ-CJAD Funding, as amended from time to time.

(7) Funding recipient obligations. Funding [~~All TDCJ-CJAD funding~~] recipients shall comply with all funding provisions as set forth in the Financial Management Manual for TDCJ-CJAD Funding and any special conditions associated with their respective funding awards.

(8) - (9) (No change.)

(c) (No change.)

(d) Facilities, utilities, and equipment.

(1) CSCDs. In accordance with Texas Government Code §76.008, the [~~The~~] county or counties served by a CSCD shall provide, at a minimum, the following facilities, equipment and utilities for the department[~~, and equipment for a CSCD~~].

(A) Minimum facilities for CSCDs. Each CSO [~~community supervision officer~~] shall be provided a private office. Each office shall have the necessary lighting, air conditioning, equipment, privacy, and environment to provide and promote the delivery of professional community corrections services.

(B) (No change.)

(C) Minimum equipment for CSCDs. Each CSO [~~community supervision officer~~] shall be furnished adequate furniture, telephone, and other equipment as necessary and consistent with efficient office operations. Adequate insurance, maintenance, and repair of the CSCD's equipment shall be maintained.

(D)- (E) (No change.)

(2) Inventory. Inventory and disposal of equipment, furniture, and/or vehicles purchased with program funds will follow the guidelines in the Financial Management Manual for TDCJ-CJAD Funding (October 1, 1999) as amended from time to time. In addition: [~~TDCJ-CJAD funding.~~]

(A) All equipment, furniture, and vehicles purchased with program funds [~~TDCJ-CJAD funding~~] are to be inventoried with TDCJ-CJAD in accordance with procedures set forth in the referenced Financial Management Manual for TDCJ-CJAD Funding.

(B) Any CSCD or other entity wanting to dispose of equipment, furniture, and/or vehicles purchased with program funds [~~TDCJ-CJAD funding~~] shall adhere to procedures set forth in the referenced Financial Management Manual for TDCJ-CJAD Funding.

(e) Certification of facilities, utilities, and equipment for CSCDs. [~~CSCDS.~~] Certification of facilities, utilities, and equipment for CSCDs shall be in accordance with Texas Government Code §76.009 and §76.010, and as provided for in the referenced Financial Management Manual for TDCJ-CJAD Funding, as amended from time to time.

§163.46. Allocation Formula for Community Corrections Program

(a) Purpose. The Texas Government Code §509.011(f), gives the Texas Board of Criminal Justice (TBCJ) discretion to adopt a policy limiting the percentage of benefit or loss that may be realized by a CSCD [~~community supervision and corrections department (CSCD)~~] as a result of the Community Corrections Program allocation formula.

(b) (No change.)

§163.47. Contested Matters.

(a) Right to contest adverse proposals.

(1) If TDCJ-CJAD (hereinafter referred to as the division) proposes to deny, revoke, or suspend the certification of a CSO [~~a supervision officer's certification~~] or to reprimand such [~~a supervision officer, the~~] officer shall be entitled to notice and a hearing before the division or a hearings examiner appointed by the division. Hearings before a hearings examiner shall be conducted pursuant to the procedures set forth in paragraph (h) below.

(2) (No change.)

(b) Notice of proposed action.

(1) The division shall issue a written notice that:

(A) defines specifically [~~with specificity~~] the alleged conduct that constitutes substantial noncompliance with division standards or requirements;

(B) - (E) (No change.)

(2) The notice must be signed by the TDCJ-CJAD director [~~division director~~] and sent by registered or certified mail, return receipt requested and postage prepaid. If the proposed action is against a CSO [~~supervision officer~~], then the notice must be sent to the individual with a copy forwarded to the director of the department.

(c) Request for further hearing before the judicial advisory council. A department or CSO [~~supervision officer~~] who received written notice of the division's proposed adverse action may after the conclusion and results of the hearing before the Division or Hearings Examiner provided under subsection (a) of this section, request a further hearing to contest the matter before the Judicial Advisory Council (JAC) [~~to the division~~].

(1) Within 15 working days (for purposes of this section, the term days refers to business days other than weekends or holidays [~~working days~~]) of the receipt of the written notice of the results of the hearing before the Division or Hearings Examiner [~~proposed adverse action~~], the respondent CSO [~~affected officer~~] or department must submit in writing a request for a further hearing before the JAC to the division director and the chairperson of the JAC.

(2) The request for further hearing before the JAC must include a succinct statement of the grounds upon which the proposed action is contested and all grounds upon which the effected individual or department refutes the basis of the proposed action and any results from the initial hearing before the Division or Hearings Examiner.

(3) The JAC shall offer the affected CSO [~~officer~~] or department an opportunity to be heard at the next regularly scheduled meeting of the JAC held immediately after receipt of the request for hearing. If no meeting is scheduled within 60 days of the receipt of the request for further hearing before the JAC, then the chairperson shall schedule a specially-called meeting to be held no later than sixty days from the receipt of the applicable request for further hearing before the JAC.

(4) The chairperson shall cause a written notice to be issued to the affected CSO [~~officer~~] or department informing the party of:

(A) - (C) (No change.)

(d) The division and the affected party shall each be given 30 minutes to present their respective sides. Testimony may be given orally under oath or through [~~as~~] a prepared written statement or affidavit as acknowledged before a notary public. No more than three witnesses per side shall testify. However, upon the request of either party made prior to the hearing and at the discretion of the chairperson, the time for making a presentation and the number of witnesses needed to testify may be increased.

(e) At the conclusion of the hearing before the JAC, the members of the JAC shall vote whether to recommend that the division's proposed adverse action [~~proposal of the division~~] be withdrawn, modified, or affirmed. Within 10 days of the recommended vote of the JAC, the TDCJ-CJAD director [~~division director~~] shall notify the officer, department director, and/or administrative judge concerning whether or not the director concurs with the recommendation of the JAC. Notice shall be made in writing and sent by registered or certified mail, return receipt requested in accordance with subsection (b)(2) of this section.

(f) (No change.)

(g) Request for hearing before the Texas Board of Criminal Justice. Except as provided in paragraph (2) of this subsection and subsection (f) of this section a department or supervision officer may contest a final proposed action of the division director before the Texas Board of Criminal Justice.

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

(3) Within 20 days of receipt of the request for hearing, the general counsel of the Texas Department of Criminal Justice or his designee shall file with the State Office of Administrative Hearings a request for assignment of administrative law judge. Said request shall be accompanied with a complaint containing the same information as required under subsection (b)(1)(A)-(E) of this section and also including a statement of the recommendation of the JAC and the division director's final proposed action. Said request shall also be accompanied with a written statement of applicable rules or policies of the division and agency. The complaint shall designate the parties in this contested matter. The affected officer or department who is appealing the proposed adverse action of the TDCJ-CJAD director [~~division's director~~] shall be designated as the petitioner. The division shall be designated as the respondent. Said request and complaint shall be sent to the officer, department director and/or administrative judge by registered or certified mail, return receipt requested and postage prepaid.

(4) Division representative. The general counsel of the Texas Department of Criminal Justice or [~~his~~] his/her designee shall represent the division. The general counsel has authority over the manner and substance of the presentation of the division's case.

(5) -(6) (No change.)

(h) Administrative hearing procedures.

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

(4) Discovery and depositions.

(A) Discovery shall be provided and governed by Texas Government Code, Chapter 2001, Subchapter D, (the Administrative Procedure Act), and where no conflict exists with said Act, with the Texas Rules of Civil Procedure.

(B) Depositions shall be taken in accordance with the requirements of Texas Government Code, Chapter 2001, Subchapter D, (the administrative Procedure Act), and where no conflict exists with said Act, with the Texas rules of Civil Procedure.

(C) On its own motion or on the written request of a party, and on deposit of an amount that will reasonably ensure payment of the amount estimated to accrue under Texas Government Code, §2001.103, the Texas Department of Criminal Justice shall issue a commission, addressed to the officers authorized by statute to take a deposition, requiring that the deposition of a witness be taken. The commission shall also authorize the issuance of any subpoena necessary to require that the witness appear and produce, at the time the deposition is taken, books, records, papers, or other objects that may be necessary and proper for the purpose of the hearing.

(5) Rules of evidence.

(A) - (D) (No change.)

(E) On its own motion or on the written request of a party, the Texas Department of Criminal Justice shall issue a subpoena addressed to the sheriff or to a constable to require the attendance of a witness or the production of books, records, papers, or other objects that may be necessary and proper for the purposes of a proceeding if:

(i) (No change.)

(ii) an amount is deposited that will reasonably ensure payment of the amounts estimated to accrue under Texas Government Code, § 2001.103.

(F) - (I) (No change.)

(6) - (8) (No change.)

(i) - (k) (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 February 25, 2002.

TRD-200201154
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 463-0422

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 15. MEDICAID ELIGIBILITY

The Texas Department of Human Services (DHS) proposes amendments to §15.100, concerning definitions; §15.450, concerning general principles concerning income; and §15.619, concerning administrative denials; and new §15.401, concerning fiduciary agent, in its Medicaid Eligibility chapter. The purpose of the amendments to §15.100 and §15.450 and new §15.401 is to clarify the treatment of a fiduciary (financial) agent. If the client is the agent for another person, the income and resources of that person are not countable to the client. If the client has a fiduciary agent, the client's income and resources are available to him, unless otherwise excludable. The purpose of the amendment to §15.619 is to clarify the time frame for

rescheduling a missed appointment for an application interview. In the proposed rule, the eligibility specialist sends a notice scheduling a second appointment that is no earlier than seven days after the date of the second notice.

James R. Hine, Commissioner, has determined that for the first five-year period the proposed sections will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections.

Mr. Hine 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 adoption of the proposed rules will be to ensure that eligibility staff apply policy correctly and consistently, statewide. There will be no effect on small or micro businesses as a result of enforcing or administering the sections, because the policy applies only to the client's financial eligibility for Medicaid benefits, not to the operation of business. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Judy Coker at (512) 438-3227 in DHS's Medicaid Eligibility section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-047, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

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

SUBCHAPTER A. GENERAL INFORMATION

40 TAC §15.100

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs, and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001 - 22.030 and §§32.001 - 32.042.

§15.100. Definitions.

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

(1) - (42) (No change.)

(43) Fiduciary agent--A person or organization acting on behalf of and/or with the authorization of another person. The term applies to anyone who acts in a financial capacity, whether formal or informal, regardless of his title, such as representative payee, guardian, or conservator [~~An individual who has authority to manage another person's funds~~].

(44) - (138) (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 February 22, 2002.

TRD-200201085
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 438-3734

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SUBCHAPTER D. RESOURCES

40 TAC §15.401

The new section is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new section implements the Human Resources Code, §§22.001 - 22.030 and §§32.001 - 32.042.

§15.401. Fiduciary Agent.

(a) A fiduciary agent is a person or organization acting on behalf of and/or with the authorization of another person. The term applies to anyone who acts in a financial capacity, whether formal or informal, regardless of his title, such as representative payee, guardian, or conservator.

(b) An action by a fiduciary agent is the same as an action by the person for whom he acts.

(c) Assets held by a client in his capacity as fiduciary agent for someone else are not countable assets to the client. Assets held by a fiduciary agent for a client are considered as available to the client, unless otherwise excludable.

This 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 February 22, 2002.

TRD-200201086
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 438-3734

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SUBCHAPTER E. INCOME

40 TAC §15.450

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs, and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001 - 22.030 and §§32.001 - 32.042.

§15.450. General Principles Concerning Income.

(a) - (h) (No change.)

(i) A fiduciary agent is a person or organization acting on behalf of and/or with the authorization of another person. The term applies to anyone who acts in a financial capacity, whether formal or informal, regardless of his title, such as representative payee, guardian, or conservator.

(1) An action by a fiduciary agent is the same as an action by the person for whom he acts.

(2) Monies received by a client in his capacity as a fiduciary agent for someone else are not income to the client, provided the client disburses the monies to or for the benefit of the other person. If the agent is authorized to keep part of the funds as compensation for services rendered, the fees, commissions, or contributions are unearned income to the client.

(3) Monies received by a fiduciary agent for a client are charged as income to the client when received by the agent.

This 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 February 22, 2002.

TRD-200201087
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 438-3734

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SUBCHAPTER G. APPLICATION FOR MEDICAID

40 TAC §15.619

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs, and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001 - 22.030 and §§32.001 - 32.042.

§15.619. Administrative Denials.

(a) When a client or responsible party misses an appointment, the eligibility specialist sends a second notice scheduling a second appointment that is no earlier than seven days after the date of the second notice. [~~When the Texas Department of Human Services eligibility specialist sends the client or responsible party a notice scheduling an appointment and the appointment is not kept, the eligibility specialist sends a follow-up second notice of appointment.~~]

(b) If there is no response to the notice and the second appointment is missed [~~by the end of the 10-day deadline given on the follow-up notice~~], the application is denied. The application can be reopened under the original file date if the client or the responsible party provides a reasonable explanation for failing to respond to the appointment letter, such as hospitalization, language barrier, or the need for other assistance.

This 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 February 22, 2002.

TRD-200201088
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 438-3734

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PART 5. TEXAS VETERANS LAND BOARD

CHAPTER 175. GENERAL RULES OF THE VETERANS LAND BOARD
SUBCHAPTER A. GENERAL RULES AND CONTRACTING FINANCING

40 TAC §175.6, §175.21

The Veterans Land Board of the State of Texas (the "Board") proposes amendments to Title 40, Part 5, Chapter 175 of the Texas Administrative Code, §175.6, relating to Commitment by the Board and §175.21, relating to Prizes and Inducements of the General Rules of the Veteran Land Board. These amendments propose to clarify the amount the Board will invest in land to be purchased and resold by the Board and the amount of investment required of the Veteran. The proposed amendments will also correct some errors and clarify some language.

Section 161.222(a) of the Texas Natural Resources Code was amended in 1985 to authorize the Board to set the amount of the initial payment required from a purchaser. Section 161.233(a) and §161.283(b) of the Texas Natural Resources Code were amended in 1991 to limit the maximum amount of the Board's investment to $40,000. The proposed amendment to §175.6 would allow the Board to invest a maximum of $40,000 by adjusting the initial payment and any additional required down payment. The proposed amendment would still require that Veteran purchasers have at least 5.0% equity in the tract they purchase. To avoid confusion, the statutory "initial payment" and additional "down payment(s)" are combined and referred to as the "equity investment" in the proposed amendment.

The proposed amendment to §175.21(a) would change the incorrect reference to §161.333(a) of the Texas Natural Resources Code, to the correct reference to §161.233(a) of the Texas Natural Resources Code, and add a previously omitted reference to §161.283(b) of the Texas Natural Resources Code.

The proposed amendments also make minor non-substantive changes to both rules.

Douglas Oldmixon, Executive Secretary of the Veterans Land Board, has determined that for each year of the first five years that the rules will be in effect, there will be no significant fiscal implication to state or local government as a result of administering the rules as amended.

Douglas Oldmixon, Executive Secretary of the Veterans Land Board, has determined that for each year of the first five years that the rules will be in effect, the public will benefit because the proposed amendments will allow the Board to increase the amount it invests in a tract of land on behalf of a Veteran. The amendments will have no significant effect on small businesses and the anticipated impact on local employment will be insignificant during each year of the first five years the amended rules are in effect . The anticipated economic cost to persons who are required to comply with the rules will be insignificant. Persons who seek financing from the Board through the Program will pay the same fees to the Board, and costs to third parties, as previously required.

Comments may be submitted to Melinda Tracy, Legal Services Division, General Land Office of the State of Texas, 1700 North Congress Avenue, Austin Texas, by no later than 30 days after publication.

The amendments are proposed under the Natural Resources Code, Title 7, Chapter 161, §§161.001, 161.061, 161.063, 161.222, 161.233 and 161.283. These sections authorize the Board to adopt rules that it considers necessary and advisable for the Land Program.

Natural Resources Code §§161.222, 161.233 and 161.283 are affected by this rule making action.

§175.6. Commitment by the Board.

(a) After reviewing the appraisal, and any other relevant information, the board shall issue a commitment showing the amount it will invest in the land selected. The veteran and seller shall be notified of the commitment amount in writing. The board shall not invest more than the least of the following options: [.]

(1) 95% of the appraised value of the land;

(2) 95% of the final agreed purchase price; or

(3) $40,000.

(b) Except for certain Forfeited Land Sales, the board requires the veteran to have at least a 5.0% equity investment in the land. The equity investment is the difference between the commitment amount and the purchase price. The amount of equity required shall be the combination of the initial payment and the down payment(s), as applicable.

(c) [~~(b)~~] If the commitment amount is less than 95% of the purchase price, one of the following should be done:

(1) The veteran may pay to the board the difference between the purchase price and the commitment amount; [~~amend the contract price to conform to the commitment amount;~~]

(2) The parties may amend the purchase [~~amend the contract~~] price, with the veteran paying to the board the difference between the amended price and the commitment amount[~~, if necessary~~];

[~~(3) pay to the board the difference between the contract price and the commitment amount;~~]

(3) [~~(4)~~] The parties may amend the contract to increase the acreage to make up for the difference in value compared to price; or

(4) [~~(5)~~] The veteran may cancel the loan application and purchase contract.

(d) In certain cases, special circumstances may require special loan conditions in the commitment terms. The following are two examples, but others may apply:

(1) If improvements on the land are considered by the board in determining the commitment amount, their value may be amortized over their lifetime as determined by the appraiser; and

(2) If the land is situated in an underground irrigation water area, the installments may be accelerated for the purpose of protecting the board's investment against the risk of any diminishment of the water reserve.

[~~(c) If improvements on the land are considered by the board in determining the commitment amount, their value will be amortized over their lifetime as determined by the appraiser. Similarly, when land is situated in an underground irrigation water area, the installments will be accelerated for the purpose of protecting the board's investment against the risk of any diminishment of the water reserve.~~]

§175.21. Prizes and Inducements.

(a) The Texas Natural Resources Code, §161.222(a) [~~and §161.333(a),~~] requires veterans to make an initial payment in an amount set by the board's rules. Section 161.233(a) and §161.283(b) require that Veterans make additional down payment(s) under certain circumstances. In order to carry out the intent of the [~~this~~] requirement that veterans have equity in any tract purchased through the program, it is the policy of the Veterans Land Board to approve no transaction, the net effect of which involves the seller, realtor, or any party to the transaction other than the veteran directly or indirectly paying the initial [~~down~~] payment or down payment(s) [~~program fees~~]. This includes inducements such as zero coupon bonds, savings bonds, etc.

(b) Subsection (a) of this section shall not be construed to prevent a veteran from contracting with the seller or any other party to a transaction for the payment of other expenses associated with closing the transaction such as survey costs, title examination, and attorney's fees.

(c) Subsection (a) of this section shall not be construed to prohibit privileges incidental to the ownership of land and available to all purchasers in the same subdivision and/or joint ownership of recreational areas such as parks, lakes, etc.

This 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 February 19, 2002.

TRD-200201006
Larry R. Soward
Chief Clerk, General Land Office
Texas Veterans Land Board
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 305-9129

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PART 6. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

CHAPTER 181. GENERAL RULES OF PRACTICE AND PROCEDURE

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §181.28

The Texas Commission for the Deaf and Hard of Hearing proposes amendment to §181.28. The amendment is proposed to

implement an increase in the application fee for children applying for camp to help cover the rising cost of the program.

David W. Myers, Executive Director, has determined that for each year of the first five years the amendment to this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Myers has also determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of this amendment will be that the program will be able to cover the costs of running the program. There will be no effect on small businesses. There is no anticipated economic hardship to persons required to comply with the amendment as proposed.

Comments on this proposed amendment may be submitted to Ann Horn, Texas Commission for the Deaf and Hard of Hearing, P.O. Box 12904, Austin, Texas 78711-2904.

The amendment is proposed under the Texas Administrative Code, §81.006(b) (3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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

§181.28. Camp SIGN.

(a) Description of Services. Camp SIGN is a learning environment for students who are deaf or hard of hearing which is free of communication barriers. The goal is to have all students who are deaf or hard of hearing regardless of their communication mode participate in the program.

(b) Eligibility. Camp is open to boys and girls who are deaf or hard of hearing between the ages of 8 and 17 and residents of Texas.

(c) Counselor in Training (CIT). A program that focuses on developing leadership skills to prepare boys and girls aged 16 and 17 to become future camp counselors and leaders.

(d) Staffing. Camp SIGN staff are chosen on the basis of criteria to accommodate the needs of the campers and to serve as role models for the campers. Staff are recruited from professionals working in the field with individuals who are deaf or hard of hearing. Staff must be able to communicate effectively with children who use American Sign Language, English or other modes of communication. Junior Counselor Staff must be at least 18 years old and Senior counselor staff must be at least 21 years old. Staff are hired by the contracted campsite based on recommendations of the Commission.

(e) Campsites. Any contracted campsite will be obtained through competitive bid or through donation. The campsite must be ADA accessible, and provide adequate facilities and a variety of learning experiences for the campers.

(f) Application Fee. A fee of $35 [~~$25~~] is required to process an application for Camp SIGN. This fee is refundable only upon written request if the child is determined ineligible, or if camp space is filled to capacity. [~~to attend camp, and refund is requested in writing~~]

(g) Sliding Scale Fee. Upon receipt of the application the family economic status is reviewed and a sliding scale may be applied.

(h) Behavior Problems. Children that have behavior problems that constantly disrupt camp activities or threaten other campers or staff will be sent home and all fees forfeited.

This 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 February 25, 2002.

TRD-200201148
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 407-3250

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PART 9. TEXAS DEPARTMENT ON AGING

CHAPTER 270. GENERAL SERVICE REQUIREMENTS

40 TAC §270.23

The Texas Department on Aging proposes new §270.23, concerning Respite Voucher Program. The new rule establishes the requirements for implementation by area agencies on aging of a respite voucher program.

Barbara Zimmerman, Chief Fiscal Officer has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Ms. Zimmerman 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 the implementation of a respite voucher program. There will be no effect on small businesses. There will be no effect to individuals required to comply with the section as proposed.

Comments on the new rule may be submitted to Gary Jessee, Director of the Office of AAA Support and Operations, Texas Department on Aging, P. O. Box 12786, Austin, Texas 78711. All comments must be written and delivered via mail, in person, or facsimile. E-mail and verbal comments cannot be accepted. All comments must be received within 30 calendar days following the date of publication of the proposed new rules in the *Texas Register*.

The new rule is proposed under Texas Government Code, §2161.003, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation of the Department.

Texas Government Code, §2161.003 is affected and implemented by this proposed action.

§270.23. Respite Voucher Program.

(a) Purpose. This rule establishes the requirements for implementation by area agencies on aging of a respite voucher program. Each area agency on aging may establish a respite voucher program. The respite voucher program shall incorporate the necessary strategies and activities to meet the following goals.

(1) Provide area agencies on aging the flexibility to best meet the respite needs of older adults, their family members and/or their caregivers within their respective service areas; and

(2) Provide vouchers to enable caregivers to have the maximum flexibility in arranging for respite services that best meet the needs of the care receivers.

(b) Targeting. The area agency on aging shall target respite voucher program services to ensure:

(1) Priority is given to older individuals who meet the requirements of the Older Americans Act, §373(c).

(2) Recipients are not currently receiving a similar service under another program.

(c) Eligibility. Eligible participants in the respite voucher program shall include:

(1) Adults of any age who are providing primary care for older adults, age 60 and over. The older adult must have a deficit in at least two or more activities of daily living. Caregivers may include spouses, adult children, other relatives or friends;

(2) Adults age 60 and over who are providing primary care for children age 18 years or younger (priority given to those raising children with developmental disabilities or mental retardation). In accordance with the requirements of the National Family Caregiver Support Program, no more than 10% of an AAA's Title III-E allocation may be spent on this group for all allowable services.

(3) A caregiver that is paid to provide care-giving services is not eligible to participate in the respite voucher program.

(d) Level of Service. The area agency on aging shall manage the respite voucher program to best meet the needs of older adults and their caregivers.

(e) Application Process. Area agencies on aging will administer an application process whereby interested caregivers may apply for the respite voucher program. Area agencies on aging will process the application, including verification that a deficit in two activities of daily living exists, and shall notify the applicant of whether or not the application is or is not approved.

(f) Caregiver Responsibilities. The caregiver is the individual that is providing care on a regular, ongoing basis. The caregiver has the responsibility of:

(1) Interviewing potential respite provider(s);

(2) Discussing and setting an hourly, daily or weekly rate;

(3) Selecting and Hiring the Respite Provider. Caregivers may choose a family member, neighbor, friend, adult care center, private agency staff, or contact the area agency on aging for assistance in finding respite providers. Selected providers must be 18 years of age or older. The respite provider may not be the spouse or legal guardian of, and may not live in the same house as the care receiver;

(4) Asking for and checking references;

(5) Informing or training the provider of the specific needs of the care receiver;

(6) Ensuring proper payment for services by keeping track of the number of hours or days of respite used and the total amount claimed against the voucher;

(7) Ensuring that federal tax guidelines for household employees are followed in accordance with IRS Publication 926;

(8) Appealing the rejection of an application for a respite voucher in accordance with the established area agency on aging appeal procedures;

(9) Notifying the area agency on aging of any change of address;

(10) Monitoring the quality of the respite service provided;

(11) Notifying the area agency on aging if they are dissatisfied with a respite provider;

(g) Quality Standards for Services Provided. To assure the highest quality of services, area agency on aging access and assistance staff will monitor and follow-up on the services provided to care receivers in accordance with §260.3(o) of this title (relating to Care Coordination).

(h) Complaints. Complaints from caregivers about the respite voucher program should be directed to the area agency on aging administering the program in their area.

This 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 February 20, 2002.

TRD-200201032
Gary Jessee
Director of the Office of AAA Support and Operations
Texas Department of Aging
Earliest possible date of adoption: April 7, 2002
For further information, please call: (512) 424-6857

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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 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §115.1

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended section, submitted by the State Securities Board has been automatically withdrawn. The amended section as proposed appeared in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6205).

Filed with the Office of the Secretary of State on February 28, 2001.

TRD-200201250

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TITLE 22. EXAMINING BOARDS

PART 20. TEXAS COMMISSION ON PRIVATE SECURITY

CHAPTER 422. DEFINITIONS

22 TAC §422.1

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended section, submitted by the Texas Commission on Private Security has been automatically withdrawn. The amended section as proposed appeared in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6233).

Filed with the Office of the Secretary of State on February 28, 2001.

TRD-200201249

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 1. TEXAS BOARD OF HEALTH

SUBCHAPTER W. PRIVACY POLICY

25 TAC §1.501

The Texas Department of Health has withdrawn from consideration proposed new §1.501 which appeared in the December 14, 2001, issue of the *Texas Register* (26 TexReg 10206).

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201120
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: February 22, 2002
For further information, please call: (512) 458-7236

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TITLE 28. INSURANCE

PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER K. TREATMENT GUIDELINES

28 TAC §§134.1000 - 134.1003

The Texas Workers' Compensation Commission has withdrawn from consideration the proposed repeal of §§134.1000 - 134.1003 which appeared in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8719).

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201102
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: February 22, 2002
For further information, please call: (512) 804-4287

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28 TAC §134.1004

The Texas Workers' Compensation Commission has withdrawn from consideration proposed new §134.1004 which appeared in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8719).

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201099
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: February 22, 2002
For further information, please call: (512) 804-4287

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SUBCHAPTER L. WORK RELEASE

28 TAC §134.1100

The Texas Workers' Compensation Commission has withdrawn from consideration proposed new §134.1100 which appeared in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8722).

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201100
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: February 22, 2002
For further information, please call: (512) 804-4287

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28 TAC §§134.1101 - 134.1103

The Texas Workers' Compensation Commission has withdrawn from consideration proposed new §§134.1101 - 134.1103 which appeared in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8723).

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201101
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: February 22, 2002
For further information, please call: (512) 804-4287

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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 daysafter the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federalstatute or regula tion 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 1. OFFICE OF THE GOVERNOR

CHAPTER 3. CRIMINAL JUSTICE DIVISION

SUBCHAPTER B. GENERAL GRANT PROGRAM POLICIES

DIVISION 2. GRANT BUDGET REQUIREMENTS

1 TAC §3.81

The Office of the Governor reviewed the rules affecting the Criminal Justice Division grant processes and procedures with the goal of adding grant budget requirements for a new program area. The review disclosed that a specific rule required updating; therefore, the Office of the Governor amends the section of the Texas Administrative Code identified below.

The Office of the Governor adopts an amendment to Title 1, Part 1, Chapter 3, Subchapter B, Division 2, §3.81 without changes as published in the January 25, 2002, issue of the *Texas Register* (27 TexReg 539). The revision updates grant budget requirements.

The adopted amendment provides processes and procedures relating to grants made through the Criminal Justice Division and includes general grant program policies within Subchapter B of this chapter relating to criminal justice grants.

No public comments were received regarding the proposed amendment.

The amended section is adopted under the Texas Government Code, Title 7, §772.006 (a) (11), which provides the Office of the Governor, Criminal Justice Division, the authority to adopt rules and procedures as necessary.

The amended section implements the Texas Government Code, Title 7, §772.066 (a), which requires the Office of the Governor, Criminal Justice Division, to advise and assist the governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles or codes are affected by the adoption of the amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 25, 2002.

TRD-200201145
David Zimmerman
General Counsel
Office of the Governor
Effective date: March 17, 2002
Proposal publication date: January 25, 2002
For further information, please call: (512) 463-1919

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PART 17. TEXAS OFFICE OF STATE-FEDERAL RELATIONS

CHAPTER 451. FEDERAL GRANT ASSISTANCE

SUBCHAPTER A. THE STATE MATCH POOL FOR FEDERAL DISCRETIONARY GRANT ASSISTANCE

1 TAC §§451.1 - 451.9

The Texas Office of State-Federal Relations adopts the repeal of Title 1, Part 17, Chapter 451, Subchapter A, §§451.1 - 451.9, concerning Federal Grant Assistance. The repeal is adopted without changes to the proposal as published in the October 12, 2001, issue of the *Texas Register* (26 TexReg 7968).

The Legislature discontinued funding for the State Match Pool for Federal Discretionary Grant Assistance in 1995, and the authority to enforce these rules no longer exists.

No comments were received regarding the repeal.

The statutory authority under Texas Government Code §751.022(b)(8) no longer exists.

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 February 21, 2002.

TRD-200201064

Ed Perez
Acting Executive Director
Texas Office of State-Federal Relations
Effective date: March 13, 2002
Proposal publication date: October 12, 2001
For further information, please call: (512) 463-1803

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TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 49. EQUINE

4 TAC §49.1

The Texas Animal Health Commission (commission) adopts an amendment to Chapter 49, §49.1, concerning Equine, with changes to the proposed text as published in the November 30, 2001, issue of the *Texas Register* (26 TexReg 9700).

Section 49.1 provides for Equine Infectious Anemia (EIA): Identification and Handling of Infected Equine. This section is being amended to add an equine infectious anemia testing requirement for equine stabled, pastured or residing within two hundred yards of equine located on an adjacent premise.

On May 29, 2001, the commission received a petition, with 27 signatories, requesting modifications to agency regulations regarding equine infectious anemia requirements. The agency also received one e-mail supporting the petition. The Commission considered the petition at their August 22, 2001, meeting and requested that language be drafted to accomplish the objective of that petition.

The petition requested that "[e]quine animals stabled or pastured within 200 yards of equine belonging to another person shall be considered to be a congregation point, and required to be tested for equine infectious anemia if a neighboring owner requests it; provided that the neighboring owner making the request has tested his or her animals. Proof of a negative EIA test shall be presented to the owner of neighboring equine upon request."

The commission believes in order to protect equine from EIA and in order to control the transmission and spread of EIA, it is necessary to adopt requirements for the testing of equine that are pastured or reside within two hundred yards of another equine. The commission believes that enacting such a requirement will be protective of the equine of this state by reducing the potential of transmission from any potentially infected equine by insuring that animals in a close enough proximity to other equine are tested.

The commission bases the two hundred yard criteria on the epidemiologically sound principle that the risk of exposure to a positive horse is minimal over a two hundred yard separation distance. The disease is spread through a partly engorged horsefly that feeds on an infected equine and immediately afterwards engorges on another equine. This two hundred yard standard is currently utilized by the commission in rules regarding quarantining of a positive animal.

Under Subsection (g) of §49.1, entitled Quarantine, "[a]ny equine animal found to be a reactor to the official test will be quarantined.... at least 200 yards away from equine on adjacent premises." This rule was established on the epidemiological principle that a distance of two hundred yards is protective of equine against the spread in transmission of EIA. This adopted rule follows that principle to its next logical step in protecting equine by requiring that equine are tested if their contact with other equine is within two hundred yards. This rule is an effective method for reducing the spread of EIA by insuring that adjacent animals that have contact closer than two hundred yards are tested.

The requirement is applicable to any equine that is stabled, pastured or residing with an ability to come within two hundred yards of contact with equine located on an adjacent premise. An equine owner can demonstrate that the requirement is not applicable by providing verifiable information that the equine are managed or pastured in such a way as to never be in closer contact than two hundred yards with an adjacent equine. Also, an equine owner can apply for a waiver to this requirement under Chapter 59, Title 4, Section 59.2 (c) for extenuating circumstances, provided such waiver is not in conflict with sound epidemiologic principles. Individual hardship will commonly mean unforeseen circumstances that affect the owner or the owner's operation and are beyond the owner's control. Any waiver or variance from agency rule will be documented and presented to the Commission at the next scheduled meeting.

The petition also requested that the rule be worded so that the testing be required "...for equine infectious anemia if a neighboring owner requests it; providing that neighboring owner making the request has tested his or her animals. Proof of a negative EIA test shall be presented to the owner of neighboring equine upon request." However, the commission feels that it is most fairly administered by making the requirement applicable to all equine that have contact within two hundred yards instead of limited to being requested by a neighbor. Also, the commission believes in administering the EIA program and that verification with commission requirements should be handled by agency personnel.

The commission received one comment letter during the comment period supporting the proposal with no requested changes. However, one point of clarification was made at the Commission meeting regarding the use of the term "Coggins test." The Coggins test represents one type of an authorized EIA test. Texas recognizes three types of EIA tests, with the Coggins being one of those tests. The intent of the rule is to insure a negative test and not limit it to a Coggins test. As such, the rule is modified to reflect the need for a negative EIA test and not just a "Coggins test." This adoption amends the proposed new subsection (n).

The amendment is adopted under the Texas Agriculture Code, Chapter 161, §161.041, entitled "Disease Control." The commission shall protect equine from equine infectious anemia. Subsection (b) provides that the commission may act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic animals, domestic fowl, exotic fowl, or canines regardless of whether the disease is communicable. The commission may adopt any rules necessary to carry out the purposes of this subsection, including rules concerning testing, movement, inspection, and treatment. Subsection (c) provides that a person commits an offense if the person knowingly fails to handle, in accordance with rules adopted by the commission, an animal infected with a disease listed in Subsection (a) of this section. Subsection (d) provides that a person commits an offense if the person knowingly fails to identify or refuses to permit an agent of the commission to identify, in accordance with rules adopted by the commission, an animal infected with a disease listed in Subsection (a) of this section.

Also the amendment is adopted under the authority of Section 161.057 entitled "Classification of Areas." Subsection (a) provides that the commission by rule may prescribe criteria for classifying areas in the state for disease control. The criteria must be based on sound epidemiological principles. The commission may prescribe different control measures and procedures for areas with different classifications.

§49.1. Equine Infectious Anemia (EIA): Identification and Handling of Infected Equine.

(a) Official Test. The agar gel immunodiffusion (AGID) test, also known as the Coggins test, the Competitive Enzyme-Linked Immunosorbent Assay (CELISA) test, and other USDA-licensed tests approved by the commission, are the official tests for equine infectious anemia (EIA) in horses, asses, mules, ponies, zebras and any other equine in Texas.

(b) Authorization to conduct test. Only United States Department of Agriculture (USDA)-approved laboratories, including USDA approved off-site laboratories, are allowed to run the AGID and CELISA or other USDA licensed tests and all tests will be official. Only test samples from accredited veterinarians or other TAHC authorized personnel accompanied by a completed VS Form 10-11 can be accepted for official testing.

(c) Official Identification of Equine Tested for EIA. All official blood tests must be accompanied by a completed VS Form 10-11 (Equine Infectious Anemia Laboratory Test) listing the description of the equine to include the following: age, breed, color, sex, animal's name, and all distinctive markings (i.e., color patterns, brands, tattoos, scars, or blemishes). In the absence of any distinctive color markings or any form of visible permanent identification (brands, tattoos or scars), the animal must be identified by indicating the location of all hair whorls, vortices or cowlicks with an "X" on the illustration provided on the VS Form 10-11. It must list owner's name, address, the animal's home premise and county, the name and address of the authorized individual collecting the test sample, and laboratory and individual conducting the test. The EIA test document shall list one horse only.

(d) Reactor. A reactor is any equine which discloses a positive reaction to the official test. The individual collecting the test sample must notify the animal's owner of the quarantine within 48 hours after receiving the results.

(e) Retest of reactors. Equine which have been disclosed as reactors may be retested prior to branding provided:

(1) owners or their agents initiate a request to the TAHC Area Director of the area where the horse is located;

(2) retests are conducted within 30 days after the date of the original test;

(3) blood samples for retests are collected by the person who collected the sample for the first test or by TAHC personnel, and the blood samples are submitted to the Texas Veterinary Medical Diagnostic Laboratory (TVMDL) for testing;

(4) the individual collecting the retest sample is provided documentation that the animal being retested is the same as the one shown positive on the initial test and can verify the retested equine as being the same as shown on the original test document; and

(5) the positive animal is held under quarantine along with all other equine on the premise.

(f) Official identification of reactors. A reactor to the official test must be permanently identified using the National Uniform Tag Code number assigned by the USDA to the state in which the reactor was tested followed by the letter "A" (the code for Texas is 74A). The reactor identification must be permanently applied by a representative of the Texas Animal Health Commission who must use for the purpose of identification, a hot-iron brand or freeze-marking brand. The brand must be not less than two inches high and shall be applied to the left shoulder or left side of the neck of the reactor. Reactors must be branded within ten days of the date the laboratory completes the test unless the equine is destroyed. Any equine destroyed prior to branding must be described in a written statement by the accredited veterinarian or other authorized personnel certifying to the destruction. This certification must be submitted to the Texas Animal Health Commission promptly.

(g) Quarantine. Any equine animal found to be a reactor to the official test will be quarantined by a representative of the Texas Animal Health Commission to the premises of its home, farm, ranch or stable until natural death, disposition by euthanasia, slaughter, or disposition to a Texas Animal Health Commission approved, diagnostic or research facility. The quarantine shall restrict the infected equine, all other equine on the premise, and all equine epidemiologically determined to have been exposed to an EIA-positive animal to isolation at least 200 yards away from equine on adjacent premises.

(h) Movement of Reactors and Exposed Equine.

(1) Reactor equine. Following official identification, a reactor must be accompanied by a VS Form 1-27 permit issued by an accredited veterinarian or other authorized state or federal personnel when moved from its home premises either:

(A) Directly to a slaughter plant, slaughter-only market, or slaughter-only buying facility; or

(B) Directly to an approved diagnostic or research facility; or

(C) Directly to a livestock market to be sold for slaughter, provided that within 24 hours prior to entry, the equine is inspected by a TAHC veterinarian or a Texas USDA-accredited veterinarian to ensure the equine displays no clinical signs of EIA and has a normal temperature. The auction market must isolate the positive equine from other equine, pen the positive equine under a roof, and hold the positive equine on the premise for no longer than 24 hours.

(2) Exposed equine. Exposed equine must be identified with an "S" brand placed on the left shoulder or left side of the neck, and be accompanied by a VS Form 1-27 permit issued by an accredited veterinarian or other authorized state or federal personnel when moved either:

(A) Directly to a livestock market for sale directly to slaughter provided the exposed equine is quarantined at the market in isolation from other horses; or

(B) Directly to a slaughter plant, slaughter-only market, or slaughter-only buying facility; or

(C) Directly to an approved diagnostic or research facility.

(i) Requirements for testing equine on quarantined premises. All equine determined to have been on the same premise with an EIA-positive horse at the time the positive horse was bled shall be tested by an accredited veterinarian at owner's expense or by Commission personnel. Nursing foals are exempt from testing.

(j) Requirements for Testing Exposed Equine and High Risk Herds.

(1) Exposed equine. All equine epidemiologically determined to have been exposed to an EIA-positive animal shall be quarantined and tested by an Accredited Veterinarian at owner's expense or by Commission personnel. Nursing foals are exempt from testing.

(2) Whole herd testing. All equine except nursing foals that are part of a herd from which a reactor has been classified shall be tested by an Accredited Veterinarian at owner's expense or by Commission personnel. A herd is:

(A) All equine under common ownership or supervision that are on one premise; or

(B) All equine under common ownership or supervision on two or more premises that are geographically separated, but on which the equine have been interchanged or where there has been contact among the equine on the different premises. Contact between equine on the different premises will be assumed unless the owner establishes otherwise and the results of the epidemiologic investigation are consistent with the lack of contact between premises; or

(C) All equine on common premises, such as community pastures or grazing association units, but owned by different persons. Other equine owned by the persons involved which are located on other premises are considered to be part of this herd unless the epidemiologic investigation establishes that equine from the affected herd have not had the opportunity for direct or indirect contact with equine from that specific premise.

(3) High Risk Testing. Herds determined to be at high risk shall be tested by an accredited veterinarian at owner's expense or by commission personnel. High risk herds are those epidemiologically judged by a State-Federal veterinarian to have a high probability of having or developing equine infectious anemia. A high risk herd need not be located on the same premise as an infected or adjacent herd.

(k) Release of EIA quarantine. The EIA quarantine may be released by the Texas Animal Health Commission after all quarantined equine test negative at least 60 days following identification and removal of the last EIA-positive equine as set out in subsections (f) and (h) of this section. Epidemiological data may be considered in the release of the quarantine.

(l) Requirements for Change of Ownership. A negative EIA test within the previous 12 months is required for all equine, except zebras, which are eight months of age or older, changing ownership in Texas, except, if the animal is:

(1) sold to slaughter, to be tested at the slaughter facility at Commission expense; or

(2) a nursing foal that is transferred with its dam and the dam has tested negative for equine infectious anemia during the 12 months preceding the date of the transfer.

(m) Any equine sold to slaughter must be accompanied by a VS Form 1-27 permit issued by an accredited veterinarian or other authorized state or federal personnel when moved to a slaughter plant, slaughter-only market, or slaughter-only buying facility.

(n) Equine animals stabled, boarded or pastured within 200 yards of equine belonging to another person shall be considered to be a congregation point. All equine must have a negative EIA test within the last twelve months.

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 February 25, 2002.

TRD-200201147
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: April 1, 2002
Proposal publication date: November 30, 2001
For further information, please call: (512) 719-0714

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT REGULATION

SUBCHAPTER Q. CHAPTER 342, PLAIN LANGUAGE CONTRACT PROVISIONS

7 TAC §§1.1201 - 1.1207

The Finance Commission of Texas adopts new 7 TAC §§1.1201 - 1.1207, concerning a plain language model contract for Subchapter F contracts. New 7 TAC §§1.1201 - 1.1207 includes proposed clauses, disclosures, layout, and font type for Subchapter F plain language contracts. The new rules are adopted with changes to the proposal as published in the December 28, 2001, issue of the *Texas Register* (26 TexReg 10691).

The purpose of the rules is stated in the purpose clause, §1.1201, and is to implement the provisions of Texas Finance Code §341.502, which requires contracts for consumer loans under Chapter 342, whether in English or in Spanish, to be written in plain language. Use of the model contract is optional; however, should a lender choose not to use the model contract, contracts must be submitted to the agency in accordance with the provisions of 7 TAC §1.841.

The agency received written comments on the rule proposal from: Rob Wisner, Crain, Caton & James; Charles Johnson, Loan Tec Financial Software; and Jennifer Sedeno, Western Shamrock.

One of the comment letters expressed specific technical concerns with portions of the rule; primarily those comments were directed toward a model Subchapter E loan contract that is currently under development. Those comments will be addressed in connection with the development of that rule. The commenter found no need for a separate Subchapter F precomputed loan contract, yet the agency licenses and examines approximately 1,500 locations that almost exclusively engage in those types of transactions. The agency disagrees with this comment and believes that it is important to adopt a model Subchapter F precomputed loan contract. Two of the comment letters expressed concern about the formatting requirements for the new plain language contracts and stated inquiries regarding a Spanish translation of the contract. Additionally one of the comment letters expressed disagreement with the agency estimates on the cost to comply with the rule. The agency's estimates were based on a lender that uses a preprinted precomputed Subchapter F loan

form. The commenter stated that many lenders rely on computer systems to reproduce loan forms and that the cost of reprogramming systems to accommodate the new form would be substantially higher than the estimate given in the proposed rule. The agency agrees that costs to reprogram a computer system might be necessary for some lenders who desire to implement the model forms. Of course, a licensed Subchapter F lender who does not desire to modify a computer system always has an option to submit their non-standard contract for a readability review. The agency made several changes to the proposed model form to accommodate computer generated contracts designed to keep the costs associated with reprogramming to a minimum.

Section 1.1202 explains the relationship of federal law to the state requirements. The section describes how any conflicts or inconsistencies shall be resolved.

Section 1.1203 provides definitions in order to ensure consistent treatment and application of defined terms. Technical corrections were made to §1.1203 to more accurately state the definitions.

Section 1.1204 details the required format, typeface, and font for model plain language Subchapter F contracts. The requirements are necessary to ensure that the contract will be easy for consumers to read and understand. Revisions were made to §1.1204 to provide more flexibility for lenders to comply with the formatting provisions. Some lenders verbally expressed a desire to use some sans serif typeface in the text of the loan contract. Some lenders have been using this typeface in their contract for a long period of time and believe that it is easily readable. The agency agrees that sans serif typefaces can be easily readable and removes the requirement that the text of contract be printed in a serif typeface. Sans serif typefaces are generally used for headings, but can be used in the text for a clean, modern look. The rule accommodates both kinds of typefaces and provides that the typeface must be easily readable.

Section 1.1205 identifies the types of provisions that may be included in a Subchapter F contract. In §1.1205 the federal disclosure box was added in the list of contract provisions, one permissible clause was added, and one subsection was reorganized.

Section 1.1206 contains the model clauses. These clauses are the agency's interpretation of a plain language version of typical contract provisions. The modifications in §1.1206 reorganize the provisions related to the security agreement in a single subsection, make consistent grammatical and other nonsubstantive language changes with a similar contract (Subchapter E) that is under development, and provide an optional finance charge earnings clause for lender who make loans of $30 or less.

Section 1.1207 outlines permissible changes that can be made to a contract and still comply with the model provision. This section provides lenders with flexibility in using a model contract. The changes in §1.1207 are conforming changes consistent with the reorganization of the security agreement. Additionally a statement was added permitting creditors considerable flexibility to arrange the format of the contract consistent with the objectives of the rule.

The new section is adopted under the Texas Finance Code §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §341.502 grants the Finance Commission the authority to adopt rules to govern the form of Subchapter F contracts and to adopt model plain language contracts.

These rules affect Texas Finance Code Chapter 342, Subchapter F. These Rules become effective May 1, 2002.

§1.1201. Purpose.

(a) The purpose of these rules is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. The use of the "plain language" model contract by a creditor is not mandatory. The creditor, however, may not use a contract other than a model contract unless the creditor has submitted the contract to the commissioner in compliance with 7 TAC §1.841. The commissioner shall issue an order disapproving the contract if the commissioner determines the contract does not comply with this section or rules adopted under this section. A creditor may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) These provisions are intended to constitute a complete plain language Subchapter F contract; however, a creditor is not limited to the contract provisions addressed by these rules.

§1.1202. Relationship with Federal Law.

In the event of an inconsistency or conflict between the disclosure or notice requirements in these provisions and any current or future federal law, regulation, or interpretation, the requirements of the federal law, regulation, or interpretation will control to the extent of the inconsistency. The remainder of the contract will remain in full force and effect.

§1.1203. Definitions.

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

(1) Acquisition Charge--a finance charge assessed for making the loan as authorized under 342.252.

(2) Borrower--the person or persons who sign the loan agreement.

(3) Collateral--an interest in personal property which serves to secure the payment or performance of an obligation. See "Security."

(4) Deferment--an additional period of time beyond a due date for the borrower to make a payment or payments. See "Extension."

(5) Installment Account Handling Charge--a finance charge assessed on the loan as authorized under §342.252.

(6) Prepayment--any whole or partial payment of an amount equal to one or more full installments made by the borrower prior to the date the payment is due.

(7) Security--an interest in personal property which serves to secure the payment or performance of an obligation. See "Collateral."

§1.1204. Format, Typeface, and Font.

(a) Plain language contracts must be printed in an easily readable font and type size pursuant to Texas Finance Code §341.502(a). If other state or federal law requires a different type size for a specific disclosure or contractual provision, the type size specified by the other law should be used.

(b) The text of the document must be set in an easily readable typeface. Typefaces considered to be readable include: Times, Scala, Caslon, Century Schoolbook, Helvetica, Arial, and Garamond.

(c) Titles, headings, subheadings, captions, and illustrative or explanatory tables or sidebars may be used to distinguish between different levels of information or provide emphasis.

(d) Typeface size is referred to in points (pt). Because different typefaces in the same point size are not of equal size, type face is not strictly defined but is expressed as a minimum size in the Times typeface for visual comparative purposes. Use of a larger typeface is encouraged. The typeface for the federal disclosure box or other disclosures required under federal law must be legible, but no minimum typeface is required. Generally, the typeface for the remainder of the contract must be at least as large as 8pt in the Times typeface.

§1.1205. Contract Provisions.

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

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

(2) A Truth-in-Lending Act (TILA) disclosure box;

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

(4) A promise to pay;

(5) A late charge provision;

(6) A provision for after maturity interest;

(7) A provision specifying that prepayment is permitted;

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

(9) A provision authorizing deferments;

(10) A provision specifying the conditions causing default;

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

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

(13) A signature block;

(14) A security agreement including provisions addressing:

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

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

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

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

(16) Statement of truthful information;

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

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

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

(20) A clause providing for joint liability;

(21) A usury savings clause;

(22) Complaints and inquiries notice;

(23) An arbitration agreement; and

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

§1.1206. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms.

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

(2) Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

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

(c) Late Charge. The late charge model clause reads: "If I don't pay an entire payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

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

(e) Prepayment Clause. The model prepayment clause reads: "I can make any payment early."

(f) Finance Charge Earnings and Refund Method. The model finance charge earnings and refund method reads: "The acquisition charge on this loan will not be refunded if I pay off early. If I pay all I owe before the beginning of the last monthly period, I will save part of the installment account handling charge. You will figure the amount I save by the Sum of the Periodic Balances Method. This method is explained in the Finance Commission rules. You don't have to refund or credit any amount less than $1." At the lender's option, the lender may include the following model finance charge and refund method language if the lender makes loans of $30 or less: "The acquisition charge on this loan will not be refunded if I pay off early. If this loan is for more than $30 and I pay all I owe before the beginning of the last monthly period, I will save part of the installment account handling charge. You will figure the amount I save by the Sum of the Periodic Balances Method. This method is explained in the Finance Commission rules. You don't have to refund or credit any amount less than $1."

(g) Deferment Clause. The deferment model clause reads: "If I ask for more time to make any payment and you allow me more time, I will pay additional interest to extend the payment. The additional interest will be figured as provided in the Finance Commission rules."

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

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

(j) Fee for Dishonored Check Clause. The fee for dishonored check model clause reads: "I agree to pay you a reasonable fee of up to $25 for a returned check. You can add the fee to the amount I owe under this agreement or collect it separately."

(k) Clause Describing Collateral. In the TILA disclosure box, the model clause describing the collateral reads: "You will have a security interest in the following described collateral _____." At the creditor's option, if the promissory note is unsecured, the lender may use the following clause: "This note is unsecured."

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

(m) Mailing of Notice to Borrower. The model agreement regarding notice to the borrower reads: "You can mail any notice to me at my last address in your records.

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

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

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

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

(r) Joint Liability. The model joint liability agreement reads: "I will keep all of my promises in this document. If there is more than one Borrower, each Borrower agrees to keep all of the promises in this document, even if the other Borrowers do not."

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

(t) Complaints and Inquiries Notice. "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems. Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, (512) 936-7600, (800) 538-1579."

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

§1.1207. Permissible Changes.

(a) An authorized lender may consider making the following types of changes to the model clauses:

(1) The addition of information related to information set forth in the model clauses that is not otherwise prohibited by law.

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

(3) The model clauses may be presented in any order, and may be combined or further segregated at the creditor's option.

(4) Inserting descriptive headings or number provisions.

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

(6) Other changes which do not affect the substance of the disclosures.

(7) A sample model contract is presented in the following example.
Figure: 7 TAC §1.1207(a)(7)

(8) A sample model security agreement is presented in the following example.
Figure: 7 TAC §1.1207(a)(8)

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

This agency hereby certifies that the 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 February 22, 2002.

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Commissioner
Finance Commission of Texas
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Proposal publication date: December 28, 2001
For further information, please call: (512) 936-7640

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SUBCHAPTER S. MOTOR VEHICLE SALES FINANCE LICENSES

7 TAC §§1.1401 - 1.1410

The Finance Commission of Texas adopts new 7 TAC §§1.1401 - 1.1410, concerning licensing procedures for motor vehicle sellers and contract holders. The new rules are adopted with changes to the proposal as published in the December 28, 2001, issue of the *Texas Register* (26 TexReg 10694).

The adopted new rules provide procedures for filing an application for and issuance of a motor vehicle sales finance license under Chapter 348, Texas Finance Code, procedures for the transfer of a motor vehicle sales finance license, processing procedures and time frames for applications, procedures for changes in business form or proportionate ownership, procedures for amendments to pending applications, procedures for the relocation of licensed offices, procedures for designating licenses in an active and inactive status, and the fees associated with licensing activities.

Section 1.1401 defines particular terms. Several new definitions were added to clarify the use of these terms as they appear later in the rule or in the application forms themselves. The definition of "principal party" is a critical term to identify individuals who must be investigated. The definition of this term was clarified to add flexibility for the applicants, especially publicly held applicants, and to only require investigation of parties closely affiliated with the financing operation.

Section 1.1402 describes the procedure for filing a new application for a motor vehicle sales finance license, including instructions regarding what form to use and what information is necessary on the application and what information must be filed with the application. A provision was added to distinguish additional branch offices from the main (headquarters) location. In the original proposed rule, all locations would require a license. In the revised rule, a single license would be required for the main location and other offices would only be required to register. Further modifications were made to the rule to reduce the volume of filings required. For example, an applicant is not required to file complete copies of certain corporate documents such as the bylaws, but need only file copies of the relevant portions. In some cases, in lieu of the copies of relevant portions of documents, certifications from the secretary of the corporation will suffice. A reference was also made to the statutory provision that permits applicants to pay a late filing fee and apply for a retroactive license.

Section 1.1403 describes the procedure for filing an application for transfer of a motor vehicle sales finance license, including the filing requirements.

Section 1.1404 describes how an application for a motor vehicle sales finance license is processed, including a description of when an application is complete as well as an explanation of what may occur if an applicant fails to complete an application. In addition, this section describes the hearings process that occurs if the applicant contests the denial of its application.

Section 1.1405 describes what action the licensee must take when it changes the proportion of ownership in or the form of the licensed entity that lists the time frame within which the licensee must notify the commissioner.

Section 1.1406 requires each applicant, upon discovery of new or changed information, to supplement its application within 10 days of discovery of the new or changed information.

Section 1.1407 describes the procedures for relocating a licensed office, including deadlines for notification thereof.

Section 1.1408 describes how a licensee may change its license from active to inactive status and how a license may activate an inactive license.

Section 1.1409 sets out the fees for new licenses, license transfers, fingerprint checks, license amendments, license duplication, and cost of hearings.

Section 1.1410 states the implementation provisions including the authority to issue provisional licenses, if necessary.

Changes to sections 1.1403 - 1.1410 were primarily clarifying changes or conforming revisions to accommodate the registered branch offices modification. Certain revisions were made to provide flexibility to publicly held corporations.

The agency received written comments from: Andrew Siegel representing the New Car Dealers Association of Greater Dallas; and Texas Independent Automobile Dealers Association, Round Rock.

One commenter disagreed with the adoption of the rules. The commenter suggested that the proposed rules be amended to exempt new car dealers from the rules or to postpone adoption of the rules. The requirement for licensing of sellers of motor vehicles financed under Chapter 348 of the Texas Finance Code was mandated by statute (Senate Bill 317). The statute does not exempt a class of dealers from the application of the licensing statute. By its terms the statute requires all sellers and holders of motor vehicles contracts covered by Chapter 348 to become licensed. The agency believes that it would not only violate the legislative intent, but that it would exceed the agency's authority to exempt a class of motor vehicle sellers from the application of the statute and the corresponding rules. The statute requiring the license becomes effective September 1, 2002. In order to begin processing licensing applications and implement the statute by its effective date, it is paramount that the agency act promptly in adopting rules with licensing procedures. Processing licensing applications for a large number of applicants will require the agency to begin processing applications as soon as possible, so that as many licenses as possible can be processed and issued in advance of the September 1 deadline. The agency believes that it is appropriate and prudent to adopt the rules at this time and respectfully disagrees with the commenter.

Another commenter offered specific recommendations for modifications of the rule. The agency agreed with several of these comments and modified the rule accordingly. The other remarks offered by this commenter addressed topics not covered by the proposed rule.

The agency met several times with representatives of trade associations representing persons covered by the rule. The agency made modifications to the proposed rule as a result of this valuable input and feedback. Generally, these modifications were to

make the rules more flexible and less burdensome for the companies who are required to become licensed.

The new rules are adopted under the Texas Finance Code §§11.304 and 348.513, which authorize the Finance Commission to adopt rules to enforce Title 4 and Chapter 348 of the Texas Finance Code.

These rules affect Chapter 348, Texas Finance Code.

§1.1401. Definitions.

Words and terms used in this chapter that are defined in Chapter 348, Texas Finance Code, have the same meanings as defined in Chapter 348. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affiliate--A business entity directly or indirectly through one or more intermediaries that is under common control with the applicant or licensee.

(2) Applicant--An entity that has filed the required forms and fees to operate under a license from the Office of Consumer Credit Commissioner pursuant to Chapter 348, Texas Finance Code.

(3) Foreign Entity--An entity formed under the laws of a jurisdiction other than the state of Texas.

(4) Licensed Location--The central or main location of the entity.

(5) Principal Party--An individual with a substantial relationship to the proposed business of the applicant. The following individuals are considered to be principal parties:

(A) proprietors;

(B) general partners;

(C) voting members of a limited liability corporation;

(D) officers of privately-held corporations, to include the chief executive officer or president, the chief operating officer or vice president of operations, and those with substantial responsibility for operations or compliance with Chapter 348, Texas Finance Code;

(E) individuals associated with publicly-held corporations designated by the applicant as follows:

(i) officers as provided by subsection (4) of this section (as if the corporation was privately- held); or

(ii) three officers or similar employees with significant involvement in the corporation's activities governed by Chapter 348, Texas Finance Code. One of the persons designated shall be responsible for assembling and providing the information required on behalf of the applicant and shall sign the application for the applicant.

(F) directors of privately-held corporations;

(G) trustees; and

(H) individuals designated as a principal party where necessary to fairly assess the applicant's financial responsibility, experience, character, general fitness, and sufficiency to command the confidence of the public and warrant the belief that the business will be operated lawfully and fairly as required by the commissioner.

(6) Privately-Held Corporation--A corporation that is not publicly-held.

(7) Publicly-Held Corporation--A corporation:

(A) subject to the registration provisions of Securities Act of 1933 in order to allow a public offering of voting stock; or

(B) owned directly or indirectly by a parent corporation that is subject to the registration provisions of Securities Act of 1933.

(8) Registered Offices--Each location other than the licensed location where a licensee will originate, service, or collect retail installment contracts subject to Chapter 348, Texas Finance Code.

§1.1402. Filing of New Application.

An application for issuance of a new motor vehicle sales finance license must be submitted on forms prescribed by the commissioner at the date of filing and in accordance with the commissioner's instructions. The application must include the appropriate fees and the following:

(1) Required Forms.

(A) Application for Motor Vehicle Finance License.

(i) Location. A physical street address must be listed for the applicant's proposed licensed location. If the address has not yet been determined or the application is for an inactive license, then the application must indicate an application for an inactive license.

(ii) Registered Offices. A physical street address must be provided for each proposed location that will be originating, servicing, or collecting transactions.

(iii) Individual Responsible for Financing Operations. Name the person responsible for the day-to-day financing operations of applicant's proposed office.

(iv) Signature.

(I) If the applicant is a proprietor or a partnership, each proprietor and general partner must sign.

(II) If the applicant is a corporation, an authorized officer.

(III) If the applicant is a limited liability company, an authorized member or manager must sign.

(IV) If the applicant is a trust or estate, the trustee or executor must sign.

(B) Disclosure of Owners and Principal Parties. If an individual's interest in an entity is community property, then the spouse's community property interest must also be listed. If the business interest is owned by a married individual as separate property, documentation establishing or confirming separate property status should be provided.

(i) Proprietorship. An individual owning and operating the business must be named.

(ii) General Partnership. Each partner must be listed and the percentage of ownership stated.

(iii) Corporation. The officers and directors' sections on the form must be completed. Each shareholder holding at least 10% of the voting stock must be named if the corporation is privately-held. If a parent corporation is the sole or part owner of the proposed business, a narrative or diagram must be attached that describes each level of ownership greater than 10%.

(iv) Limited Liability Partnership. Each partner, general and limited, owning at least 10% must be listed and the percentage of ownership stated. If a partner is a business entity and not an individual, a narrative or diagram must be attached that describes each level of ownership greater than 10%.

(v) Limited Liability Company. Each manager, officer, agent, and member owning at least 10% of the company, as those

terms are used by the Texas Limited Liability Company Act, Texas Civil Statutes, Article 1528n, must be named. If a member is a business entity and not an individual, a narrative or diagram must be attached that describes each level of ownership greater than 10%.

(vi) Trust or Estate. Each trustee or executor must be listed.

(C) Application Questionnaire. Questions requiring a yes answer must be accompanied by an explanatory statement and any appropriate documentation requested on the form.

(D) Statutory Agent Disclosure. This form must be completed by each applicant. The statutory agent is the person or entity to whom any legal notice may be delivered. The agent must be a Texas resident and list an address for legal service. If the statutory agent is an individual, the address must be a physical residential address.

(E) Personal Affidavit, Personal Questionnaire, and Employment History. Each individual listed on the application as a principal party must complete the forms. The employment history must also include the individual's association with the entity applying for the license.

(F) Fingerprint Card. A complete set of legible fingerprints must be provided for each individual that is a principal party. Individuals who have previously been licensed by the agency and principal parties of entities currently licensed are not required to provide fingerprints. All fingerprints should be submitted on the format provided by the agency and approved by the Department of Public Safety and the Federal Bureau of Investigation.

(2) Other Required Filings.

(A) Contract Forms. The applicant must provide information regarding the retail installment contract forms generally expected to be used.

(i) Custom Forms. If a custom contract form is anticipated for regular use, a complete preliminary draft indicating the number and distribution of copies expected for each transaction must be submitted.

(ii) Stock Forms. If an applicant plans to purchase stock forms from a supplier, the applicant must attach a statement that includes the supplier's name and address and a list identifying the forms to be used.

(B) Statement of Experience. An applicant should provide information that relates to the applicant's prior experience in the motor vehicle sales finance business. If the applicant or its principal parties do not have significant experience in the business, the applicant must provide a written statement explaining the applicant's relevant business experience or education, why the commissioner should find that the applicant has the requisite experience, and how the applicant plans to obtain the necessary knowledge to operate lawfully and fairly.

(C) Business Operation Plan. An applicant must attach a brief narrative to the application explaining:

(i) the extent of planned motor vehicle sales finance activity;

(ii) whether the applicant will be the creditor to whom the contract is originally payable;

(iii) whether the applicant will be assigning the contract to another financing entity (assignee) and, if so, list the types of entities;

(iv) whether the applicant will only be accepting contracts from another entity (assignor), and, if so, list the types of entities; and

(v) whether the collections will occur at the licensed location.

(D) Entity Documents.

(i) Partnerships. A partnership applicant must submit a copy of the relevant portions of the partnership agreement addressing ownership and the responsibility for operations

(ii) Corporations. A corporate applicant, domestic or foreign, must provide the following documents:

(I) copies of the relevant portions of the by-laws addressing directors and officers of the corporation; and

(II) minutes of corporate meetings that record the election of the statutory agent and all current officers and directors as listed on the license application or a certification from the secretary of the corporation identifying the statutory agent and current officers and directors as listed on the license application.

(iii) Foreign Entities. In addition to the items required by this chapter, a foreign entity must provide a statement of where records of Texas transactions will be kept. If these records will be maintained at a location outside of Texas, the applicant must acknowledge responsibility for the travel costs associated with examinations in addition to the usual assessment or agree to make all the records available for examination in Texas.

(iv) Publicly-Held Corporations. In addition to the items required for corporations, a publicly-held corporation must file the most recent 10K or 10Q for the applicant or for the parent company.

(v) Trusts. A copy of the relevant portions of the instrument that created the trust addressing management of the trust and operations of the applicant must be filed with the application.

(vi) Estates. A copy of the relevant portions of the instrument establishing the estate addressing management of the estate and operations of the applicant must be filed with the application.

(vii) Limited Liability Companies. A limited liability company applicant, domestic or foreign, must provide the following documents:

(I) a copy of the relevant portions of the operating agreement addressing responsibility for operations; and

(II) minutes of meetings that record the election of the statutory agent and all current officers, directors, and managers as listed on the license application, or a certification identifying the statutory agent and current officers, directors, and managers as listed on the license application.

(E) Registered Offices. An applicant must submit the assumed name (DBA), physical address, telephone number, and individual responsible for financing operations for each registered office.

(3) Additional Offices. An applicant or licensee must provide the assumed name (DBA), physical address, telephone number, and individual responsible for financing operations for each new registered office and the appropriate fees before operations begin. Other information required by this section need not be filed if the information on file with the agency is current and valid.

(4) Late Filing. An applicant who desires to retroactively file a license application may do so by complying with Texas Finance Code, section 349.303, and the rules adopted under this chapter. A

licensee who desires to retroactively register an office may do so by complying with the Texas Finance Code, section 349.302, and the rules adopted under this chapter.

§1.1403. Transfer of License.

(a) Definition. As used in this section, a "transfer of ownership" occurs whenever an existing owner relinquishes that owner's entire interest in a license or an entirely new entity has obtained an ownership interest in the license. This term includes any purchase or acquisition of control over more than 10% of the outstanding voting stock of any licensed privately-held corporation, or of any privately-held corporation which is the parent or controlling stockholder of a licensed corporation. The term also includes stock ownership changes that result in a change of control for a publicly-held company. This term also includes any acquisition of a license by gift, devise, or descent. This term does not include a change in proportionate ownership as defined in section 1.1405(c)(1) of this title.

(b) Approval of Transfer. No license may be sold, transferred, or assigned without written approval by the commissioner.

(c) Filing Requirements. An application for transfer of a license must be submitted on forms prescribed by the commissioner and in accordance with the rules and instructions. The application for transfer shall include the appropriate fees and the following:

(1) Application Form. The instructions in section 1.1402(1) of this title (relating to Filing of New Application) are applicable to this filing.

(2) Evidence of the Transfer of Ownership. Documentation evidencing the transfer of ownership must be filed with the application and should include one of the following:

(A) a copy of the asset purchase agreement when only the assets have been purchased;

(B) a copy of the stock purchase agreement or other evidence of acquisition if voting stock of a corporate license has been purchased or otherwise acquired; or

(C) any document that transferred ownership in a license by gift, devise, or descent, such as a probated will or a court order.

(d) Permission to Operate. No business under the license shall be conducted by any transferee until the application has been received, all applicable fees have been paid, and a request for permission to operate has been approved. A request for permission to operate during the pendency of the application may be denied. This subsection does not apply to a change of control of a publicly-held corporation or a change due to the death or disability of an individual.

(e) Purchaser Operating Under Seller's License. A written agreement whereby a seller grants a buyer the authority to operate under the seller's license pending approval of the buyer's new license application is authorized. The agreement must provide that the seller accepts full responsibility to any customer of the licensed business for any acts of the buyer in connection with the operation of the business. The written agreement between the seller and the buyer must be submitted to the commissioner with a request to operate under the seller's license not less than 10 business days after the closing or the date of the sale. The agreement shall be for a defined period of time as provided in the agreement.

(f) Application Filing Deadline. Applications filed in connection with transfers of ownership may be filed in advance but must be filed no later than 10 calendar days following the actual transfer. Failure to meet the application filing deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

§1.1404. Processing of Application.

(a) Initial Review. Applications shall be responded to within 14 calendar days of receipt stating that the application is complete and accepted for filing or stating that the application is incomplete and specifying the information required for acceptance.

(b) Complete Application. An application is complete when:

(1) it conforms to the rules and published instructions;

(2) all fees have been paid; and

(3) all requests for additional information have been satisfied.

(c) Failure to Complete Application. If a complete application has not been filed within 30 calendar days after notice of deficiency has been sent to the applicant, the application may be denied.

(d) Hearing. Whenever an application is denied, the affected applicant has 30 calendar days from the date the application was denied to request in writing a hearing to contest the denial. This hearing shall be conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001, and section 9.1 et seq. of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings), before an administrative law judge who will recommend a decision to the commissioner. The commissioner will then issue a final decision after review of the recommended decision.

(e) Denial. If an application has been denied, the investigation fee in section 1.1409(a) of this title (relating to Fees) shall be forfeited.

(f) Processing Time.

(1) A license application shall ordinarily be approved or denied within a maximum of 60 calendar days after the date of filing of a completed application.

(2) When a hearing is requested following an initial license application denial, the hearing shall be held within 60 calendar days after a written request for a hearing is made unless the parties agree to an extension of time. A final decision approving or denying the license application shall be made after receipt of the proposal for decision from the administrative law judge.

(3) Exceptions. More time may be taken where good cause exists, as defined by Texas Government Code, section 2005.004, for exceeding the established time periods in paragraphs (1) and (2) of this subsection.

(g) Applications and Notices as Public Records. Once a license application or notice is filed with the agency, it becomes a "state record" under Texas Government Code, section 441.180(11), and "public information" under Texas Government Code, section 552.002. Under Texas Government Code, sections 441.190, 441.191 and 552.004, the original applications and notices must be preserved as "state records" and "public information" unless destroyed with the approval of the director and librarian of the State Archives and Library Commission under Texas Government Code, section 441.187. Under Texas Government Code, section 441.191, the agency may not return any original documents associated with a license application or notice to the applicant or licensee. An individual may request copies of a state record under the authority of the Texas Government Code, Chapter 552.

§1.1405. Change in Form or Proportionate Ownership.

(a) Organizational Form. When any licensee desires to change the organizational form of its business (e.g., from proprietorship to corporation), the licensee must advise the commissioner in writing of the change within 10 calendar days by filing the appropriate fees and transfer documents as provided in this title. In addition, the licensee shall submit a copy of the relevant portions of the organizational document for the new entity (i.e., the articles of incorporation) addressing the ownership and management of the new entity. Failure to meet the application filing deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

(b) Merger. A merger of a licensee is a change of ownership that results in a new or different surviving entity and requires the filing of a transfer application pursuant to this title. A merger of the parent entity of a licensee that leads to the creation of a new entity requires a transfer application pursuant to this title. A merger of the licensee's parent entity resulting in a different surviving parent entity requires a transfer application pursuant to this title. Mergers or transfers of other entities with a beneficial interest beyond the parent entity level only require notification within 10 calendar days. Failure to meet the application or notification filing deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

(c) Proportionate Ownership.

(1) A proportional change in ownership among the current owners does not require the filing of a transfer application, but does require notification when the cumulative ownership change to a single entity or individual amounts to greater than 10%. The notification is required no later than 10 calendar days following the actual change.

(2) This section does not apply to a publicly-held corporation that has filed with the agency the most recent 10K or 10Q filing of the licensee or the publicly-held parent corporation.

(3) Failure to meet the notification filing deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

§1.1406. Amendments to Pending Application.

Each applicant shall provide information supplemental to that contained in the applicant's original application documents and attachments. Any action, fact, or information that would require a materially different answer than given in the original license application and which relates to the qualifications for license must be reported within 10 calendar days after the person has knowledge of the action, fact, or information.

§1.1407. Relocation.

(a) Relocation of a Licensed Location. A licensee may move a licensed location to any other location by paying the appropriate fees and giving notice of intended relocation to the commissioner not less than 10 calendar days prior to the anticipated moving date.

(b) Relocation of a Registered Office. A licensee may move a registered office from the registered location to any other location by payment of the appropriate fees and giving notice of intended relocation to the commissioner not less than 10 calendar days prior to the anticipated moving date.

(c) The notice must include the contemplated new address of the licensed location or registered office and the approximate date of relocation. Failure to meet the notification deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

§1.1408. License Status.

(a) Inactivation of an Active License. A licensee may cease operating a licensed location by giving notice of the cessation of operations on the appropriate form not less than 10 calendar days prior to the anticipated inactivation date and remitting the fee for license amendment. Registered offices will be designated as closed when a license is inactivated.

(b) Activation of an Inactive License. A licensee may activate a license by giving notice of the intended activation on the appropriate form not less than 10 calendar days prior to the anticipated activation date and remitting the fee for license amendment. Registered offices must be listed and appropriate fees paid upon activation of a license.

(c) Expiration. A license will expire unless a fee is paid by the due date on the license renewal form. A licensee that pays the annual renewal and examination assessment will automatically be renewed even though a new license may not be issued.

§1.1409. Fees.

(a) New Licenses.

(1) A $100 non-refundable investigation fee is assessed each time an application for a new license is filed.

(2) Registered Office Fees. The fee for each registered office is $25.

(b) License Transfers. An applicant must pay a non-refundable investigation fee of $100 for the transfer of a license.

(c) Fingerprint Record Checks. The non-refundable fee to investigate each applicant's fingerprint record is $40 per set. This fee must be paid for each set of fingerprints filed with an application for a new license or a license transfer.

(d) License Amendment.

(1) A fee of $25 must be paid each time a licensee seeks to amend a license by rendering a license inactive, activating an inactive license, changing the assumed name of the licensee, or relocating a licensed location.

(2) Registered Office Amendment Fees. The fee for amending or transferring a registered office is $10.

(e) Annual Renewal and Examination Assessment.

(1) An annual renewal fee is required for each licensee consisting of:

(A) a licensed location fee of $75;

(B) a registered office fee of $10 per location; and

(C) a variable fee based upon the annual dollar volume of contracts originated or acquired during the preceding calendar year.

(2) The maximum annual assessment for each active license shall be no more than $250 excluding the registered office fees.

(f) Licensed Location or Registered Office Duplicate Certificate. The fee for a duplicate certificate is $10.

(g) Costs of Hearings. The commissioner may assess the costs of an administrative appeal pursuant to the Texas Finance Code, section 14.207 for a hearing afforded under section 1.1404 of this title (relating to Processing of Application), including the cost of the administrative law judge, the court reporter, and agency staff representing the agency at a hearing.

§1.1410. Implementation Provisions of Licensing.

(a) Effective Date. The effective date of the statutory licensing requirement is September 1, 2002. After September 1, 2002, a motor

vehicle seller may not engage in any retail installment transaction without a provisional or permanent license granted under this title. Any motor vehicle seller engaging in a motor vehicle sales finance transactions must comply with the provisions of the Texas Finance Code, sections 348.401 and 348.402 as it existed prior to September 1, 2001, and 7 TAC, Part I, Chapter 1, Subchapter P until September 1, 2002. Failure to comply with required registration provisions is grounds for denial of an application made under section 1.1404 of this title (relating to Processing of Application).

(b) Provisional license. The commissioner may issue a provisional license with a specified expiration date if necessary during implementation.

(c) Securitization of transactions. In the case of securitized transactions, such as a transaction in which motor vehicle retail installment contracts are held in trust or similar structure with participatory interests in the structure transferred to investors, the licensing requirements may be fulfilled either by the trust or other securitization entity or by the servicer that is responsible for servicing the contracts included in the securitized entity.

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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Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
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For further information, please call: (512) 936-7640

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CHAPTER 4. CURRENCY EXCHANGE

7 TAC §4.21

The Finance Commission of Texas (the commission) adopts new §4.21, concerning the filing of consumer complaints with the Texas Department of Banking (department). New §4.21 is being adopted with nonsubstantive changes to the proposal as published in the November 2, 2001, *Texas Register* (26 TexReg 8629). The text of new §4.21 will be republished.

Section 4.21 implements the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the department.

New §4.21 specifies the manner in which currency exchange, transmission, and transportation licensees provide consumers with information on how to file complaints with the department. The new section also requires that the information on how to file complaints be included with each privacy notice a currency exchange, transmission, and transportation licensee is required by law to provide to consumers.

The commission received no comments regarding the proposal. However, the commission made nonsubstantive changes to the rule as proposed for consistency with similar recently adopted rules applying Finance Code, §11.307 to other regulated industries. See, for example, §29.21 of this title (relating to How Do I Provide Information to Consumers on How to File a Complaint) published for adoption in this issue of the Texas Register.

The commission revised the language of the required notice for providing information to consumers of currency exchange, transmission, and transportation licensees on how to file complaints with the department in subsection (b)(1).

Further, the rule as proposed required currency exchange, transmission, and transportation licensees to post the required notice in every area where the licensee conducts business on a face-to-face basis. However, such business is often conducted by the agent of a licensee rather than the licensee itself. The commission has therefore revised subsection (b)(5)(A) to require that the notice must be posted in an area where the licensee or its agent conducts business with consumers on a face-to-face basis, that the licensee is responsible for providing the notice to its agents, and that the licensee is in compliance with this section if it provides the required notice to its agents and requires posting of the notice in its contract with the agent. A licensee that fails to hold an agent accountable for actions or conduct on behalf of the licensee under this section may be subject to enforcement sanctions under Finance Code, Chapter 153, Subchapter E.

The commission also added an alternative to compliance with the posting requirement of subsection (b)(5)(A). Instead of posting the required notice, the required notice may be included on the currency exchange, transmission, or transportation transaction receipts.

The commission added language to subsection (b)(3) to clarify that the requirement to include consumer complaint notices with privacy notices applies only to Texas consumers.

The commission also provided that the notice required to be included with each privacy notice under subsection (b)(3), and required to be accessible on a website offering currency exchange, transmission, or transportation services under subsection (b)(5)(B), be in substantially the same language and form as the required notice set out in subsection (b)(1).

Section 4.21 is adopted under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which currency exchange, transmission, and transportation licensees provide consumers with information on how to file complaints with the department. The commission concluded that the changes made to the proposal are nonsubstantive because no person's rights are adversely affected by the changes in the adopted rule as compared to the proposal.

§4.21. How Do I Provide Information to Consumers on How to File a Complaint?

(a) Definitions

(1) "Consumer" means an individual who obtains or has obtained a product or service from you that is to be used primarily for personal, family, or household purposes.

(2) "Privacy notice" means any notice which you give regarding a consumer's right to privacy as required by a specific state or federal law.

(3) "Required notice" means a notice in a form set forth or provided for in subsection (b)(1) of this section.

(4) "You" means a currency exchange, transmission, and transportation licensee that is licensed by the Texas Department of Banking under the Finance Code.

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: Complaints concerning currency exchange, transmission, and transportation activities should be directed to: Texas Department of Banking 2601 North Lamar Boulevard, Austin, Texas 78705 1-877/276-5554 (toll free) www.banking.state.tx.us

(2) You must provide the required notice in the language in which a transaction is conducted.

(3) You must include the required notice with each privacy notice that you send to consumers in this state. The language and form of the notice must substantially conform to the required notice set out in subsection (b)(1) of this section.

(4) Regardless of whether you are required by any state or federal law to give privacy notices, you must take appropriate steps to let your consumers know how to file complaints by giving them the required notice in compliance with subsection (b)(1) of this section.

(5) You must use the following measures to give the required notice:

(A) In each area where you or your agent conduct business on a face-to-face basis under Chapter 153 of the Finance Code, the required notice must be conspicuously posted. If such business is conducted by an agent, the licensee must provide to the agent a notice which complies with this section for posting at each such area. A licensee will be deemed in compliance with this section if it provides to each of its agents in this state the required notice and requires posting of the notice in its contract with the agent. A licensee that fails to hold an agent accountable for actions or conduct on behalf of the licensee under this section may be subject to enforcement sanctions under Finance Code, Chapter 153, Subchapter E. A notice is conspicuously posted if a consumer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) As an alternative to subsection (b)(5)(A) of this section you may include the required notice on all currency exchange, transmission, or transportation transaction receipts.

(C) This section applies equally to business conducted electronically. For example, those portions of your or your agent's website that offer to consumers currency exchange, transmission, or transportation services must contain access to the required notice. The language and form of the notice must substantially conform to the required notice set out in subsection (b)(1) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Everette D. Jobe
Certifying Official
Finance Commission of Texas
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For further information, please call: (512) 475-1300

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PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER A. CONTRACT FORMS

7 TAC §§25.1 - 25.6

The Finance Commission of Texas (the commission) adopts the repeal of §§25.1 - 25.6, concerning contract forms for sale of prepaid funeral benefits, without changes to the proposal as published in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8631). The repealed sections are replaced by new §§25.1 - 25.6, adopted in this issue of the *Texas Register*.

Amendments in law made by the 77th Texas Legislature, effective September 1, 2001, required existing §§25.1 - 25.6 to be significantly rewritten, effectively requiring repeal and replacement by new sections.

No comments were received regarding the proposed repeal.

The repeals are adopted under Finance Code, §154.051, which authorizes the commission to adopt reasonable rules concerning enforcement and administration of Finance Code, Chapter 154.

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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Everette D. Jobe
Certifying Official
Texas Department of Banking
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For further information, please call: (512) 475-1300

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7 TAC §§25.1 - 25.6

The Finance Commission of Texas (the commission) adopts new §§25.1 - 25.6, concerning contract forms. Nonsubstantive changes are made to the proposed text of each section as published in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8631). (A corrected version of Figure: 7 TAC §25.3(b) was published in the November 23, 2001, issue of the *Texas Register* (26 TexReg 9642).) Existing §§25.1 - 25.6 in this title are repealed in this issue of the *Texas Register*. The text of adopted §§25.1 - 25.6 will be republished.

According to Texas courts, if, after proper notice and hearing, an agency incorporates public comments into a proposed rule and the final rule affects no other subject or person than those previously given notice, no further purpose would be served by requiring republication of the proposed rule. While numerous changes are made to proposed §§25.1 - 25.6, because these changes in the rules as finally adopted regulate no new parties, affect no new subjects of regulation, and are in almost every instance the result of public comment, the commission concludes

the changes to §§25.1 - 25.6 are nonsubstantive and do not require reproposal. *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 801-802 (Tex. Civ. App.--Austin 1982, writ ref'd n.r.e.)

The commission is adopting these sections to guide a prepaid funeral benefits contract seller in complying with law. Finance Code, §154.151(a), requires the Texas Department of Banking (department) to approve a sales contract form for prepaid funeral benefits before a licensed seller uses the form. Amendments enacted by the Texas Legislature to Finance Code, Chapter 154, effective September 1, 2001, significantly alter the legal requirements applicable to a prepaid funeral benefits contract, requiring licensees to revise their contract forms. As amended, Finance Code, §§11.307, 154.151, and 154.156, obligate the commission and the department to provide new standard disclosures, model contract forms, and "plain language" contract standards.

Under Finance Code, §154.151(a), the department must approve a sales contract form for prepaid funeral benefits before a seller uses the form. Finance Code, §154.151(d), provides that a prepaid funeral benefits contract, whether in English or Spanish, must be written in plain language designed to be easily understood by the average consumer. Further, the contract must be printed in an easily readable font and type size. The department is charged with providing model contracts that comply with these directives and must enforce the provisions as applied to contract forms submitted by industry for approval. A form waiver of right of cancellation must also be approved by the department under the same standards that apply to a contract, see Finance Code, §154.156(a).

The department published draft model prepaid funeral benefits contracts for both insurance-funded and trust-funded arrangements and a waiver of cancellation rights, as required by Finance Code, §154.151(d) and §154.156(a). These forms were developed with the assistance of the regulated industry and have been revised simultaneously with this adoption to improve and enhance consistency with the rules. A few provisions in the models directly reflect certain required, standard disclosures and these provisions are incorporated into the adopted sections as appropriate and discussed further in this preamble. (The models use the term "you" to describe the purchaser of a prepaid funeral benefits contract, not the seller as the adopted sections do, because the focus of the models is the contractual relationship between a seller and a purchaser.)

General Concerns of Commentors

Six commentors responded in writing to the commission's request for comments. Interested groups or associations offering comment were the Texas Funeral Directors Association, the Texas Association of Insurance Officials, and a coalition of unidentified insurance companies that asserts its members write the majority of insurance policies funding prepaid funeral benefits contracts. The commission also held a public hearing to solicit additional public comment on December 14, 2001, as requested by the Texas Funeral Directors Association. The only attendees at the hearing were the same commentors who submitted written responses. All commentors recognized the rules are required by recent legislation and commended the department's efforts in developing the proposal, but opposed adoption of the rules in their proposed form.

The commentors expressed three general concerns: failure to appropriately distinguish between the prepaid funeral benefits contract that is funded by insurance and the funding insurance policy, imposition of requirements on non-model contracts that are more onerous than the model contracts, and a lack of specific deadlines for department approval or disapproval of submitted contracts and detailed due process procedures for the contract approval process.

Most commentors specifically expressed concerns relating to the incorporation by the proposed rules of portions and provisions of the insurance contract and contracting process into the prepaid funeral benefits contract. These commentors asserted that the proposed rules fail to appreciate the unique nature of the insurance-funded transaction, pointing out that the prepaid funeral benefits contract is fundamentally separate and apart from the insurance policy and related documents. Further, the commentors noted that the agents who will be completing the prepaid funeral benefits contract and taking the application for insurance can now be licensed and appointed to sell insurance policies or annuities for a number of companies. Therefore, a prepaid funeral benefits contract needs to take into account and allow the possibility that the agent will shop the coverage and the premium through the various companies in its portfolio. At a minimum, the commentors requested that the rules permit a provision in model and non-model contracts relating to insurance funding that provides the terms of the policy will control any conflicts between the two documents.

The department acknowledges that the prepaid funeral benefits contracting transaction and the insurance contracting transaction are distinct, though linked, and that the insurance transaction is regulated by the Texas Department of Insurance (TDI). The department has altered specific provisions in response to the expressed concerns, as discussed further in this preamble. However, the department believes some disclosure of insurance policy information is necessary to comply with Finance Code, §154.151. The department requested TDI to review these comments and the proposal. TDI does not believe the department is attempting to regulate the business of insurance and did not find any of the proposed insurance disclosures to be objectionable. In making revisions, the department attempted to avoid requiring a seller to disclose information in a contract form that is exclusively within the knowledge of the insurance company or that insurance law already requires to be disclosed to the consumer.

Most commentors also observed generally that the proposed rules impose disclosures or provisions on a non-model contract that are not reflected in the model contract, asserting this burden is patently unfair. The department did not intend to vary the requirements in this manner, and attempted to design the model contract to satisfy the same requirements imposed on non-model contracts. The rules have therefore been revised to address this perception, as discussed further in connection with §25.2(e).

Finally, most commentors criticized the failure of the proposed rules to provide due process for the approval or disapproval of non-model contracts and customized model contracts. The department has revised the rules to incorporate more details regarding process, as discussed further in this preamble.

Section by Section Summary and Analysis of Comments

Section 25.1

Overview. Section 25.1 defines terms commonly used in prepaid funeral benefits contracting and terms that will simplify understanding of legal requirements. A number of commentors indicated confusion regarding phrases and terms used in §§25.2 - 25.6 that were not defined in §25.1 as proposed, terms that were

defined in statute or that the department believed were self-defining. The department concluded the proposal could be improved by adding a number of definitions, and by including statutory definitions of basic terminology used in defining derived terms. Section 25.1 is significantly revised as a result. The former introductory language is revised into two subsections. New subsection (a) incorporates defined terms from Finance Code, Chapter 154, unless a term is otherwise defined in new subsection (b). Comments and responses regarding proposed definitions are included in the discussion of individual definitions that follows.

Contract beneficiary was defined in proposed §25.1(1) (now §25.1(b)(1) as adopted) as the person for whom a prepaid funeral benefits contract is purchased. One commentor requested that the definition provide additional explanation because the prepaid funeral benefits contract could have been purchased for someone who is actually not the person upon whose death the contract depends. The same commentor observed that the term "beneficiary" is a term of art in the insurance industry and could therefore be misleading to a consumer if used in two separate contracts to mean two different people, explaining that the "beneficiary" of the life insurance policy will always be different than the "contract beneficiary" under the prepaid funeral benefits contract. The department has no objection to adding clarification and has revised the definition to refer to the person named in a prepaid funeral benefits contract as the intended recipient of contracted funeral merchandise and services. The department disagrees with the recommendation to use a different term because the term is also a term of art in the prepaid funeral benefits industry and is used in Finance Code, Chapter 154. Further, a seller has the flexibility to use a different term for "contract beneficiary" in the seller's contract. As proposed and as adopted, §25.3(c) permits use of an alternate term.

Funeral goods and services was not defined in the proposal. The term is defined in §25.1(b)(2) as adopted, to generally mean prepaid funeral benefits regulated under Finance Code, Chapter 154. Because Finance Code, §154.151(e), requires a prepaid funeral benefits contract to contain a standard disclosure informing purchasers of the goods and services that will be provided or excluded under the contract, without distinction between prepaid funeral benefits and other funeral goods and services, the definition permits an exception for goods and services that are listed in the standard disclosure required by §25.3(b) but may not be within the definition of "funeral goods and services."

Funeral home is defined in §25.1(b)(3) as a "funeral provider", a term statutorily defined in Finance Code, §154.002(6). The definition was not included in the proposal. A commentor observed that the proposed rules throughout referred to "funeral home" but the statutory definition for "funeral provider" seems to have been intended. In addition, the proposal further suggested that one could substitute the word "provider" for "funeral home". Because "funeral home" is a more meaningful term to consumers than the statutory "funeral provider", the department elected to explicitly define the term.

Insurance-funded contract is defined in §25.1(b)(4) as a prepaid funeral benefits contract funded by an insurance policy. The term was not defined in the proposal. A commentor noted numerous occurrences of the undefined phrase "funding insurance policy" throughout the proposal and suggested the department include a definition for insurance-funded contract as a means to achieve the desired specificity. The department concurs with this suggestion. As part of implementing this suggestion, the department also added a definition for *trust-funded contract* as new §25.1(b)(14), to mean a prepaid funeral benefits contract funded by trust deposits made on behalf of the purchaser.

Insurance policy is defined in §25.1(b)(5) exactly as defined in Finance Code, §154.002(7), specifically a life insurance policy or an annuity contract but not any other form of insurance. The term was not defined in the proposal and is included for convenience to assist comprehension.

Model contract, model waiver, non-model contract, non-model waiver, prepaid funeral benefits contract, and *purchaser* are defined in §25.1(b)(6) - (11) substantially the same as these terms were defined in proposed §25.1(2) - (7), with minor stylistic and conforming edits. One commentor noted that the term "purchaser" was defined differently in proposed §25.1(7) than in pre-existing §25.1(c) (repealed in this issue of the *Texas Register*). After review, the department concluded that the proposed definition was consistent with the prior definition and differed only through the addition of clarifying details.

Responsible person is defined in §25.1(b)(12) substantially the same as the term was defined in proposed §25.1(8), with minor stylistic and conforming edits.

Seller is defined in §25.1(b)(13) exactly as defined in Finance Code, §154.002(10), specifically a person selling, accepting money or premiums for, or soliciting contracts for prepaid funeral benefits or contracts or insurance policies to fund prepaid funeral benefits in this state. The term was not defined in the proposal and is included for convenience to assist comprehension. A commentor associated with the insurance industry objected to including words such as "premiums" and "insurance policy" in this definition, arguing that only a licensed insurance agent can be involved in an insurance transaction. The department disagrees based on the literal text of Finance Code, §154.002(10).

You is defined in §25.1(b)(13) substantially the same as the term was defined in proposed §25.1(9), with minor stylistic and conforming edits. One commentor observed that proposed section titles used first person pronouns instead of second person pronouns. In response to this comment, the department parenthetically added explanatory text, so that the term "you" (or "I" in a section title) means a seller that is licensed under Finance Code, Chapter 154, and is subject to Title 7, Chapter 25, Texas Administrative Code.

Section 25.2

Overview. Section 25.2 explains how a seller may use the model forms developed by the department, and generally describes the requirements applicable to non-model forms. The model contracts and waiver, as revised to conform the adopted sections, are available from the department's web site, in English and Spanish.

Subsection (a). With respect to the insurance-funded model contract, the department received conflicting comments that created difficulties in resolving uniform application of the model contract to different potential contractual arrangements. The department thus has limited the applicability of the model contract to insurance-funded transactions in which purchaser is also the insurance policy owner. The text of §25.2(a) has therefore been modified to more clearly state limitations on use of the department's model contracts.

In this connection, §25.2(a)(2) did not appear in the proposal and has been added to clarify that the insurance-funded model contract developed by the department is designed to fit a transaction where the person named in the contract as the purchaser is also the insurance policy owner. If the contract purchaser and the insurance policy owner are not to be the same person, a seller must use an approved non-model contract that has been modified to correctly explain this arrangement. The department will consider adding future clarifications to the rules for additional guidance as it gains experience, through the contract approval process, in understanding the potential variations in insurance-funded contracting and related legal consequences to the consumer.

According to one commentor, sellers who opt to use the model form should not be required to submit the same form to the department for verification, as required by proposed §25.2(a)(2) (now §25.2(a)(3) as adopted), if no changes have been made to the model form other than to add information about the seller or a funeral home. Compliance is so minimal and straightforward that waiting for verification should not be required. Further, the requirement places an unnecessary administrative burden on the department. The department disagrees. New legislation changed contract requirements dramatically and the department believes compliance must initially be closely monitored. The department will consider adopting a "file and use" system after it develops experience regarding problems that might arise in compliance with new law.

Subsection (b). Proposed §25.2(b)(1) and (2) stated that the non-model contract must meet the requirements of §25.3 and §25.4 "as the department determines." One commentor stated the emphasized phrase was discomforting and seemed to convert an objective decision to a subjective one. The department believes the phrase is superfluous and has removed it from §25.2(b)(1) and (2) as adopted.

Subsection (c). Another commentor stated that requiring non-model waivers to contain identical provisions to the model waiver and use substantially the same language as the model waiver, in §25.2(c), is tantamount to requiring the use of the model waiver. Substantive reasons could exist why a seller may wish to use other language in the non-model waiver, perhaps something unique to the seller's business processes. The commentor suggested that flexibility be incorporated into the review standards to accommodate this concern as long as the additional or substitute language does not harm consumers or violate the plain language requirements of §25.4. However, if the suggestion is adopted, the commentor further requested that standards for the non-model waiver be developed to prevent use of unfair or arbitrary standards in the review process. The department believes some easing of this requirement is appropriate, and has revised §25.2(c) to permit some flexibility.

Subsection (d). Section 25.2(d) did not appear in the proposal and has been added in response to comments critical of the process in the proposed rules for use of a Spanish language contract. These comments are discussed further in connection with §25.5. As adopted, §25.2(d) permits a seller to use a Spanish version of an approved non-model contract after the seller files a copy of the Spanish document with a certification of accurate translation.

Subsection (e). Section 25.2(e) did not appear in the proposal and has been added to clarify that the department considers the model contracts and waiver to fully comply with §§25.1 - 25.6. Most commentors perceived that the proposed rules would impose disclosures or provisions on a non-model contract that are not reflected in the model contract, and asserted that this burden appeared to be patently unfair. The department did not intend to vary the requirements in this manner and attempted to design the model contract to satisfy the same requirements imposed on non-model contracts. Although the department revised the draft model contracts in a manner consistent with the adopted sections, new §25.2(e) has also been added to clearly state that the model contracts and model waiver satisfy the substantive content requirements of §25.3 and qualify under the plain language principles in §25.4. Section 25.2(e) should thus provide assurance that a non-model document need not include a broader or more comprehensive provision than is contained in the relevant model document unless additional explanation or disclosure is necessary to clarify or prevent misleading provisions in the non-model document.

Section 25.3

Overview. Section 25.3 imposes requirements for the content and certain formatting aspects of a non-model form submitted for department approval. In preparing the proposal, the department attempted to satisfy state law requirements while permitting the variations that may be necessary to comply with other state or federal law.

Several commentors argued that consideration must be given in §25.3 to TDI's supervision and control of the insurance market so that duplicitous regulation and conflicting control by the department can be avoided. To the extent that TDI regulations address the issues of concern to the department, the commentors urged that the regulations not be repeated in the prepaid funeral benefits contract rules. Specifically, the commentors stated that the terms of the insurance policy, the consumer insurance sales process, and the on-going administration of the insurance policies are regulated by TDI, and insurance law and regulations control insurance cancellation, premium payment disclosures, and repetition of life insurance policy provisions. Further, according to the commentors, the relationship of premiums to the death benefit should not be a matter regulated by the department. These comments are addressed in the context of specific requirements.

Subsection (a). Section 25.3(a) collects all requirements in summary form that are more explicitly described elsewhere in §§25.3 - 25.5. Comments made regarding subsection (a) are more appropriately discussed in connection with the substantive requirements that are incorporated by reference into subsection (a).

Subsection (b). The department intends §25.3(a)(1) and (b) to meet the mandates of Finance Code, §154.151(e), that "a standard disclosure . . . must be included in each contract to inform purchasers of the goods and services that will be provided or excluded under the contract . . . ." A number of commentors objected to the requirements of the proposal that the statement of goods and services must be page one of the contract exactly as set out in the model contract, including substantially the same formatting and spacing. The statement of goods and services is merely part of the contract and there is no compelling reason to require it to be page one. Further, commentors reasoned, the requirement actually detracts from the remainder of the contractual provisions to the detriment of consumers. As long as the information is provided to fully inform the consumer, companies should be allowed to use their expertise in designing the forms. The department disagrees regarding location, formatting, and spacing because of its obligation to design uniform, comparable,

and understandable disclosures. Flexibility has been enhanced in certain respects as described in subsequent discussions.

One commentor observed that a seller should be required to include only those items which it offered for sale to the public in the statement of funeral goods and services included, and should be permitted to relocate those funeral goods and services not offered to the description of the items not typically included in a prepaid funeral benefits contract. Further the commentor expressed the belief that the department had agreed to permit this type of variation. The department believed such variations were permissible under §25.3(b) as proposed. After further review, the department concurs that these permitted variations were not as clearly articulated in the proposal as the department had intended. The department revised §25.3(b)(5) to more explicitly permit variations in categories of funeral goods and services and has added new §25.3(b)(7) to provide reduced requirements for sellers operating under specifically limited permits.

One commentor found the general description categories under the caption "Immediate Burial and Direct Cremation", in Figure: 7 TAC §25.3(b), to be confusing to the seller and consumer, pointing out that the form may inadvertently encourage errors. Specifically, the cost of the burial container could be entered twice, once in the area specific to the container and again under the referenced caption. The commentor recommended that this redundancy be removed to avoid accidental double billing. The department concurs and has edited Figure: 7 TAC §25.3(b) accordingly.

Subsection (c). Section 25.3(a)(2) and (c) as proposed addressed defined terms in a contract to increase uniformity of terminology, comparability of contracts, and consumer understanding. One commentor recommended permitting usage of the 16 defined terms in the Federal Trade Commission's (FTC) Funeral Rule, Title 16, Part 453, Code of Federal Regulations (16 CFR Part 453), and that usage of the federal or state terminology be exempt from the plain language principles of §25.4. The commentor noted that many currently licensed sellers use the terminology found in the FTC Funeral Rule in their general price lists. These terms are also found in the rules of the Texas Funeral Services Commission. The commentor agreed that consistency in terminology is consumer friendly but points out that using multiple terms for the same service on different documents is confusing to the consumer. The department generally concurs and has revised the model contracts to make greater use of terminology in the FTC Funeral Rule.

Another commentor objected to requiring sellers to use terms that may be self-defining, such as "insurance policy" or "insurance company", or terms that can be misleading in specific circumstances, such as using the term "contract beneficiary" in an insurance-funded contract, because the term "beneficiary" means something different in the insurance policy. To address this concern, the department revised §25.3(c) as adopted to permit use of "terms commonly understood by consumers to be equivalent" to the required terms.

Subsection (d). Section 25.3(d) as proposed required a prepaid funeral benefits contract to explain the obligations of the parties to the contract and the obligations of the insurance company if the contract was insurance-funded. One commentor noted that the only obligation of the insurance company is to meet the terms and conditions of the insurance policy, and recommended deleting any reference to the obligations of an insurance company. The department acknowledges that the prepaid funeral benefits contracting transaction and the insurance contracting transaction are distinct, though linked, and that the insurance transaction is regulated by TDI. As previously noted, TDI does not share the commentor's concerns, and the department believes some disclosure of insurance policy information is necessary to comply with Finance Code, §154.151. The department made revisions to §25.3(d) as adopted to eliminate a perception that a seller must disclose information in a contract that is exclusively controlled by the insurance company. For example, in lieu of requiring a discussion of the insurance company's obligations, §25.3(d) now requires a discussion of the impact of terms in the insurance policy on specified obligations of parties to the contract. To further clarify the distinction between the contract and the insurance policy, the department added a new provision as §25.3(d)(10) to require a disclosure that the purchaser must refer to the terms of the insurance policy for information concerning its operation.

Most commentors were also critical of §25.3(d) because of a perception that the proposal imposed significantly more onerous requirements on a non-model contract as compared to the model contracts. The department had attempted to draft standards based on the draft model contracts developed with industry assistance and did not intend to impose more burdensome requirements on a non-model contract. However, the department understands the expressed concerns and has revised §25.3(d) and the model contracts to clarify that the required disclosures do not impose requirements for non-model contracts that are not also satisfied by the model contracts. In this connection, clarification is also provided by new §25.2(e) as previously discussed.

Specifically regarding §25.3(d)(2), one commentor suggested clarifications regarding what was meant by the disclosure that selected goods and services could not be changed "unless a new contract is issued." As adopted, §25.3(d)(2) requires disclosure that selected goods and services cannot be changed "unless the contract is voided and replaced with a new contract." Another commentor also objected to the revised phrase and argued that contract amendments should be permitted. The department disagrees based on the literal text of Finance Code, §154.155(c).

As proposed, §25.3(d)(4)(A) required explanation of the extent to which the purchaser will have any tax liability for earnings attributable to the contract or to an insurance policy and the manner in which the seller or insurance company will withhold funds to pay any tax liability. Several commentors asserted that, unlike a trust funded prepaid funeral benefits contract, no tax liability is associated with an insurance policy used to fund prepaid funeral benefits contracts. One commentor said an insurance company cannot withhold funds for tax purposes without violating the terms of the insurance policy. Finally, commentors noted inconsistency with the model contracts with respect to the tax withholding disclosure.

In response to these comments, the department has revised §25.3(d)(4) to require explanation of "whether the purchaser may incur tax liability for earnings under a trust-funded contract or for growth under an insurance policy if the contract is insurance-funded", and has revised the model contracts for consistency with this requirement. While the commentors are correct that no income tax consequence accompanies issuance or maturity of most insurance policies, a tax consequence may exist for an annuity and perhaps for certain life insurance policies. A consumer should be informed regarding future tax consequences

that may result from the choice of funding mechanism the consumer must make when purchasing a prepaid funeral. If no tax consequence exists with respect to a particular policy, the contract may so state.

One commentor observed that proposed §25.3(d)(5) and §25.3(d)(7) referred to the parties' general contractual obligations or other contractual provisions of a general nature, and suggested the provisions were redundant of one another. The department concurs and has deleted proposed §25.3(d)(7). Proposed §25.3(d)(4)(C) also addressed a general contractual provision and has been merged with proposed §25.3(d)(5) into (8) as adopted.

Section 25.3(d)(6) as adopted was formerly part of proposed §25.3(e)(4) and is relocated for consistency with the model contracts and revised for the reasons stated in connection with the discussion of comments received on proposed §25.3(e).

Subsection (e). Several commentors noted that cancellation of a prepaid funeral benefits contract or insurance policy, and the assignment of benefits of an insurance policy, both addressed in proposed §25.3(a)(4) and (e), are two very different issues that should separately be addressed. As adopted, the department has reorganized §25.3(e) to more clearly differentiate between trust-funded and insurance-funded contracts and to more carefully distinguish required disclosures regarding cancellation or assignment, but has not divided disclosure requirements for cancellation and assignment into separate subsections. Trust-funded contract requirements relating to cancellation and assignment appear in §25.3(e)(1) and insurance-funded contract requirements appear in §25.3(e)(2).

As originally proposed, §25.3(e)(1) required the contract to recognize and explain the mandatory 15-day delay after contract execution that applies to a voluntary waiver of cancellation rights under the contract. Most commentors suggested that the provision should be limited to trust-funded contracts because cancellation rights under an insurance-funded contract are not meaningful if contract funding is accomplished by an irrevocable assignment of policy proceeds. Further, the proposal did not permit an insurance-funded contract seller to eliminate irrelevant provisions from the contract, such as a reference to the use of a department-approved cancellation form. There is no such form for canceling the insurance policy, and no refund would ever be owing under the contract, according to the commentor. Any refund would be due from the insurance company that provided the insurance policy. As adopted, the department has limited the applicability of this provision as requested, in §25.3(e)(1)(A) and (B) (trust-funded contracts) and §25.3(e)(2)(A) (insurance-funded contracts). However, the department believes the commentor overstates the separation of the contract and the insurance policy with respect to cancellation issues, at least with respect to the manner in which the legislature addressed the issue, *see, e.g.*, Finance Code, §154.205.

One commentor argued that the requirement in §25.3(e)(1) as proposed, for explaining the process of waiving cancellation rights in the original contract, will potentially be very confusing to consumers, observing that an explanation can be given at the time a waiver is executed. The department declines to alter this requirement because consumers should be made aware of the option at the time of contracting, as well as be able to discover applicable legal requirements by reading transaction documents in the possession of the consumer. Further, a consumer should be made aware that a seller may not legally require a waiver of cancellation rights at the time the contract is executed. The department anticipates that sellers will not unlawfully solicit waivers. However, because Finance Code, §154.155(d), as revised entitles a consumer to half of the earnings under the contract upon cancellation, a benefit that did not previously exist, a limited financial incentive exists for a seller to routinely induce consumers to waive cancellation rights as soon as possible. The prudent course is to ensure consumers are adequately informed regarding both the potential for increased refund and the statutory limitation on soliciting waivers.

Comments were generally very critical of proposed §25.3(e)(4), which required a contract to disclose "the prohibition on partial cancellation of the contract, loans against the contract and loans against or withdrawal of proceeds accrued under a funding insurance policy," because the provision significantly overstated applicable legal restrictions. Under the terms of the insurance policy and state laws governing insurance, the purchaser has the right to make partial cancellations, take out loans on the policy, and withdraw proceeds. Commentors argued that these consumer rights, granted under other state law, do not need to be usurped even though the exercise of these rights would likely be an event of default under the prepaid funeral benefits contract. The department concurs and has made appropriate revisions to limit this restriction to trust-funded contracts in §25.3(d)(6) as adopted. With respect to an insurance-funded contract, adopted §25.3(e)(2)(H) now requires the contract to disclose "the effect that loans against or withdrawal of proceeds accrued under an insurance policy will have on the contract and on price guaranties in the contract."

Commentors also noted that the model contract did not contain the disclosure contained in §25.3(e)(4) as proposed, now revised in adopted §25.3(e)(2)(H), but instead simply stated that the applicant cannot take out a loan against the insurance policy. According to commentors, this language misstates the rights of an owner of a life insurance policy and conflicts with insurance law. Although the guarantees under the prepaid funeral benefits contract may be adversely impacted, the proposed model contract should not contain the false statement that the owner cannot take a loan out against an insurance policy. The department has revised the model contracts to be consistent with the adopted section.

In criticizing §25.3(e)(6)(A) as proposed, a commentor pointed out that requiring a contract clause referencing the "purchaser's interest" in the insurance policy ignored the fact that the purchaser may not be the owner of the life insurance policy. The department concurs with this observation but concluded that addressing the implications of this comment would create extraordinary complexity. Comments received conflicted with one another regarding the exact requirements of insurance regulation, and additional research will be necessary to properly define and describe structural variations in the aggregate, insurance-funded transaction. Thus, §25.5(e)(2) as adopted addresses disclosure requirements in the situation where the purchaser is also the owner of the insurance policy, but requires appropriate modification of the disclosures if the purchaser is not the policy owner, as permitted by adopted §25.2(a)(2).

The department concurs with the several comments that noted proposed §25.3(e)(7) appeared to be a catch-all and was superfluous, and has deleted the provision in its entirety.

Subsection (f). Section 25.3(a)(5) and (f) were designed to require contract disclosure of the consequences of default. Because the insurance policy is an integral component of an insurance-funded transaction, proposed disclosures addressed potential default under both the contract and the insurance policy. One commentor referred to proposed §25.3(f) as perhaps the best illustration of the department's failure to recognize the distinction between the insurance-funded contract and the insurance policy, and requested that the rule be revised to exclude matters in the insurance domain. Other commentors have endorsed the premise underlying this suggestion. The department disagrees that the rule should exclude all disclosures regarding matters in the insurance domain because the insurance policy is an integral part of the underlying transaction. However, the department revised §25.3(f) as adopted to better differentiate between the prepaid funeral benefits contract and the insurance policy acquired to fund it.

For example, §25.3(f)(1) as proposed required disclosure of the consequences of missed or late payments under the contract or under an insurance policy. A commentor requested that insurance-funded contracts be exempt from this requirement, observing that, because no payments are due under an insurance-funded contract, no need exists for an explanation in the contract of the consequences of a late payment. Further, the commentor noted that requiring a prepaid funeral benefits seller, who may not be licensed as an insurance agent or have any familiarity with the product, to describe to the consumer the consequences of incomplete or late premium payments on the insurance policy, is unjustified. According to the commentor, explaining an insurance policy constitutes the business of insurance under Insurance Code, Article 21.02, and is a clear violation of law if performed by a person not licensed as an agent. The commentor suggested a more effective disclosure would address the impact of failure to make required premium payments on any guarantees provided under the prepaid funeral benefits contract.

This commentor and others identified similar problems in §25.3(f)(2) - (4). Generally, commentors suggested that disclosure should be limited to a caution that the insurance policy is a separate contract that can affect the purchaser's rights under the prepaid funeral benefits contract coupled with a recommendation that the purchaser refer to the insurance policy to understand its terms. Commentors had conflicting views on whether an insurance company is required to deliver a copy of the policy and application to the policy owner. Finally, several commentors pointed to discrepancies between the requirements of §25.3(f) and the model contracts. The department revised §25.5(f)(1) - (4) and the model contracts for consistency and to minimize the expressed concerns regarding the separate business of insurance.

Subsection (g). The department proposed §25.3(a)(6) and §25.3(g) to address the mandate of Finance Code, §154.151(e), that "a standard disclosure . . . must be included in each contract to inform purchasers of . . . the circumstances under which the contract may be modified after death of the beneficiary." The standard disclosure as proposed was set forth in proposed Figure: 7 TAC §25.3(g) (26 TexReg 8864). One commentor recommended clarification of language in the model contract that addresses this requirement to clarify that the contract must be paid in full at the time of death, not immediately after death. The department concurs and revised the model contracts as requested. The revised language appears in Figure: 7 TAC §25.3(g). In addition, the department agrees with a commentor that the phrase "fully funded" must be used in lieu of "fully paid" in an insurance-funded contract to avoid a potentially misleading disclosure.

Subsection (h). Section 25.3(a)(7) and (h) as proposed required disclosure and explanation of all payment terms imposed on a purchaser of prepaid funeral benefits. The department attempted to succinctly capture and identify, in one location in a contract, the monetary obligations a purchaser incurs as a result of entering the contract and the terms of the contract that affect the amount and timing of these obligations, whether the obligations are to fund trust deposits or to pay premiums on a funding insurance policy.

Most commentors objected to the provisions as written, citing proposed §25.3(h) as another example of the rules to contemplate the differences between trust-funded and insurance-funded contracts and the failure of the department to appreciate the unique nature of the insurance-funded transaction. All commentors concurred that §25.3(h) should be revised to permit an insurance-funded contract to disclose that the terms of payment are provided for in the insurance policy. However, all comments received were not in agreement with regard to specific details of the operation of Texas insurance law, and the following summary of comments contains inconsistencies. Subject to specific exceptions, the department generally concurs with the commentors and has revised §25.3(a)(7) and (h) to more accurately capture the relationship between insurance-funded contracts and the insurance policies purchased to fund them, and to adjust required disclosures accordingly.

Commentors agreed that no payments are made under an insurance-funded contract; all payments are made under an insurance policy purchased to fund the contract. Several commentors asserted that Texas insurance laws require complete disclosure of payment information on the application for insurance. Because the application for insurance provides clear information concerning the payment obligations under the insurance policy, these commentors believed that including duplicate information in the insurance-funded contract is redundant, unnecessary, and potentially confusing. In particular, commentors pointed to the potential confusion and possible liability that would result if the payment information were completed differently on each form.

One commentor noted that, because premium payments are strictly a matter between the purchaser and the insurance company, they may not even be known when the contract is entered. In some circumstances the rates proposed in the application are based on the information contained in the application. In such circumstances, the cost of insurance may be higher or lower than the proposed rates, depending on the results of the underwriting process before the application is accepted by both the purchaser and the insurer. If payment terms provided in the prepaid funeral benefits contract are copied from the application, the contract would be in error. The department has addressed this concern in §25.3(h)(4)(C) as adopted. If premium information in the initial documents delivered at closing is based on an estimate of premiums, the contract must contain a notice that actual premiums could be more or less than estimated after the insurance company completes its underwriting process.

A commentor also argued that requiring a prepaid funeral benefits seller to provide insurance policy payment information to the purchaser would place the seller in violation of Insurance Code, Article 21.02, unless the seller is also licensed as an insurance agent. As previously noted, TDI does not share these concerns, although the department has clarified the distinction between the

contract and the insurance policy throughout this section to address the commentor's concern. The department notes, however, that sellers of insurance-funded contracts or designated employees of such sellers are indeed often licensed as insurance agents.

Another commentor asserted that the rule presumes that the seller is an insurance company and thus would know the payment information, but some sellers are not insurance companies and would not have access to the information. In addition, information in the application for insurance constitute personal information of the purchaser provided to the life insurance company through its agent. Thus, unless specifically authorized by the purchaser, the commentor stated that this information cannot be shared with the prepaid funeral benefits seller without violating privacy laws, citing the federal Gramm-Leach-Bliley Act (GLBA). The department specifically disagrees with the asserted application of GLBA. Specific exceptions exist for disclosure of nonpublic personal information if necessary to effect, administer, or enforce a transaction requested or authorized by the consumer, or to persons holding a legal or beneficial interest relating to the consumer. The core transaction requested by the consumer in this context is a funeral. See 15 U.S.C. §6801(e)(1) and (3)(C); 16 C.F.R. §313.14(a) and §313.15(a)(2)(iv). TDI has also adopted regulations interpreting GLBA that contain similar exceptions, effective January 1, 2002. See 28 TAC §22.18(a) and §22.19(a)(5). Thus, the relevant inquiry is whether sharing of the information is necessary to implement the core transaction, not whether the consumer has consented.

The department believes that §25.3(h) as adopted adequately addresses the central objections of commentors. Subject to modifications or clarifications required by §25.2(a)(2), new §25.3(h)(4)(B) requires notice in an insurance-funded contract that the terms governing premium payments are set forth in another document that the purchaser should consult, such as the application for insurance or the insurance policy.

Several commentors also pointed out that §25.3(h)(4)(B) as proposed (proposed §25.3(h)(4)(B) is now §25.3(h)(4)(D) as adopted) required a notice that insurance premiums paid on the underlying insurance policy or policies "may exceed the total contract price." These commentors objected to this disclosure as misleading because it is not necessarily true. In addition, the model contract is inconsistent with this provision. Commentors believed the proposed disclosure is prejudicial by its very nature and recommend that the provision be revised to be more consistent with the language used in the draft model contract. The department concurs. As adopted, §25.3(h)(4)(D) requires notice that insurance premiums paid on the insurance policy or policies may be more or less than the total contract price.

Subsection (i). Section 25.3(a)(8) and (i) established standards for the signature page and related notices. No comments were received directly regarding this subsection. Consistent with comments received regarding the legally separate duties imposed by insurance law, the requirement of proposed §25.3(i)(3), to include a notice that the purchaser may request a copy of the insurance policy, has been separately incorporated into new §25.3(i)(4) and revised to require notice that the policy owner may request a copy of the insurance policy from the insurance company if the insurance company is not legally required to deliver a copy of the policy to the policy owner. The department also revised proposed §25.3(i)(4) (now §25.3(i)(5) as adopted) to correct an oversight by adding telephone numbers to the information identifying certain parties.

Subsection (j). Finance Code, §11.307(a), requires the commission to adopt rules, applicable to each entity regulated by the department, requiring the entity to provide consumers with information on how to file complaints with the department and other state agencies. The commission adopted new §25.41 in December 2001 to apply this requirement to a prepaid funeral benefits seller, see the December 28, 2001, issue of the *Texas Register* (26 TexReg 10851). However, to improve conformity, amendments are proposed to §25.41 is this issue of the *Texas Register*.

As a specific, contextual application of this requirement, the model contract forms contain the required disclosure. Section 25.3(a)(9) and (j) as proposed required the same disclosure to appear in non-model forms. One commentor specifically objected to including the seal of the State of Texas in the notice, stating that it provided no benefit to consumers. The department disagrees. Consistent with plain language principles, the image of the state seal instantly communicates to a purchaser that the state has a regulatory interest in the transaction and provides an easily identifiable reference point for a purchaser thumbing through a stack of papers in search of this information, perhaps months or years later.

The commentor further objected to including information regarding how to contact other state regulatory agencies, asserting that the department is the only agency with jurisdiction over prepaid funeral benefits contracts. The department disagrees. Finance Code, §11.307(a), specifies that the notice must include information on how to file complaints with the "appropriate agency." In addition to contact information for the department, at the very least the department believes a consumer of a prepaid funeral benefits contract needs information on how to contact the Texas Funeral Service Commission, as well as TDI if the contract is insurance-funded. Other "appropriate" agencies exist, such as the Office of Consumer Credit Commissioner with respect to finance charges or the Federal Trade Commission with regard to violations of the FTC Funeral Rule, 16 C.F.R. Part 453, but the department did not include other agencies to minimize the regulatory burden the notice requirement may impose.

Finally, a commentor requested more flexibility with respect to placement of the required notice. As proposed, §25.3(j) required the disclosure to appear at the end of the last page of the contract. The department modified the placement requirement to prefer placement at the bottom of the signature page but permit placement at the top or bottom of a preceding page if separated from other text by at least 1/2 inches of white space.

Subsection (k). As proposed, §25.3(k) collected certain miscellaneous requirements and permitted additions that do not logically fit elsewhere in §25.3. Section 25.3(k)(2) as proposed required that the title of the contract include the term "Prepaid Funeral Benefits Contract." The department's purpose in imposing this requirement and similar requirements is to promote comparability among the contracts of competing sellers to enhance consumer understanding and facilitate comparison shopping. One commentor argued that companies should be permitted to brand their programs, title their forms in any manner that is not misleading, and otherwise have the ability to use discretionary judgment if no compelling public interest requires dictating conduct. The department revised §25.3(k)(2) to marginally increase the seller's discretion while retaining some degree of comparability. As revised, the contract title must disclose the contract is for the purpose of prearranging a funeral, such as "Prepaid Funeral Benefits Contract."

As proposed, §25.3(k)(6) required that a non-model contract contain "all consumer disclosures required by other state or federal law for this type of transaction." A commentor asserted that this requirement is overly broad and outside the jurisdiction of the department. The department used mandatory language in recognition that additional disclosures are legally required by other law but did not intend to use its regulatory authority to "require" these disclosures. The department concurs that the proposed language is overly broad and has reorganized and revised the requirement into new §25.3(l). As revised, a non-model document is "permitted" to contain additional contract clauses that are fair to consumers in light of the purpose of Finance Code, Chapter 154, and additional consumer disclosures that will assist the purchaser in understanding the transaction or that the seller determines are required by other state or federal law for the type of transaction the contract represents.

However, a seller must logically determine what additional disclosures are required to be in the contract by other law. Therefore, a seller is required by adopted §25.5(b)(1)(D), discussed further in connection with comments and revisions to §25.5, to represent to the department that, "to the best of your knowledge", a proposed non-model document submitted to the department for approval complies with all applicable state and federal law. The department does not believe it is using its regulatory authority to "require" these disclosures by insisting that the seller have considered the subject prior to filing a contract for approval.

Regarding consumer disclosures required by other law, the commentor noted that disclosures required by other state or federal law may change over time and suggested that the rule should permit companies to modify non-model contracts to comply with changes in such other law without further submission to the department other than notification of the changes. The department disagrees because of its obligation to approve a non-model contract for consistency with plain language principles. However, approval of a non-model contract that has been revised solely to comply with changes in other law can be obtained without significant difficulty or delay if properly explained, as required by adopted §25.5(b)(1)(C)(ii).

Section 25.4

Generally. Section 25.4 as proposed articulated the plain language principles that are incorporated into the model forms and will guide the department in evaluating non-model contract and waiver forms submitted for department approval. This plain language requirement is imposed by Finance Code, §154.151(d). Although the department specifically invited comments regarding how the department could more effectively determine that a Spanish language contract is "designed to be easily understood by the average consumer," no commentor addressed this question.

The department researched plain language writing and determined that plain language principles sound deceptively simple but can dramatically improve readability and understandability if followed. Plain language writing does not mean deleting complex information to make the document easier to understand. A plain language document uses words economically and at a level the audience can understand. Its sentence structure is tight. Its tone is welcoming and direct. Its style and design is visually appealing and attracts the eye to important information. The department located numerous resources from which to derive the requirements of §25.4, including the information and links available at http://www.plainlanguagenetwork.org/ and http://www.plainlanguage.gov, and has made some modifications in response to comments.

One commentor flatly asserted that §25.4 as proposed was vague, arbitrary, and failed to establish objective standards for plain language contracts. The commentor pointed to terms that appear in the proposal, such as "easily", "clear", "concise", "strong verbs", "everyday words", "superfluous", and "legalistic", and argued that these terms and others are not objective criteria upon which a seller may gauge compliance. These terms, according to the commentor, are so judgmental that compliance will vary depending upon the opinion of the person conducting the review rather than upon objective criteria. The department disagrees and believes the comment is more appropriately directed to the legislature, not the state agency charged with implementing and enforcing a statutory mandate that contracts must be "written in plain language designed to be easily understood by the average consumer [and] printed in an easily readable font and type size." None of the terms the commentor finds objectionable are used in connection with inflexible requirements, but are rather part of general principles that describe factors the department will consider in evaluating a proposed document.

Subsection (a). The text of §25.4(a) as adopted sets forth the statutory standard the department must follow and is unchanged from the proposal. The commentor that believed proposed §25.4 was vague, arbitrary, and failed to establish objective standards for plain language contracts urged that subsection (a) be deleted. The department disagrees that deletion of the paraphrased statutory standard is appropriate. Subsection (a) is adopted without changes.

Subsections (b) and (c). A proposed non-model contract or waiver should substantially comply with the plain language writing principles stated in §25.4(b) and substantially avoid the plain language impediments identified in §25.4(c), although the department will consider a seller's asserted reasons why a particular principle should not be applied in a specific context. The principles stated in §25.4(b) and (c) sought to avoid the most common writing problems that hinder a reader's understanding, including overly long sentences, overuse of passive voice and weak verbs, and unnecessary use of technical jargon and artificially defined terms. The commentor that believed proposed §25.4 was vague, arbitrary, and failed to establish objective standards for plain language contracts urged that subsections (b) and (c) be deleted. The department disagrees and believes the guidance provided by these provisions will be helpful to industry in understanding plain language requirements. None of the principles are expressed as inflexible requirements. These subsections are adopted without changes.

Subsections (d) and (e). Section 25.4 as proposed incorporated typesetting concepts in §25.4(d) and (e). Subsection (d) addressed typeface (font) selection and described both serif and sans serif typefaces and the relative advantages of these categories of typeface. The basic text of a proposed non-model document should be set in a serif typeface. Titles, headings, subheadings, captions, and illustrative or explanatory tables or sidebars may be set in a sans serif typeface for emphasis. The department has specified the minimum type size (measured in points (pt) in §25.4(e)(1) as equivalent to a Times typeface in 10pt, and will permit smaller sizes for certain provisions. Most resources reviewed by the department suggest 10pt as the minimum size and urge consideration of 12pt or larger if the document is designed for an elderly audience. In specifying what is

generally considered a smaller than desirable type size for certain sections of the document, the department sought a compromise between easy legibility and other advisable requirements, such as keeping related disclosures grouped together or satisfying a requirement to keep specified text on a single page. However, the department encourages sellers to consider using a larger and more legible type size.

Proposed §25.4 also addressed linespacing, or "leading", which refers to the amount of space between lines of text. The department specified minimum leading in §25.4(e)(2) as about 120% of type size, provided this standard results in at least two points of additional leading between lines of type.

No comments were received regarding proposed §25.4(d) and (e). The subsections are adopted without changes.

Subsection (f). Document design and formatting can enhance or hinder readability. Section 25.4(f) stated a preference for left justified, ragged right text and encourages use of descriptive headings and subheadings and tabular presentations. A commentor suggested full-justification should be permissible if the document is arranged in columns. The department concurs with the commentor. As revised and adopted, §25.4(f)(1) strongly encourages left-justified text in any paragraph or section of a non-model document that has text lines exceeding 70 characters in length.

The commentor that believed proposed §25.4 was vague, arbitrary, and failed to establish objective standards for plain language contracts urged that §25.4(f)(1) and §25.4(f)(3) be deleted for the reasons discussed in the following paragraphs.

This commentor criticized §25.4(f)(1) as addressing esthetics of the document rather than any substantive requirement. The commentor asserted that this requirement has no bearing on the readability, content, or any other substantive matter, and that companies should at the very least be free to design the look of their own forms without government interference. The department disagrees. Every comprehensive "plain language" resource reviewed by the department states that design and layout of a document strongly influences comprehension. The department therefore believes it must consider these factors in evaluating whether a contract is "designed to be easily understood by the average consumer."

Proposed §25.4(f)(3) required a non-model document to "use descriptive headings and subheadings that match the headings in the department's model contract." The commentor argued that headings and subheadings should be at the discretion of the drafter as long as they are not misleading. The department's purpose in imposing this requirement and similar requirements is to promote comparability among the contracts of competing sellers to enhance consumer understanding and facilitate comparison shopping. In response to this comment, the department has revised §25.4(f)(3) as adopted to encourage use of descriptive headings and subheadings that "are conceptually similar to the headings in the department's model contract." A seller will therefore be able to choose alternate terms if a consumer would understand the language chosen to mean substantially the same as the comparable heading or subheading in a model contract.

A commentor requested flexibility to use a page size of 8-1/2 inches by 17 inches. Proposed §25.4(f)(2) stated that the recommended page size for a proposed non-model contract is 8-1/2 inches by 14 inches. The department has revised §25.4(f)(2) to recommend a minimum page size for a proposed non-model contract of 8-1/2 inches by 14 inches and a maximum page size of 8-1/2 inches by 17 inches. However, as was the case with the proposal, page size is not expressed as an inflexible requirement.

Another commentor observed that proposed §25.4(f)(5) addressed use of alternate definitional terms and did not seem to fit in the plain language section. The department concurs and has deleted the provision by incorporating it into revised and adopted §25.3(c).

Subsection (g). As proposed, §25.4(g) required a non-model document to be subjected to mechanical readability tests as one factor to aid determination of its readability. These tests are contained in Microsoft Word and Corel WordPerfect software. The person submitting a proposed document for approval will be expected to apply the same tests before submission and explain how the results are consistent with the requirements of §25.4. Mechanical readability formulas are flawed because they cannot analyze substantive content. The department will therefore not rely solely on the readability statistics generated by these tests but will instead use them to supplement the department's evaluation of more subjective factors. However, in the absence of a suitable explanation that is consistent with plain language principles, a document that fails one of the four common tests listed in §25.4(g)(1) will ordinarily not be approved.

The commentor that believed proposed §25.4 was vague, arbitrary, and failed to establish objective standards for plain language contracts conceded that readability standards in §25.4(g) do set forth apparently objective criteria but argued that the stated principles are so arbitrary and vague that it is impossible to assess their meaning. The department disagrees and emphasizes that it will not rely solely on the readability statistics generated by these tests, as the text of subsection (g) plainly states, but will instead use them to supplement the department's evaluation of more subjective factors.

Another commentor noted that, in most instances in which mechanical scoring is used, certain phrases, disclosures, or terms are specifically excluded from the scoring requirements. For example, in some instances, such as with disclosures relating to representations and warranties as well as the disclosures required by Finance Code, Chapter 154, the legislature or a regulatory agency elected to use certain language for specific reasons. The commentor believed it would be inappropriate to include statutorily mandated language, disclosures, or definitions in the scoring because of the mandate to use such language and the lack of a seller's discretion to exercise control over its readability. The department concurs with this comment but specifically designed the proposed standards to account for this situation. First, the specified minimum scores are already skewed in anticipation of statutorily mandated language, disclosures, and definitions. The department's model contracts satisfy the requirements of subsection (g). Second, proposed §25.4(g)(2) required a seller to explain the circumstances and justifications for any scores outside the parameters. Language, disclosures, or definitions mandated by other law constitute circumstances that may justify substandard scores. However, the scores listed as desirable in subsection (g) have been relaxed slightly as adopted.

Section 25.5

Generally. Section 25.5 as proposed stated the filing requirements and procedures applicable to department approval of a non-model document. A fee is imposed of $250 plus $60 per hour spent by department employees in excess of one hour in evaluating the proposed document submitted for approval. A

seller would have the option of seeking judicial review of a department decision by following the specified procedures.

Commentors universally requested more detailed due process and specific time periods for action in §25.5. The department concurs and has expanded §25.5 as adopted to explicitly incorporate specific procedures designed to increase confidence that an application for approval of a non-model document will be handled predictably, as discussed further with regard to specific subsections and comments.

Subsection (a). Section 25.5(a) contained a statement of the legal authority underlying the requirement that a non-model contract form must be approved by the department before it can be used. No comments were received and the proposed text of the subsection is adopted. However, the department has added numbered paragraphs specifically describing each subsection of §25.5 and its purpose, as a general guide to a section significantly increased in length.

Subsection (b). Section 25.5(b) as proposed listed the documents and fees required to be submitted with an application to approve a non-model document. The adopted subsection has been expanded with descriptive text and the addition of requirements currently imposed by the department through its forms for submission of contracts for approval.

As proposed, §25.5(b)(2) required the submission of the Spanish version of the non-model contract at the time the English version is filed. A commentor suggested that, because the Spanish version is a translation of the English version, the rule should allow it to be filed after the English version is approved. The department concurs. As adopted, §25.5(b)(1)(B) and 25.2(d) implement this suggestion.

Adopted §25.5(b)(1)(C) did not appear in the proposal and has been added to incorporate requirements currently imposed in the department's application form for approval of a contract that is an amended version of a previously approved contract. Under §25.5(b)(1)(C), a seller requesting approval of amendments to a previously approved contract must submit a printed copy of the proposed non-model document that is specifically marked to show all text proposed to be added and all text proposed to be deleted, and a written summary of the amendments explaining their purpose.

Adopted §25.5(b)(1)(D) is based on and revised from §25.5(e) as proposed. Proposed §25.5(e) required a seller to submit a certification accepting responsibility for ensuring that the submitted non-model document complies with all applicable state and federal law, including Finance Code, Chapter 154. The proposed subsection (e) also contained a statement that the department does not determine that a submitted contract complies with laws and regulations administered by other state and federal regulatory agencies.

One commentor requested that proposed §25.5(e) be stricken in its entirety, arguing that the department by statute only has the authority to require compliance with Finance Code, Chapter 154, and has the sole obligation, without certification from the seller, to determine whether a submitted non-model contract complies with Chapter 154. The department disagrees with this characterization of the department's responsibilities but has more specifically defined its role based on the comment. It would be highly irresponsible of the department to approve a contract that it knows violates another state or federal law, yet the department does not desire the duty to inquire into compliance with other law. The only responsible solution is to rely on the seller to assume that duty, and in fact sellers submitting contracts for approval in past years have signed such a certification for the department, without comment or complaint. However, another commentor expressed concern that a seller without legal training might not be aware of a failure to comply with other law and could, by signing a certification of compliance, unwittingly empower the department to take a disciplinary action against the seller for filing a false document. This result is not intended or desired by the department. Although the department does not agree that the language of the proposal can reasonably be interpreted in this manner, it has revised the proposal to more explicitly avoid this interpretation.

As adopted, §25.5(b)(1)(D) requires a seller submitting a proposed document for approval to certify that the seller has examined the submitted document and, *to the best of seller's knowledge*, the submitted document complies with all applicable state and federal law. In addition, if an amendment to a previously approved document, the seller will certify, *to the best of seller's knowledge*, that the submitted document is identical to the previously approved document except for specifically marked and identified changes. In light of the intensity of comments received urging faster processing times, this requirement is not unreasonable, and does not expose the seller to penalty for lack of knowledge. Further, this requirement is identical in all material respects to current practice as represented by the application form sellers have signed and submitted to the department for years.

The remaining issue raised by these comments, whether the department should consider compliance with other law, is addressed in §25.5(c)(3) as adopted, regarding standards for approval. Generally, the applicable standards are based on Finance Code, Chapter 154. However, if the department "discovers" and "confirms" that a proposed non-model document will "clearly" violate a mandatory requirement of other law, the department will deny approval. However, the department will ordinarily not seek to review a proposed non-model document for compliance with other law, and approval of a non-model document by the department does not represent a determination of compliance with other state and federal law.

As proposed, §25.5(b)(3) specified certain additional documents to be filed with the department, including a copy of the life insurance policy form intended for use with the proposed contract and written evidence from TDI that the submitted policy form had been approved. A commentor asserted that TDI does not require formal approval of all life insurance policies marketed in Texas. Companies may therefore not have "written evidence from the Texas Department of Insurance that the policy has been approved." The department disagrees after consultation with TDI, with one exception. The commentor is technically correct that TDI does not approve all policy forms, but TDI does approve all policy forms that are used to fund prepaid funeral benefits contracts. If TDI fails to act within its time period for approval and the form becomes automatically approved, TDI stated its practice is to issue an approval letter upon request. However, policy forms may exist and be in use that were approved by TDI before it specifically addressed approval of the forms to fund prepaid funeral benefits contracts. As adopted, §25.5(b)(1)(E)(ii) incorporates this adjusted requirement.

Revised and adopted §25.5(b)(1)(F) and (b)(3) impose filing and review fees. As proposed, §25.5(d) imposed a filing fee of $250 plus an additional fee of $60 per employee hour in excess of one hour for review of a proposed non-model document submitted for approval. One commentor suggested that §25.5(d) be revised to

include a maximum fee of $500. Another commentor proposed a maximum fee of $550. The department disagrees, based on its prior practice, complied with by sellers without objection, of charging $50 per employee hour in excess of one hour for review of a proposed contract, without a maximum stated fee. However, the department modified the proposal to more closely conform to current fees, in revised §25.5(b)(1)(F) and (b)(3), by imposing a filing fee of $250 plus an additional fee of $60 per employee hour in excess of four hours for review of a proposed non-model document submitted for approval.

Subsection (c). As proposed, §25.5(c) described the procedure the department will follow in considering whether to approve a proposed non-model document. After submission, §25.5(c)(1) provided the department would act "as soon as reasonably possible" and, if approval is denied, the department would "state the basis for the denial." If approval was denied, proposed §25.5(c)(2) provided a seller the opportunity to either keep the application open by resubmitting a modified non-model document or request a hearing before the commissioner to review and reconsider the department's response. Proposed subsection (c)(3) required the hearing to be set "as soon as reasonably possible" and imposed the burden of proof at a hearing on the department, and subsection (c)(4) made the commissioner's order after hearing appealable. The department did not specify deadlines for action, reasoning that initial contract form submissions by sellers could potentially overwhelm the department's resources in the short term. Hard and fast deadlines in this circumstance would be detrimental to the public policies established by Finance Code, Chapter 154.

A commentor urged that, in exchange for payment of the required fees by §25.5(d), a seller should be reasonably entitled to some assurance that the application will be reviewed within 15 days, the department will specify the specific basis for any disapproval in writing, and an automatic approval of the form will occur if no action is taken within 30 days. Otherwise, according to the commentor, companies will be faced with potential loss of revenue, the expense of extra regulatory fees, and no corresponding obligation on the department to act. Another commentor joined in requesting the department be required to specify a specific basis for denial, including citations to the specific legal provisions the document fails to satisfy.

The department concurs that adding additional assurances regarding processing time is reasonable but disagrees that a 15 day review period is appropriate for the reasons underlying the department's initial proposal to omit specific deadlines. The department disagrees with the suggestion that automatic approval is appropriate in the event of a missed deadline. The legislature is clearly aware of its authority to impose automatic approval deadlines on state agencies and has done so in numerous instances, but not in connection with any application process under Finance Code, Chapter 154. Absent explicit legislative direction, the department will not voluntarily relinquish its statutorily-granted discretion in a manner that could damage the regulatory interests the department is charged with protecting.

After consideration, the department concluded that an appropriate processing time for a new non-model contract, as stated in §25.5(c)(1)(A) as adopted, is 90 days if submitted prior to March 1, 2003, and 45 days if submitted on or after that date. Further, with respect to a proposed non-model waiver or an amended version of a previously approved non-model contract, adopted §25.5(c)(1)(B) specifies a processing time of 30 days. Finally, the specified processing time for amendments limited to changed or added information about the seller or a funeral home is 10 days, consistent with the manner in which modifications to a model document are processed under adopted §25.2(a)(3). Subsection (c)(2) grants the department discretion to extend a processing time by up to an additional 30 days if the filing raises issues requiring additional information or additional time for analysis.

Section 25.5(c)(3) as adopted is based on proposed §25.5(e). Under this provision, the department will deny approval if the proposed non-model document fails to comply with the Finance Code, Chapter 154, as implemented by §§25.1 - 25.6. As previously noted, the department will not ordinarily seek to verify compliance with other law but reserves the authority to refuse to approve a document that "clearly" violates other applicable law if the department takes action to confirm the clear violation.

With respect to comments requesting the department to state the specific basis for denial, the department was unaware that its proposed obligation to "state the basis for the denial" could be interpreted to allow a general denial without justification, and accordingly has revised §25.5(c)(4) as adopted to more explicitly require a statement of the specific basis for denial and make additional disclosures to inform the applicant of available second review and appeal rights.

Subsection (d). Section 25.5(d) is based on proposed text that was originally part of §25.5(c). The text has been expanded to more explicitly grant and describe rights to an unsuccessful applicant to seek a second review of a revised version of the proposed document by the department or to request a hearing before the commissioner. The department will not require a new filing fee but may charge additional review fees. The specified processing time for the department to approve or disapprove a revised submission on second review is 10 days. After a second disapproval, the applicant may request a hearing before the commissioner. However, if approval would be granted provided minor changes are made to the document and the applicant has not previously had an opportunity to make those changes, the department will include an option in the second notice of denial to submit the revised form for approval within 10 days.

Subsection (e). Section 25.5(e) is also based on proposed text that was originally part of §25.5(c), and the text has been expanded to more explicitly describe the procedures that will apply to a hearing before the commissioner. These procedures are not newly created and would have applied to a commissioner hearing in the absence of this expanded text, based on 7 TAC Chapter 9. However, including detailed procedures in §25.5 as adopted will provide better guidance to sellers unaccustomed to researching procedural administrative law.

Subsection (f). Adopted §25.5(f) describes the circumstances under which a seller may not use a previously approved document, as did proposed §25.5(f). The dates specified in the proposal have been advanced forward to account for delays that occurred in finally adopting §§25.1 - 25.6.

Several commentors requested that a seller be permitted to use the seller's current contract after the stated expiration date if the seller's request for approval of a non-model contract is still pending or remains open pending additional submission or resolution by a requested hearing. The department incurs in part but will still retain an outside expiration date. To address continued use of an existing contract while a good faith application for approval is pending, the seller may request an extension from the commissioner.

As adopted, §25.5(f) generally prohibits use of a prepaid funeral benefits contract form that was approved before January 31, 2002, because contracts approved prior to this date were analyzed under the law in effect prior to September 1, 2001. However, a seller can continue using an obsolete contract with the model addendum developed by the department until the later of June 1, 2002, October 1, 2002, if the seller files a proposed non-model contract with the department for approval before June 1, 2002, or a later date if, before October 1, 2002, the seller requests an extension of time to permit completion of a pending approval proceeding under this section and the commissioner approves the request in writing. In addition, these expiration dates do not apply once a seller obtains approval of a non-model contract. After approval and following a transition period of 30 days, the seller must use the non-model contract and not the seller's obsolete contract, even with the model addendum.

Section 25.6

Proposed §25.6 rephrased and reorganized existing §25.6 in a manner consistent with the proposal without adding new substantive content. Generally, the section specifies who should receive copies of documents after a contract is executed by all parties.

Commentors generally pointed to the failure of §25.6 to recognize the difference between an insurance-funded contract and the life insurance policy, stating that §25.6(a) attempts to regulate life insurance companies when they may not be a party to the prepaid funeral benefits contract. The life insurance laws dictate who receives a copy of the life insurance contract application, and under certain circumstances the purchaser may not be entitled to a copy of the application. The department concurs and has revised §25.6 as adopted to clarify the roles of the parties.

Sections 25.1 - 25.6 are adopted under Finance Code, §154.051(b), which authorizes the commission to adopt reasonable rules regarding matters relating to the enforcement and administration of Chapter 154, including rules concerning the filing of contracts. Additional authority and applicable requirements are provided by Finance Code, §§11.307(a) and (b), 154.151(d) and (e), and 154.156(a).

§25.1. Definitions.

(a) A word or term that is defined in Finance Code, Chapter 154, retains the same meaning when used in this subchapter unless the word or term is defined otherwise in subsection (b) of this section.

(b) The following words and terms have the following meanings when used in this subchapter, unless the context in which a word or term is used clearly indicates a different meaning that is consistent with the purpose of Finance Code, Chapter 154:

(1) "Contract beneficiary" means the person named in a prepaid funeral benefits contract as the intended recipient of contracted funeral merchandise and services.

(2) "Funeral goods and services" means funeral merchandise and services that are regulated as prepaid funeral benefits, as that term is defined by Finance Code, §154.002(9), except to the extent provided otherwise in §25.3(b) of this title (relating to What Requirements Apply to a Non-Model Contract) and related provisions.

(3) "Funeral home" means a funeral provider, as that term is defined by Finance Code, §154.002(6), specifically a funeral home that agrees in a prepaid funeral benefits contract to provide specified prepaid funeral benefits.

(4) "Insurance-funded contract" means a prepaid funeral benefits contract funded by an insurance policy.

(5) "Insurance policy" has the meaning assigned by Finance Code, §154.002(7), specifically a life insurance policy or an annuity contract. The term does not include a policy for any other form of insurance.

(6) "Model contract" means a prepaid funeral benefits contract form developed and published by the department for your use.

(7) "Model waiver" means the waiver form developed and published by the department for your use, to govern the voluntary waiver of a purchaser's right to cancel a prepaid funeral benefits contract as permitted by Finance Code, §154.156(a).

(8) "Non-model contract" means a prepaid funeral benefits contract form that differs from the model contract with respect to the requirements and standards of §25.3 of this title and §25.4 of this title (relating to What Are the Plain Language Requirements for a Non-Model Contract or Waiver). A model contract does not become a non-model contract because you add your name, trademark, or other information about you, or information about the funeral home.

(9) "Non-model waiver" means a form of waiver that has the same purpose as but differs from the model waiver with respect to the requirements and standards of §25.2(c) of this title (relating to Am I Required to Use the Model Contract and Model Waiver) and §25.4 of this title. For example, a model waiver does not become a non-model waiver because you add your name, trademark, or other information about you, or information about the funeral home.

(10) "Prepaid funeral benefits contract" or "contract" means a contract or agreement for prepaid funeral benefits, whether trust-funded or insurance-funded.

(11) "Purchaser" means the person who contracts to buy prepaid funeral benefits. The purchaser may also be the contract beneficiary. If permitted by the context, the term includes the purchaser's authorized agent.

(12) "Responsible person" means the person charged with the disposition of the contract beneficiary's remains by Health and Safety Code, §711.002(a).

(13) "Seller" has the meaning assigned by Finance Code, §154.002(10), specifically a person selling, accepting money or premiums for, or soliciting contracts for prepaid funeral benefits or contracts or insurance policies to fund prepaid funeral benefits in this state.

(14) "Trust-funded contract" means a prepaid funeral benefits contract funded by trust deposits made on behalf of the purchaser.

(15) "You" (or "I" in a section title) means a seller that is licensed under Finance Code, Chapter 154, and is subject to this chapter.

§25.2. Am I Required to Use the Model Contract and Model Waiver?

(a) Use of model contract and waiver. You may use the appropriate model contract or the model waiver described in this subsection except as provided in paragraph (2) of this subsection, but you are not required to do so if you obtain approval to use a non-model contract or waiver.

(1) The department has adopted two model contracts, one for sale of trust-funded prepaid funeral benefits and one for sale of insurance-funded prepaid funeral benefits where the purchaser is also the policy owner, and a model waiver, in English and in Spanish, for your use. Each model contact or waiver meets all statutory requirements and the requirements of this subchapter with respect to the type of transaction it is designed to govern. You may acquire copies of model contracts

and the model waiver by downloading them from the department's web site or requesting them by mail. The department's web site address is http://www.banking.state.tx.us.

(2) If you sell insurance-funded contracts, the insurance-funded model contract is suitable only if the person named in the contract as the purchaser is also the insurance policy owner. If the contract purchaser and the insurance policy owner are not to be the same person, you must use an approved non-model contract that correctly addresses this arrangement.

(3) You may use a current model contract or model waiver after the department verifies that your proposed form document is a current model document that has been customized by inserting your name and permit number. Your submitted form document may also contain other information about you or a funeral home as long as you do not otherwise alter the model document. The department shall approve or disapprove a customized model document on or before the 10th business day following the day the document is filed with the department.

(b) Non-model contracts. Before you use a non-model contract, it must:

(1) satisfy the substantive content requirements of §25.3 of this title (relating to What Requirements Apply to a Non-Model Contract or Waiver);

(2) qualify under the plain language principles stated in §25.4 of this title (relating to What Are the Plain Language Requirements for a Non-Model Contract or Waiver); and

(3) be approved by the department as provided in §25.5 of this title (relating to How Do I Obtain Approval of a Non-Model Contract or Waiver).

(c) Non-model waivers. You may use a non-model waiver if it addresses substantially the same matters in substantially the same order as the model waiver, to promote comparability and consumer understanding. Your proposed non-model waiver form may contain additional provisions that are fair to consumers in light of the purpose of Finance Code, Chapter 154. You must submit a non-model waiver to the department for approval in the manner required by §25.5 of this title. The model waiver in English appears as:
Figure: 7 TAC §25.2(c)

(d) Transactions conducted in Spanish. If you intend to conduct any prepaid funeral benefits transaction predominately in Spanish, you may use a current model contract or model waiver in Spanish as provided by subsection (a) of this section. If the department has approved your non-model document in English under §25.5 of this title, you may use a Spanish version of the document after you file a copy of your Spanish document and a certification from a translation service acceptable to the department that the Spanish version is a true and correct translation of the submitted English document. If the English version of your Spanish non-model document has not previously been approved, you may not use your Spanish non-model document until you comply with subsection (b) of this section.

(e) Interpretation of required content and form. The department considers the model contracts and model waiver to satisfy the substantive content requirements of §25.3 of this title and qualify under the plain language principles stated in §25.4 of this title. If you have questions regarding the intent and meaning of a requirement in this subchapter, locate and review the related clause in the model contracts or model waiver. You are not required to include a broader or more comprehensive provision than is contained in the relevant model document unless additional explanation or disclosure is necessary to clarify or prevent misleading provisions in your non-model document.

§25.3. What Requirements Apply to a Non-Model Contract or Waiver?

(a) Contract requirements. The department must approve a non-model contract before you can use it. Your proposed non-model contract must:

(1) contain a disclosure informing the purchaser of the funeral goods and services that will be provided or excluded under the contract, as described by subsection (b) of this section;

(2) define terms used in the contract as described by subsection (c) of this section;

(3) state and explain the purchaser's obligations, your obligations, and the obligations of the funeral home if you are not performing all funeral services under the contract, and the impact of terms in the insurance policy on the contract if the contract is insurance-funded, as described by subsection (d) of this section;

(4) disclose and explain the purchaser's cancellation rights under the contract and, if the contract is insurance-funded, the effect of insurance policy cancellation or assignment on the contract, as described by subsection (e) of this section;

(5) state events of default under the contract for all parties and explain the consequences of default, as described by subsection (f) of this section;

(6) state and explain the circumstances under which the responsible person may modify or change the contract at the death of the contract beneficiary, as described by subsection (g) of this section;

(7) disclose and explain all payment terms under the contract and related provisions as described by subsection (h) of this section;

(8) contain a section for required signatures and related notices as described by subsection (i) of this section;

(9) contain a standard disclosure explaining how a purchaser can make inquiries or file complaints with specified regulatory agencies, as described by subsection (j) of this section;

(10) comply with subsections (k) and (l) of this section;

(11) comply with §25.4 of this title (relating to What Are the Plain Language Requirements for a Non-Model Contract or Waiver); and

(12) be approved by the department as provided by §25.5 of this title (relating to How Do I Obtain Approval of a Non-Model Contract or Waiver).

(b) Statement of funeral goods and services selected. The first section of a proposed prepaid funeral benefits contract must inform the purchaser of the funeral goods and services that you will provide or exclude under the contract, as required by Finance Code, §154.151(e). This section must appear entirely on page one of the contract exactly as set out in the model contract and in the figure below, including substantially the same formatting and spacing, except:
Figure: 7 TAC §25.3(b)

(1) you may move specific goods and services between general description categories;

(2) you may move specific goods and services between the category of goods and services to be provided and the category of goods and services not included in the contract;

(3) you may change the description of specific goods or services if the alteration does not change the intent of the description in the standard disclosure;

(4) you may add other, specific funeral goods and services to the list of included funeral goods and services;

(5) you may delete the category designated "cash advance items" under included funeral goods and services if you do not sell cash advance items as prepaid funeral benefits and you list all cash advance items under funeral goods and services not normally included, provided that individual cash advance items may not be added to another category of included goods and services;

(6) you may delete check boxes and related text for sealing features in casket and outer burial container descriptions, for example, "seal", "non-seal", "protective", and "non-protective", if these features are not included in the funeral home's price list; and

(7) if the goods and services you sell are specifically limited and constitute significantly less than those goods and services normally required for a funeral, you may substitute a simplified disclosure that the contract is for your specific goods and services only and that you do not offer any other funeral goods and services. For example, you may substitute this limited disclosure if you sell only services relating to opening and closing of the grave or unique memorials that utilize a token portion of cremains, or if you only sell limited funeral goods such as outer burial containers or caskets without furnishing funeral services.

(c) Definitions. Your proposed prepaid funeral benefits contract must list, define, and use the terms "contract beneficiary", "responsible person", "funeral home", "purchaser", and "seller", or terms commonly understood by consumers to be equivalent, substantially as defined in a model contract. For example, you may substitute the term "provider" for "funeral home", or use a combined term such as "seller/provider" or "seller/funeral home" if you believe the alternate term is more descriptive of your services. If your proposed contract is insurance-funded, you must also list, define, and use the terms "insurance company", "insurance policy", and "premiums" in the contract, or terms commonly understood by consumers to be equivalent, substantially as defined in the department's insurance-funded model contract. You may list, define and use additional terms if they are consistent with the requirements of §25.4 of this title.

(d) General provisions. Your proposed prepaid funeral benefits contract must recognize and explain the purchaser's obligations, your obligations, and the obligations of the funeral home if you are not performing all funeral services under the contract, and the impact of terms in the insurance policy on the contract if the contract is insurance-funded, with respect to:

(1) your obligation (and that of the funeral home) to furnish the funeral goods and services selected in the contract for a cost not to exceed the total contract price at the death of the contract beneficiary, if the purchaser has fully complied with the contract and with each insurance policy, if the contract is insurance-funded;

(2) the purchaser's inability to change the selected funeral goods and services during the life of the contract unless the contract is voided and replaced with a new contract;

(3) the extent to and conditions under which the purchaser may change the funeral home specified in the contract or, with respect to a trust-funded contract, the contract beneficiary;

(4) whether the purchaser may incur tax liability for earnings under a trust-funded contract or for growth under an insurance policy if the contract is insurance-funded;

(5) the extent to which you offer any warranties or guarantees or assert any specific disclaimers of warranty;

(6) the prohibition on partial cancellation of or loans against the contract;

(7) if the transaction may result in available funds in excess of the contract price at the time the funeral is performed, identification of who is entitled to such excess funds;

(8) each party's general contractual duties under the contract and the extent to which the contract is binding on a person who assumes the rights or obligations of a party to the contract;

(9) the manner in which a party must notify other parties of a change of address; and

(10) if the contract is insurance-funded, the requirement that terms of the insurance policy must be consulted for information concerning the obligations of the insurance company and those of the policy owner.

(e) Cancellation or assignment. Your proposed prepaid funeral benefits contract must recognize and explain:

(1) with respect to a trust-funded contract:

(A) the requirement for, and 15-day delay that applies to, a separate, written waiver of cancellation rights if the purchaser chooses to irrevocably waive the right to cancel the contract;

(B) the manner in and conditions under which the purchaser may cancel the contract, including the procedural requirements applicable to a cancellation, including the purchaser's obligation to request cancellation in writing on department-approved forms and your obligation to pay a refund not later than the 30th day after receipt of the purchaser's written cancellation notice;

(C) the amount of the refund or other payment that you will owe the purchaser if the contract is canceled and the conditions or circumstances that may alter the refund amount; and

(D) the refund or other benefits you will owe the purchaser if the contract is canceled at your request; or

(2) subject to modifications or clarifications required by §25.2(a)(2) of this title (Relating to Am I Required to Use the Model Contract and Model Waiver), with respect to an insurance-funded contract:

(A) the purchaser's right to assign the purchaser's interest in an insurance policy by signing a separate document;

(B) the qualification that canceling the contract does not automatically cancel the insurance policy but canceling the insurance policy does cancel the contract;

(C) the requirement for, and 15-day delay that applies to, a separate, written waiver of cancellation rights if the purchaser chooses to irrevocably waive the right to cancel the contract, unless the contract is funded by an insurance policy for which an irrevocable assignment of ownership rights has been made;

(D) the procedural requirements applicable to a cancellation of the contract, including the purchaser's obligation to request cancellation in writing on department-approved forms and the statutory obligation, if applicable, to pay a refund not later than the 30th day after receipt of the purchaser's written cancellation notice;

(E) the refund the purchaser may expect if insurance coverage is denied, and the conditions or circumstances that may alter the refund amount;

(F) the purchaser's obligation to read the insurance policy to determine the conditions imposed upon cancellation and the potential amount of refund that would be due if the policy is canceled during or after the "free look" period;

(G) the consequences the purchaser may expect, whether refund of premium, receipt of cash surrender value, or other benefits from you or another person, if the contract is canceled at your request; and

(H) the effect that loans against or withdrawal of proceeds accrued under an insurance policy will have on the contract and on price guaranties in the contract.

(f) Default. Your proposed prepaid funeral benefits contract must explain events and consequences of default under the contract and under each insurance policy if the contract is insurance-funded, including:

(1) the potential effect on the contract if the purchaser fails to make a payment or makes a late payment under the contract or under an insurance policy if the contract is insurance-funded;

(2) the effect on the contract and on payments due if the contract beneficiary dies:

(A) before the purchaser's payment obligations have been fulfilled under a trust-funded contract; or

(B) if the contract is insurance-funded:

(i) during a period when an insurance policy pays reduced benefits, if applicable; or

(ii) before the premium obligations have been fulfilled on an insurance policy, if applicable; and

(3) the conditions under which you may owe a full or partial refund to the purchaser of funds received under a contract, or a full or partial abandonment of your rights to anticipated proceeds of an insurance policy if the contract is insurance-funded and proceeds are not yet received, as a consequence of your inability (or the funeral home's inability, if you are relying on another to perform portions of the contract) to furnish the selected funeral goods and services;

(4) only with respect to a trust-funded contract, whether or not the purchaser may make a claim to the prepaid funeral guaranty fund governed by §25.17 of this title (relating to Guaranty Fund), if you are unable to honor the contract terms.

(g) Changes to a contract at the death of contract beneficiary. Your proposed prepaid funeral benefits contract must disclose the circumstances under which the contract may be modified by the responsible person at the death of the contract beneficiary, as required by Finance Code, §154.151(e). The disclosure must appear exactly as set out in the model contract and in the figure below, without modification, except that the phrase "fully funded" must be substituted for the phrase "fully paid" wherever it appears in this disclosure when used in an insurance-funded contract. In addition, you may use a larger type size if feasible.
Figure: 7 TAC §25.3(g)

(h) Payment terms. Your proposed prepaid funeral benefits contract must clearly state and explain payment terms and related provisions, including:

(1) how and when you will deposit a payment received under a trust-funded contract, or forward any premiums received to the insurance company for application to an insurance policy if the contract is insurance-funded;

(2) with respect to a trust-funded contract, whether and the extent to which you will retain a portion of the purchaser's payments for reimbursement of your operating and selling expenses;

(3) with respect to a trust-funded contract, the finance charges you will impose, if applicable, provided that the description must also comply with Finance Code, Chapter 345, and other state and federal law governing such charges;

(4) subject to modifications or clarifications required by §25.2(a)(2) of this title, with respect to an insurance-funded contract:

(A) the effect on the contract if insurance coverage is denied and the manner in which written notice of the reason for denial will be sent to the policy owner;

(B) if payment terms under the insurance policy are not disclosed in the contract, a space for the purchaser to initial or sign to acknowledge that the purchaser has received written information regarding the terms governing premium payments in another document that the purchaser received at the time of sale, such as the application for insurance or the insurance policy;

(C) if the information the purchaser receives regarding payment terms under an insurance policy is based on an estimate of premiums, notice that actual premiums could be more or less than estimated after the insurance company completes its underwriting process;

(D) notice that insurance premiums paid on the insurance policy or policies may be more or less than the total contract price; and

(5) other contract provisions that materially relate to payment terms under a contract or under an insurance policy.

(i) Required signatures and notices. Your proposed prepaid funeral benefits contract must contain a section for required signatures and related notices that appears in its entirety on the last page of the contract. This section must include:

(1) a list of all items that must be received or offered before the contract can be signed;

(2) if required by state or federal law, cooling-off period language that includes spaces to note when and where the contract was signed;

(3) notice that the purchaser will receive a copy of the contract;

(4) if the contract is insurance-funded:

(A) notice that the policy owner will receive a copy of the insurance policy from the insurance company; or

(B) if the insurance company is not legally required to deliver a copy of the insurance policy to the policy owner, notice that the policy owner may request a copy of the insurance policy from the insurance company;

(5) spaces for:

(A) the purchaser's printed name, mailing address, telephone number, social security number (if required), and signature line;

(B) if you are not directly providing the funeral goods and services, the printed name, mailing address, and telephone number of the funeral home, and spaces for the printed name and signature of the authorized officer or agent signing on behalf of the funeral home;

(C) your printed name, mailing address, and telephone number, and spaces for the printed name and signature of the authorized officer or agent signing on your behalf; and

(D) the printed name, mailing address, and date of birth of the sole individual designated as contract beneficiary; and

(6) other provisions, party identifications, or certifications legally required for valid execution of the contract.

(j) Inquiries and complaints notice. Your proposed prepaid funeral benefits contract must disclose how a purchaser, potential purchaser or consumer can make consumer inquiries and complaints to the department as required by Finance Code, §11.307(a), and §25.41 of this title (relating to How Do I Provide Information to Consumers on How to File a Consumer Complaint), and to other specified state regulatory agencies with appropriate jurisdiction.

(1) This disclosure must appear exactly as set out in the relevant model contract, including the state seal and the names and contact information for each regulatory agency, without modification, and will vary in context depending on whether the proposed contract is trust-funded or insurance-funded. The model disclosures for both trust-funded and insurance-funded contracts appear in:
Figure: 7 TAC §25.3(j)

(2) If the disclosure does not appear at the bottom of the last page of the contract following the signatures of the parties, it must be placed at the top or bottom of a preceding page and be separated from other contract text by at least 1/2 inches of white space. The disclosure may not be placed on a page by itself.

(k) Additional requirements. A proposed prepaid funeral benefits contract must also contain:

(1) page numbers;

(2) a document title that discloses the contract is for the purpose of prearranging a funeral, such as "Prepaid Funeral Benefits Contract";

(3) a distinguishing form number or name;

(4) your permit number; and

(5) a space for the contract number.

(l) Your proposed non-model contract or waiver form may contain:

(1) additional contract clauses that are fair to consumers in light of the purpose of Finance Code, Chapter 154; and

(2) additional consumer disclosures that you determine:

(A) will assist the purchaser in understanding the transaction; or

(B) are required by other state or federal law for the type of transaction the contract represents.

§25.4. What Are the Plain Language Requirements for a Non-Model Contract or Waiver?

(a) Overview. If you elect to not use a model contract or waiver, you must prepare a non-model prepaid funeral benefits contract or a waiver of cancellation rights, whether in English or Spanish, in plain language designed to be easily understood by the average consumer. Your proposed non-model document must also be printed in an easily readable font and type size. The department is charged with enforcing these requirements by Finance Code, §154.151(d).

(b) Plain language principles for English documents. The department will consider the extent to which you have incorporated plain language principles into the organization, language, and design of a non-model document that you submit for approval. At a minimum, your proposed non-model document should substantially comply with each of the plain language writing principles identified in this subsection.

(1) You must present information in clear, concise sections, paragraphs, and sentences. Whenever possible, you should use the active voice with strong verbs in short, explanatory sentences and bullet lists. Passive voice is not banned but should be used sparingly.

(2) You should use everyday words whenever possible and avoid the use of legal and highly technical business terminology. In those instances where no plain language alternative is apparent, you should explain what the term means when the term is first used. Use of a defined term may improve readability in such instances.

(3) You should group related information together whenever possible to help identify and eliminate repetitious information.

(4) You should use first-person plural (we, us, our/ours) and second-person singular (you, your/yours) pronouns.

(5) You should make complex information more understandable by using an example scenario or a "question and answer" format.

(c) Attributes to avoid. The department will consider the extent to which you avoid the detrimental attributes identified in this subsection. In preparing your proposed non-model document, you should not:

(1) include a term in definitions unless the meaning of the term is unclear from the context and cannot be easily explained in context, or rely on artificially defined terms as the primary means of explaining information;

(2) use superfluous words (words that can be replaced with fewer words that mean the same thing) that detract from understanding;

(3) rely on legalistic or overly complex presentations;

(4) copy complex information directly from legal documents, statutes, or rules without a clear and concise explanation of the material;

(5) unnecessarily repeat information in different sections of the non-model document; or

(6) use multiple negatives.

(d) Typeface (font). Typefaces come in two varieties: serif and sans serif. All serif typefaces have small lines at the beginning or ending strokes of each letter. Sans serif typefaces lack those small connective lines.

(1) The text of your proposed non-model document must be set in a serif typeface. Popular serif typefaces include Times, Scala, Caslon, Century Schoolbook, and Garamond.

(2) A sans serif typeface may be used for titles, headings, subheadings, captions, and illustrative or explanatory tables or sidebars to distinguish between different levels of information or provide emphasis. Popular sans serif typefaces include Scala Sans, Franklin Gothic, Frutiger, Helvetica, Ariel, and Univers.

(e) Type size and line spacing. You must select a type size for your proposed non-model document that is clearly legible. Minimum type size and line spacing are specified in this subsection. If other state or federal law requires a different type size for a specific disclosure or contractual provision, you should set the specific disclosure or contractual provision in the type size specified by other law.

(1) Typeface size is referred to in points (pt). Because different typefaces in the same point size are not of equal size, type size is not strictly defined in this subsection but is expressed as a minimum

size in the Times typeface for visual comparative purposes. Use of a larger size typeface is encouraged. Generally, the type size must be at least as large as 10pt in the Times typeface, except the type size must be at least as large as 8-1/2pt in the Times typeface for:

(A) the statement of funeral goods and services selected, as described in §25.3(b) of this title (relating to What Requirements Apply to a Non-Model Contract);

(B) the required signatures and notices, as described in §25.3(i) of this title; and

(C) the consumer inquiries and complaints disclosure, described in §25.3(j) of this title.

(2) You must use line spacing that is at least 120% of the type size. For example, a 10pt type should be set with 12pt leading (two points of additional leading between the lines).

(3) The department may approve a smaller type size or denser line spacing than specified in this subsection in limited circumstances, such as keeping related disclosures grouped together or satisfying a requirement to keep specified text on a single page. However, you must offset smaller type size or denser line spacing by use of other readability enhancements such as a more readable typeface or greater use of white space through wider margins or divisions between sections of the document.

(f) Formatting and design. The department will consider the extent to which your non-model document uses the plain language formatting and design concepts described in this subsection.

(1) You should use left-justified text (text aligned flush on the left, with a loose, or ragged, right edge) in any paragraph or section of your document that has text lines exceeding 70 characters in length. If you seek approval of a document containing any full-justified paragraph or section with text lines exceeding 70 characters in length (text aligned flush on both left and right sides), the full-justified portions of your proposed document should at a minimum use a larger type size than specified in subsection (e) of this section. You should also add other readability enhancements, such as a more readable typeface or greater use of white space, including wider margins and additional leading between lines.

(2) The minimum recommended page size of a proposed non-model contract is 8-1/2 inches by 14 inches and 8-1/2 inches by 11 inches for a proposed non-model waiver. However, the page size should ordinarily not be larger than 8-1/2 inches by 17 inches.

(3) You must use descriptive headings and subheadings that are conceptually similar to or match the headings in the department's model contract.

(4) You may use tabular presentations or bullet lists to simplify disclosure of complex material. You may also use pictures, logos, charts, graphs, or other design elements so long as the design is not misleading and the required information is clear.

(g) Readability statistics. The department will consider the readability statistics generated by your non-model document in the tests described in this subsection.

(1) The department's evaluation of your proposed non-model document will include results of automated readability tests applied to the complete document, without omission of titles or other attributes of the document. These tests are commonly available in word processing software, including Microsoft Word and Corel WordPerfect. Because mechanical readability formulas do not evaluate the substantive content of a document, the department will exercise judgment when considering the readability statistics generated by these tests. However, absent explanatory circumstances or additional justification persuasive to the commissioner, your proposed non-model document will ordinarily not be approved if:

(A) over 21% of the sentences are passive in structure;

(B) the average sentence length exceeds 19 words;

(C) the Flesch reading ease score is less than 47.0; and

(D) the Flesch-Kincaid grade level score is higher than 11.0.

(2) As part of your application for department approval, you must disclose the readability statistics you generated in evaluating the final draft of your proposed document and explain the circumstances and justifications for any scores outside the parameters expressed in this subsection.

§25.5. How Do I Obtain Approval of a Non-Model Contract or Waiver?

(a) Authority. Finance Code, §154.151(a), requires the department to approve a prepaid funeral benefits contract form before you use the form. Finance Code, §154.156(a), requires the department to approve a waiver of cancellation rights form in the same manner. You may use the department's model contracts or model waiver as provided in §25.2(a) of this title (relating to Am I Required to Use the Model Contract and Model Waiver). This section describes:

(1) how to apply to the department for approval of your proposed non-model contract, what information, documents, and fees you must file as part of your application before the department will accept it for filing, and what fees the department may impose, in subsection (b) of this section;

(2) what procedures the department will follow to approve or deny approval of your proposed non-model document and when you may reasonably expect the department to decide, in subsection (c) of this section;

(3) what actions you must take to obtain a second review by the department or a hearing before the commissioner if the department denies approval of your proposed non-model document, in subsection (d) of this section;

(4) how you may request a hearing before the commissioner, how the hearing will be conducted, and what the staff of the department must prove to uphold the disapproval, in subsection (e) of this section; and

(5) when you may no longer use an approved contract form, in subsection (f) of this section.

(b) Application for approval. Your application for approval of your proposed non-model document must be in writing and include all additional information, documents, and fees required by this subsection. You should file your application as far in advance of the date you intend to use your proposed document as possible.

(1) The additional information, documents, and fees that you must file as part of your application include:

(A) both a printed copy of your proposed non-model document and an electronic version of the document, prepared using Microsoft Word or Corel WordPerfect software;

(B) except as provided in §25.2(d) of this title, an English translation if the proposed non-model document is in Spanish and a certification from a translation service acceptable to the department that the filed English version is a true and correct translation of the proposed Spanish non-model document filed for approval;

(C) if your application is for approval of amendments to a previously approved non-model document:

(i) a printed copy of the proposed non-model document that is specifically marked to show all text proposed to be added and all text proposed to be deleted; and

(ii) a written summary of the amendments, both additions and deletions, explaining their purpose;

(D) a certification on a form supplied by the department, signed and acknowledged by you or your authorized agent, that you have reviewed the proposed non-model document that you filed for approval and to the best of your knowledge:

(i) your proposed non-model document complies with all applicable state and federal law, including Finance Code, Chapter 154, and this chapter; and

(ii) if your application is for approval of amendments to a previously approved non-model document, the proposed non-model document is identical to the previously approved document except for text specifically marked as additions and deletions;

(E) unless you notify the department that it already has a copy on file:

(i) a copy of all related contracts and agreements that are part of your prepaid funeral arrangement, such as a separate finance charge agreement; and

(ii) if the proposed non-model document is an insurance-funded contract, a copy of the insurance policy form you intend to use and written evidence from the Texas Department of Insurance that the insurance policy has been approved for use in conjunction with the sale of prepaid funeral benefits; and

(F) payment of a $250 filing fee.

(2) Your application is considered accepted for filing and eligible for consideration if the application is substantially complete with all information, documents, and fees required by paragraph (1) of this subsection. At your request, the department will inform you in writing of the date it considers your application accepted for filing.

(3) If the department's review of a non-model document takes longer than four employee hours, you must pay a review fee of $60 per employee hour in excess of four hours. If you fail to pay review fees on or before the 10th day after you receive a written statement of charges due from the department, the department may exercise its discretion to conclude that you have withdrawn your application.

(c) Review process. This subsection describes when you may reasonably expect the department to approve or deny approval of your proposed non-model document and the procedure the department will follow in making its initial decision.

(1) The time the department's decision is due regarding your proposed non-model document will vary depending upon the date your application is accepted for filing under subsection (b)(2) of this section and on the nature of the document you seek to have approved.

(A) If your proposed non-model document is a new non-model contract under Finance Code, §154.151, as effective September 1, 2001, the department will approve or deny approval on or before:

(i) the 90th day after the date your application is accepted for filing if the date of filing is before March 1, 2003; or

(ii) the 45th day after the date your application is accepted for filing if the date of filing is on or after March 1, 2003.

(B) If your proposed non-model document is a non-model waiver or an amended version of a non-model contract previously approved by the department under this section, the department will approve or deny approval on or before the 30th day after the date your application is accepted for filing, except the department will either approve or deny approval on or before the 10th day after the date your application is accepted for filing if the proposed amendments are limited to changed or added information about you or a funeral home.

(2) The department may extend the date its decision is due under this subsection by up to an additional 30 days if it determines that your application raises issues requiring additional information or additional time for analysis. The department may request additional information from you in writing if the information is reasonably necessary for an informed decision to approve or deny approval of your proposed non-model document. If you receive a written request for additional information, you must file the information or a satisfactory written explanation of when the information can be filed with the department on or before the 30th day after the date you receive the request. If you fail to reply within this time period the department may exercise its discretion to conclude that you have withdrawn your application.

(3) The department will approve your proposed non-model document unless a specific basis exists to deny approval. The department will deny approval if your proposed non-model document fails to comply with the standards of this subchapter that apply. If the department discovers and confirms that use of the proposed non-model document will clearly violate a mandatory requirement of an applicable state or federal law other than Finance Code, Chapter 154, and this chapter, the department will deny approval. However, the department will ordinarily not review a proposed non-model document for compliance with other law, and approval of a non-model document under this section does not mean the department has determined that the non-model document complies with any state and federal law other than Finance Code, Chapter 154, and this chapter.

(4) If the department denies approval of your proposed non-model document, the department will send you a written notice of denial that:

(A) states the specific basis for the denial in writing and cites the specific provisions of law that the document does not satisfy;

(B) informs you that, on or before the 30th day after the date you receive the notice of denial, you must exercise your rights under subsection (d) of this section, to file either a written request for hearing or a revised non-model document for second review, or the denial will become final.

(d) Your rights after initial denial. This subsection describes the further actions you may take to obtain approval of your non-model document if the department initially denies approval under subsection (c) of this section.

(1) If the department denies approval of your proposed non-model document under subsection (c) of this section, you may file a written request for hearing before the commissioner under subsection (e) of this section or seek the department's second review by filing a new version of your proposed non-model document that you have specifically revised to address the reasons for denial.

(2) If you elect to file a new version of your proposed non-model document for second review, the department will consider the revised document to be part of your original application and will not require a new filing fee but may charge additional review fees under subsection (b)(3) of this section. The department will approve or deny approval of your revised non-model document on or before the 10th day following the date of its filing.

(3) If the department denies approval of your revised non-model document, the department will send you a second written notice of denial that:

(A) states the specific basis for the denial in writing and cites the specific provisions of law that the revised non-model document does not satisfy;

(B) if minor changes to the proposed document would result in approval and you have not previously been given the opportunity to make these changes, informs you of the opportunity to obtain approval by submitting your document with the specified changes on or before the 10th day after the date you receive the department's second written notice of denial; and

(C) informs you that you must file a written request for hearing with the department under subsection (e) of this section on or before the 30th day after the date you receive the department's second written notice of denial or the denial will become final.

(e) Commissioner hearing. This subsection describes how you may obtain a hearing before the commissioner and how the hearing will be conducted.

(1) To obtain a hearing before the commissioner, you must file a written request for hearing with the department on or before the 30th day after the date you receive the department's written notice of denial. Your written request for hearing must state with specificity the reasons you allege the department's denial of approval is in error.

(2) The department will forward your request for hearing to the administrative law judge, who shall enter appropriate orders and conduct the hearing on or before the 60th day after the date your request for hearing was received, under Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemaking) and Government Code, Chapter 2001. Your complete application, the department's notice or notices of denial, and your request for hearing will be made a part of the record.

(3) At the hearing, the staff of the department bears the burden of proof that approval of your proposed non-model document should be denied.

(4) The proposal for decision, exceptions and replies to the proposal for decision, the order of the commissioner, and motions for rehearing are governed by Chapter 9 of this title and Government Code, Chapter 2001.

(f) Withdrawn approval. This subsection describes circumstances under which you may not use a previously approved document.

(1) The department may withdraw its approval of a model or previously approved non-model document for future use if governing law is changed or clarified by statute, rule, or judicial opinion. The department will notify you in writing if you are affected by a withdrawn approval.

(2) You may not use a prepaid funeral benefits contract form that was approved by the department before January 31, 2002 (an obsolete contract), except that you may continue using an obsolete contract if the model addendum developed by the department is included as part of the contracting transaction until the later of:

(A) June 1, 2002;

(B) October 1, 2002, if you filed a proposed non-model contract with the department for approval before June 1, 2002; or

(C) a later date if, before October 1, 2002, you request an extension of time to permit completion of a pending approval proceeding under this section and the commissioner approves your request in writing.

(3) Notwithstanding the provisions of paragraph (2) of this subsection, you may not continue using an obsolete contract after the 30th day following the date the department approves your non-model contract.

§25.6. How and When are Contract Copies Distributed Between the Parties?

(a) At the conclusion of a discussion about funeral arrangements, if someone purchases prepaid funeral goods or services, whether trust-funded or insurance-funded, you must give the purchaser a copy of the contract and all related agreements.

(b) On or before the 30th day after the contract is executed by all parties, you must give a copy of the fully-executed contract to the purchaser, to any third-party provider or administrator that has responsibility for any portion of the contract, and, with respect to an insurance-funded contract, to the insurance company issuing the insurance policy, if the insurance company is a party to the contract.

(c) If a purchaser signs a written waiver of cancellation rights, you must give the purchaser a copy of the executed waiver at the time of execution.

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 February 22, 2002.

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Everette D. Jobe
Certifying Official
Texas Department of Banking
Effective date: March 14, 2002
Proposal publication date: November 2, 2001
For further information, please call: (512) 475-1300

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CHAPTER 29. SALE OF CHECKS ACT

7 TAC §29.21

The Finance Commission of Texas (the commission) adopts new §29.21, concerning the filing of consumer complaints with the Texas Department of Banking (department). New §29.21 is being adopted with nonsubstantive changes to the proposal as published in the November 2, 2001, *Texas Register* (26 TexReg 8640). The text of new §29.21 will be republished.

Section 29.21 implements the requirements of Finance Code, §11.307, pertaining to the filing of consumer complaints with the department.

New §29.21 specifies the manner in which sale of checks licensees provide consumers with information on how to file complaints with the department. The new section also requires that the information on how to file complaints be included with each privacy notice a sale of checks licensee is required by law to provide to consumers.

The commission received one comment on the proposed section on behalf of the Non-Bank Funds Transmitters Group, composed

of Thomas Cook, Inc., Travelers Express Company, Inc./Moneygram Payment Systems, Inc., Western Union Financial Services, Inc., American Express Travel Related Services Company, Inc., Citicorp Services, Inc., Comdata Network Inc., and RIA Financial Services, all licensees under Chapter 152 of the Finance Code, the Sale of Checks Act.

The commenter noted that while the proposed rule in subsection (b)(5)(A) appears to require sale of checks licensees to post the required notice in every area where the licensee conducts business on a face-to-face basis, such business is normally conducted by the agent of a licensee rather than the licensee itself. The commenter also noted that if the proposed rule was read by implication to require the licensee to post the notice where the agent conducts business the proposed rule would be unworkable because licensees do not post material at agent's locations and there is no practical way for a licensee to insure that agents post the required notice.

The commenter included a proposed revision to the requirement to subsection (b)(5)(A) which the commission has generally incorporated into the rule as adopted. This revision clarifies that the required notice must be posted in an area where the licensee or its agent conducts business with consumers on a face-to-face basis, that the licensee is responsible for providing the notice to its agents, and that the licensee is in compliance with this section if it provides the required notice to its agents and requires posting of the notice in its contract with the agent. A licensee that fails to hold an agent accountable for actions or conduct on behalf of the licensee under this section may be subject to enforcement sanctions under Finance Code, Chapter 152, Subchapter F.

The commenter also discussed the potential application of Finance Code, §152.401(b) which prohibits the commission from promulgating rules which "directly apply" to a sale of checks license holders's agent. The commission does not consider the adopted rule to directly apply to agents, but rather the requirements of the rule are firmly placed on the sale of checks license holders.

The commenter also suggested the proposed rule be clarified to reflect that the requirement to include consumer complaint notices with privacy notices applies only to Texas consumers. The commission concurs and has revised subsection (b)(3) accordingly.

Finally, the commission also made a number of clarifying revisions based on internal issues. The commission revised the language of the required notice for providing information to consumers on how to file complaints with the department. The commission added an alternative to compliance with the posting requirement of subsection (b)(5)(A). Instead of posting the required notice, the required notice may be included on the sale of checks instruments or receipts. The commission also provided that the notice required to be included with each privacy notice under subsection (b)(3), and required to be accessible on a website offering sale of checks services under subsection (b)(5)(B), be in substantially the same language and form as the required notice set out in subsection (b)(1).

Section 29.21 is adopted under the authority of Finance Code, §11.307, which requires the commission to adopt rules specifying the manner in which sale of checks licensees provide consumers with information on how to file complaints with the department. The commission concluded that the changes made to the proposal are nonsubstantive because no person's rights are adversely affected by the changes in the adopted rule as compared to the proposal.

§29.21. How Do I Provide Information to Consumers on How to File a Complaint?

(a) Definitions

(1) "Consumer" means an individual who obtains or has obtained a product or service from you that is to be used primarily for personal, family, or household purposes.

(2) "Privacy notice" means any notice which you give regarding a consumer's right to privacy as required by a specific state or federal law.

(3) "Required notice" means a notice in a form set forth or provided for in subsection (b)(1) of this section.

(4) "You" means a sale of checks licensee that is licensed by the Texas Department of Banking under the Finance Code.

(b) How do I provide notice of how to file complaints?

(1) You must use the following notice in order to let your consumers know how to file complaints: Complaints concerning sale of checks activities should be directed to: Texas Department of Banking 2601 North Lamar Boulevard, Austin, Texas 78705 1-877/276-5554 (toll free) www.banking.state.tx.us

(2) You must provide the required notice in the language in which a transaction is conducted.

(3) You must include the required notice with each privacy notice that you send to consumers in this state. The language and form of the notice must substantially conform to the required notice set out in paragraph (1) of this subsection.

(4) Regardless of whether you are required by any state or federal law to give privacy notices, you must take appropriate steps to let your consumers know how to file complaints by giving them the required notice in compliance with paragraph (1) of this subsection.

(5) You must use the following measures to give the required notice:

(A) In each area where you or your agent conduct business on a face-to-face basis under Chapter 152 of the Finance Code, the required notice must be conspicuously posted. If such business is conducted by an agent, the licensee must provide to the agent a notice which complies with this section for posting at each such area. A license holder is considered in compliance with this section if it provides to each of its agents in this state the required notice and requires posting of the notice in its contract with the agent. A licensee that fails to hold an agent accountable for actions or conduct on behalf of the licensee under this section may be subject to enforcement sanctions under Finance Code, Chapter 152, Subchapter F. A notice is conspicuously posted if a consumer with 20/20 vision can read it from the place where he or she would typically conduct business or if it is included on a bulletin board, in plain view, on which all required notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.) are posted.

(B) As an alternative to subparagraph (A) of this paragraph you may include the required notice on all sale of checks instruments or receipts.

(C) This section applies equally to business conducted electronically. For example, those portions of your or your agents website that offer to consumers sale of checks services must contain access to the required notice. A license holder is considered in compliance

with this section if it provides to each of its agents in this state the required notice and requires posting of the notice on an agent's website in its contract with the agent. The language and form of the notice must substantially conform to the required notice set out in paragraph (1) of this subsection.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Everette D. Jobe
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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 85. RULES OF OPERATION FOR PAWNSHOPS

SUBCHAPTER B. PAWNSHOP LICENSE

7 TAC §85.211

The Finance Commission of Texas adopts amendments to 7 TAC §85.211, concerning pawnshop assessments. The new amendments are adopted with changes to the proposal as published in the November 2, 2001, issue of the *Texas Register*, (26 TexReg 8655).

The purpose of the amendments are to harmonize the administrative pawnshop operational rules with the amendment made by the 77th Legislature to the Texas Pawnshop Act in Senate Bill 317. In the legislation, an authorization to employ a volume based assessment methodology for fee collection was placed in the pawnshop statute. The agency has used an activity based costing formula that charges annually for license renewals and for examinations which occur on average every 12 to 16 months. The formula contemplated in the rule would replace the two fees with a single fee containing a fixed portion necessary to recoup the administrative costs associated with regulating an active pawnshop licensee and a variable portion based upon the licensee's volume level. The agency through its experience has determined a direct relationship between a pawnshop's volume and its level of compliance risk. All operating pawnshops possess at minimum levels a fairly equivalent level of compliance risk. The formula contemplated in the rule provides the agency with the required revenue level to recoup the cost of agency direct and indirect cost associated with the administration of the Texas Pawnshop Act. The rule includes a minimum assessment level ($430) for active licensees that directly corresponds to the cost of supervision and a maximum assessment level ($1,000) that includes the estimated maximum supervision cost. The agency anticipates using the previous activity based cost methodology until pawnshop renewals occur in June 2002. During the renewal process June 2002 the agency anticipates using the new assessment funding formula.

The agency received written comments from: Morgan Jones, American Pawn; Connie Kondik, EZCorp; Mac McCommas, Texas Association of Pawnbrokers; Larry Nuckols, Pawn Management, Inc.; and Hugh Simpson, Cash America.

The commenters generally either objected to the proposed rule and urged support for maintaining the current fee structure or offered alternative assessment formulas. One commenter suggests that the assessment formula should be entirely volume based, while several of the other commenters suggest that the assessment formula be a standardized single fee per pawnshop that would recover the costs of supervising all pawnshops. Several of the commenters object to the use of volume as a factor and argue that volume does not contribute to a pawnshop's level of compliance. The agency has found, though, that while volume is not a sole indicator of risk it does have a direct relationship to the level of compliance. Most notably, when the agency discovers a violation during a pawnshop examination, it is often systemic and repeated many times until being discovered and corrected. These violations may either be errors in computer calculation programs, improper procedures in company policies, or errors associated with employee turnover or inadequate training. The larger the volume of a pawnshop, the greater the impact of a single systemic violation. Additionally a high volume pawnshop is generally an indicator of other risk factors such as employee turnover or the ability of management to review individual transactions. In some instances a company with multiple locations may have a very high level of compliance and a good internal control system to prevent errors. A company such as this may presently have a fairly low cost associated with the time of examination as at least one commenter noted. An assessment based methodology necessarily bases costs on risk factors and size groupings. While some industry members will actually pay less, some may actually pay more. The average projected assessment per operating pawnshop is $455. The current regulatory cost per pawnshop is an annual license fee of $125 and a direct examination cost (every 12-16 months) that averages $449.

One commenter suggests that the proposed assessment has a disproportionate impact on small business. The agency disagrees and believes that the impact is proportional between large businesses and small businesses. Each pawnshop, no matter what its size, has a minimum level of cost associated with regulation. Although an incremental basis, such as representing the cost on per volume sales basis, reflects higher costs per smaller locations, it is paramount that fee structures be established that distribute costs fairly among the regulated industry and ensuring that each business at a minimum absorbs its costs of regulation. This methodology is consistent with other regulated entities, including other entities regulated under the Finance Commission's authority. To further analyze the impact on small business, the agency performed a more comprehensive analysis of the smallest quartile of the population of active pawnshops. This analysis focused on 278 pawnshops. The average assessment for these pawnshops under the rule will equal $434.49. Due to the comments received that the smallest pawnshops were unfairly burdened with excessive costs of regulations, the agency analyzed the historical cost level of these 278 pawnshops. Depending on how long the pawnshop had been in business and the years of available examination cost data, the agency determined the historical examination and licensing cost level for each pawnshop for 1 - 5 years. These costs were then compared to the proposed assessment

level for the same period of time for the respective pawnshop. Aggregating and averaging the difference in historical cost and the proposed methodology for all 278 pawnshops in the smallest quartile results in an average annual decrease in cost of $1.81 per pawnshop. The agency believes that the rule does not unfairly burden the smaller pawnshops, since the analysis reveals that the costs for these pawnshops remain virtually the same. In establishing the methodology, the agency attempted to provide a formula that recovered the minimum costs of regulation for each pawnshop. Beyond that level the methodology bases the remaining costs of regulation upon risk through the volume assessment. The agency has determined that the minimum indirect fixed costs associated with supervision of a pawnshop licensee is $405 per year. The amount represents the proportionate costs associated with regulating the pawnshop industry for annual licensing renewals, examination review and supervision, examiner travel, enforcement, complaint resolution, and consumer education. An analysis of the direct examiner time, annualized for the frequency of examination scheduling, results in a direct cost of $25 per year.

The agency believes that the most appropriate assessment methodology based upon the analysis and after considering the comments is a fee with a fixed portion of $430 and a variable portion of $.05 per $1,000 loaned. The minimum fee will be $430 and the maximum fee will be $1,000 per pawnshop, although the agency does not currently have any licensees who will reach the maximum threshold.

The amendments are adopted under the Texas Finance Code § 371.006, which authorizes the Finance Commission to adopt rules to enforce the Texas Pawnshop Act.

These rules affect Chapter 371, Texas Finance Code.

§85.211. Fees.

(a) New licenses. A $500 investigation fee is assessed each time an application for a new license is filed and is non- refundable. In addition, the applicant is initially required to pay an annual license fee of $100 that is not prorated but is refundable if the license application is denied.

(b) Subsequent licenses. A $250 investigation fee is assessed each time an application for a new license of an existing licensee is filed or if the application involves substantially identical principals and owners of a licensed pawnshop and is non-refundable. In addition, the applicant is initially required to pay an annual license fee of $100 that is not prorated but is refundable if the license application is denied.

(c) License transfers. An investigation fee of $500 for the first license transfer and $250 on each additional license transfer sought simultaneously is required and is non-refundable. If the application involves substantially identical principals and owners of a licensed pawnshop, then the fee is $250 for the first license transfer.

(d) Fingerprint checks. The fee to investigate each applicant's fingerprint record is $40 per set and is non- refundable. This fee must be paid for each set of fingerprints filed with applications for new licenses or license transfers.

(e) Annual Renewal and Examination Assessment.

(1) An annual renewal fee is required for each licensed pawnshop of:

(A) A fixed fee of $430; and

(B) A volume fee of $0.05 per each $1,000 loaned as calculated from the most recent annual examination report as described in §85.502 of this title (relating to annual examination report).

(2) The minimum annual assessment for each active license shall be no less than $430.

(3) The maximum annual assessment for each active license shall be no more than $1,000.

(4) The minimum annual assessment for each inactive license shall be no less than $125.

(5) A pawnshop license shall expire on June 30 unless the assessment has been paid.

(6) Upon approval of a new pawnshop license pursuant to 7 TAC 85.206, the first year's operational assessment fee shall be $430.

(f) License amendment. A fee of $25 must be paid each time a licensee seeks to amend a license by rendering a license inactive, activating an inactive license, changing the assumed name of the licensee, or relocating an office. An activation or relocation in a county with a population of 250,000 or more shall require a $250 investigation fee and other fees as may be required of a new license applicant.

(g) License duplicate. The fee for a license duplicate is $10.

(h) Each applicant for a new or relocated license shall pay $1.00 to the commissioner for each notice of application that is required to be mailed.

(i) Costs of hearing. The commissioner or administrative law judge may assess the costs of an administrative appeal hearing afforded under 7 TAC §85.206(g), including the cost of the administrative law judge, the court reporter, and agency staff representing the agency at a hearing. If it is determined that a protest is frivolous or without basis, then the cost associated with the hearing may be assessed solely to the protesting party.

(j) Excess payment of fees. Any excess payment of fees received by the commissioner may be held to offset anticipated fees that may be owed by the licensee or applicant.

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 February 22, 2002.

TRD-200201128
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: March 14, 2002
Proposal publication date: November 2, 2001
For further information, please call: (512) 936-7610

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TITLE 13. CULTURAL RESOURCES

PART 4. RECORDS MANAGEMENT INTERAGENCY COORDINATING COUNCIL

CHAPTER 50. COUNCIL PROCEDURES

13 TAC §§50.3, 50.5, 50.11

The Records Management Interagency Coordinating Council (RMICC) adopts amendments to §§50.3, 50.5, and 50.11,

concerning the Council's officers, meetings, and rules without changes to the proposed text as published in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9348).

In §50.3(6) the reference to the General Services Commission is changed to the Texas Building and Procurement Commission, in accordance with Senate Bill 311, 77th Legislature, Regular Session. In §50.5(b) the language concerning a special meeting is deleted, and the subsections are reformatted to reflect the amendment. In §50.11 an outdated reference to the Government Code §441.053, which was repealed, is deleted. The correct statutory citation, Government Code §441.203, is added.

No comments were received regarding adoption of the amendments.

Statutory Authority: Government Code, §441.203(f)

The amendment implements Senate Bill 311, 77th Legislature, Regular Session.

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 February 20, 2002.

TRD-200201028
Dan Procter
Vice Chair
Records Management Interagency Coordinating Council
Effective date: March 12, 2002
Proposal publication date: November 16, 2001
For further information, please call: (512) 463-5561

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CHAPTER 51. AUTHENTICATION OF ELECTRONIC INFORMATION

13 TAC §51.1, §51.3

The Records Management Interagency Coordinating Council (RMICC) adopts the repeal of Chapter 51, Authentication of Electronic Information, §51.1 and §51.3.

In reviewing its rules, as required by Texas Government Code §2001.039, the Council determined that the rules in Chapter 51 are no longer necessary and the reasons for initially adopting the rules no longer exist.

No comments were received regarding the repeal.

Statutory Authority: Government Code, §441.203(f).

The repeal implements no other codes or statutes.

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 February 20, 2002.

TRD-200201029
Dan Procter
Vice Chair
Records Management Interagency Coordinating Council
Effective date: March 12, 2002
Proposal publication date: November 16, 2001
For further information, please call: (512) 463-5561

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

The Public Utility Commission of Texas (commission) adopts an amendment to §26.401 relating to Texas Universal Service Fund (TUSF), the repeal of §26.413 relating to Tel- Assistance Service, and an amendment to §26.417 relating to Designation as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF) with no changes to the proposed text as published in the November 23, 2001 *Texas Register* (26 TexReg 9489). The repeal of §26.413 was necessary as a result of House Bill 2156, 77th Legislative Session (HB 2156), that eliminated the Tel-Assistance Program effective September 1, 2001. HB 2156 required telecommunications carriers to convert all Tel-Assistance customers to Lifeline Service as of September 1, 2001; therefore §26.413 is no longer necessary. The amendments to §26.401 and §26.417 removed references to §26.413 and Tel-Assistance, and made other non-substantive changes. This repeal and amendments are adopted under Project Number 24523.

The commission received no comments on the proposed repeal or amendments.

16 TAC §26.401, §26.417

The amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, 2001 Texas Session Laws, HB 2156 (Vernon's), 77th Legislature, Regular Session, Chapter 1451, §4, that discontinues the Tel- Assistance Program.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 55.015, and 56.021.

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 February 15, 2002.

TRD-200200993

Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 7, 2002
Proposal publication date: November 23, 2001
For further information, please call: (512)936-7308

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16 TAC §26.413

The repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, 2001 Texas Session Laws, HB 2156 (Vernon's), 77th Legislature, Regular Session, Chapter 1451, §4, that discontinues the Tel- Assistance Program.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 55.015, and 56.021.

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 February 15, 2002.

TRD-200200992
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 7, 2002
Proposal publication date: November 23, 2001
For further information, please call: (512) 936-7308

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PART 8. TEXAS RACING COMMISSION

CHAPTER 303. GENERAL PROVISIONS

SUBCHAPTER D. TEXAS BRED INCENTIVE PROGRAMS

DIVISION 2. PROGRAM FOR HORSES

16 TAC §303.99

The Texas Racing Commission adopts an amendment to §303.99, relating to stakes and other prepayment races, breed registries, without changes to the proposed text as published in the December 21, 2001, issue of the *Texas Register* (26 TexReg 10461) and will not be republished. The amendment deletes an incorrect cross-reference and inserts the proper reference.

No comments were received regarding the adoption of this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks.

The amendment implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201035
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: December 21, 2001
For further information, please call: (512) 833-6699

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CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER D. GREYHOUND RACETRACKS

DIVISION 2. OPERATIONS

16 TAC §309.361

The Texas Racing Commission adopts an amendment to §309.361, relating to greyhound purse and kennel account without changes to the proposed text as published in the December 21, 2001, issue of the *Texas Register* (26 TexReg 10462) and will not be republished. The purpose of this amendment is to hold purses in greyhound stakes races until all drug testing has been completed and cleared in all trial races and finals before the distribution of purses to affected persons. The amendment is necessary to avoid financial difficulty to those affected persons who may be required to reimburse a share of the purse due to a positive test found in qualifying rounds or in the finals.

No comments were received regarding the adoption of this amendment.

The amendments are adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks.

The adoption implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201036

Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: December 21, 2001
For further information, please call: (512) 833-6699

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CHAPTER 311. OTHER LICENSES
SUBCHAPTER B. SPECIFIC LICENSES

16 TAC §311.103

The Texas Racing Commission adopts an amendment to §311.103, relating to kennel owners, without changes to the proposed text in the January 18, 2002, issue of the *Texas Register* (27 TexReg 45) and will not be republished. The amendment requires kennel owners to provide documentation of their greyhounds' whelping kennel. This amendment will ensure that all greyhound participating in pari-mutuel racing have been whelped from inspected kennels. The National Greyhound Association will perform the inspections to ensure minimal standards are upheld.

No comments were received regarding the adoption of this amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules relating to all aspects of pari-mutuel tracks.

The adoption implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201037
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: January 18, 2002
For further information, please call: (512) 833-6699

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CHAPTER 315. OFFICIALS AND RULES FOR GREYHOUND RACING
SUBCHAPTER D. GREYHOUND BREEDING FARMS

16 TAC §315.250

The Texas Racing Commission adopts new §315.250, pertaining to standards for greyhound breeding farms, without changes to the proposed text as published in the December 21, 2001, issue of the *Texas Register* (26 TexReg 10462) and will not be republished. The new section provides for minimum standards for greyhound breeding farms as required by §10.04(b) of the Texas Racing Act.

No comments were received regarding the adoption of this new rule.

The new rule is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks, and §10.04, which authorizes the Commission to adopt standards relating to the operation of greyhound farms.

The new rule implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201038
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: December 21, 2001
For further information, please call: (512) 833-6699

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CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING
SUBCHAPTER D. DRUG TESTING
DIVISION 2. TESTING PROCEDURES

16 TAC §319.338

The Texas Racing Commission adopts new §319.338, relating to the storage of split samples, without changes to the proposed text as published in the December 21, 2001, issue of the *Texas Register* (26 TexReg 10463) and will not be republished. This section was formally known as §319.363. The rule will be now located with the testing procedures subsection of the rulebook. By creating this new section in its current placement, the storage procedure will apply to both horses and greyhounds without unnecessary repetition.

No comments were received regarding the adoption of this amendment.

The new section is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The new rule implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201039
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: December 21, 2001
For further information, please call: (512) 833-6699

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DIVISION 3. PROVISIONS FOR HORSES

16 TAC §319.362

The Texas Racing Commission adopts amendments to §319.362, relating to split specimen, without changes to the proposed text as published in the December 21, 2001, issue of the *Texas Register* (26 TexReg 10463) and will not be republished. The amendment modifies the rule to reflect the current practice of handling split samples for horses.

No comments were received regarding the adoption of this amendment.

The amendments are adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The adoption implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201040
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: December 21, 2001
For further information, please call: (512) 833-6699

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16 TAC §319.363

The Texas Racing Commission adopts the repeal §319.363, relating to the storage of split samples, without changes to the proposed text as published in the December 21, 2001, issue of the *Texas Register* (26 TexReg 10464) and will not be republished. The repeal is necessary because a new section has been created which provides for storage procedures. These procedure are now applicable to both horses and greyhounds.

No comments were received regarding the adoption of this repeal.

The repeal is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The repeal implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201041
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: December 21, 2001
For further information, please call: (512) 833-6699

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DIVISION 4. PROVISIONS FOR GREYHOUNDS

16 TAC §319.391

The Texas Racing Commission adopts amendments to §319.391, relating to the testing of greyhounds, without changes to the proposed text as published in the December 21, 2001, issue of the *Texas Register* (26 TexReg 10465) and will not be republished. The amendments provide a procedure to request a split sample, to determine when a split is to be performed, and to maintain the split sample for greyhound testing.

A written comment was received from a greyhound association. The comment stated that it was unlikely a greyhound would be able to provide sufficient urine needed for testing. Staff of the Commission explained that the drug testing facilities recommended the quantity required by the rule. Further, it was also explained that the Racing Act requires a method for split samples for greyhounds as well as horses.

The amendments are adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.021, which authorizes the Commission to regulate all aspects of greyhound and horse racing in Texas, and §3.16 which authorizes the Commission to adopt rules relating to split testing procedures.

The adoption implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201042

Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: December 21, 2001
For further information, please call: (512) 833-6699

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CHAPTER 323. DISCIPLINARY ACTION AND ENFORCEMENT

SUBCHAPTER C. CRIMINAL ENFORCEMENT

16 TAC §323.202, §323.203

The Texas Racing Commission adopts amendments to §323.202 and §323.203 relating to notice to district attorneys and reporting to the Texas Department of Public Safety, without changes to the proposed text as published in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9349) and will not be republished. The amendments leave to the discretion of the executive secretary the types of criminal conduct and offenses related to racing or pari-mutuel wagering which may be reported to a district or county attorney and the amendments conform terminology to current Commission rule style.

No comments were received regarding the adoption of these amendments.

The amendments are adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §3.11 which relates to cooperation with peace officers.

The adoptions implements Texas Civil Statutes, Article 179e.

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 February 20, 2002.

TRD-200201043
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: March 13, 2002
Proposal publication date: November 16, 2001
For further information, please call: (512) 833-6699

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.20

The Texas Appraiser Licensing and Certification Board adopts amendments to §153.20, Guidelines for Revocation, Suspension or Denial of Licensure or Certification without changes to the proposed text as published in the December 14, 2001, issue of the *Texas Register* (26 Tex Reg 10200). The text will not be republished.

These adopted rules add language which specifies that an applicant or licensee must notify the board within 30 days of a conviction, or of pleading guilty or nolo contendere, to a felony or criminal offense involving fraud or moral turpitude, or is incarcerated for those offenses. Non compliance could result in revocation or suspension of licensure or having an application denied.

No comments were received concerning the adoption of the amendments.

The amendments are adopted under the Powers and Duties of the Board, Texas Appraiser Licensing and Certification Act, §5 (Texas Civil Statutes, Article 6573a.2), which provides the board with authority to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 25, 2002.

TRD-200201153
Renil C. Liner
Commissioner
Texas Appraiser Licensing and Certification Board
Effective date: March 17, 2002
Proposal publication date: December 14, 2001
For further information, please call: (512) 465-3950

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PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 173. PHYSICIAN PROFILES

22 TAC §173.1

The Texas State Board of Medical Examiners adopts an amendment to §173.1, concerning Physician Profiles, without changes to the proposed text as published in the January 18, 2002, issue of the *Texas Register* (27 TexReg 456) and will not be republished.

This amendment deletes a reference from subsection (b)(22). Section 173.1 was recently amended in the November 2, 2001, issue of the *Texas Register* (26 TexReg 8661) and adopted in the December 28, 2001, issue of the *Texas Register* (26 TexReg 10865). The reference to §5.05(f) should have been deleted at that time, however it was inadvertently omitted.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Occupations Code Annotated, §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.

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 February 19, 2002.

TRD-200200998
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: March 11, 2002
Proposal publication date: January 18, 2002
For further information, please call: (512) 305-7016

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PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 216. CONTINUING EDUCATION

22 TAC §216.3

The Board of Nurse Examiners for the State of Texas adopts amendments to §216.3, relating to Continuing Education Requirements for Registered Nurses in regard to Hepatitis C. The amendments are adopted with changes as proposed in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9350). Prior to adoption, staff reviewed the proposed amendment and decided to clarify an internal reference within §216.3(3)(A) which was inadvertently omitted from the rule as proposed. The phrase "The required hours are not in addition to the requirements of (1), and (2), of this section" was changed to: "The required hours are not in addition to the requirements of paragraphs (1), (2), and (4) of this section." This modification to the text as proposed is non-substantive.

Senate Bill 338, Section 2, passed by the 77th Legislative Session, in part amended Subchapter G, Chapter 301, Occupations Code by adding section 301.304. This legislation requires all Registered Nurses renewing a license in the biennium between 6/1/2002 and 6/1/2004 in the state of Texas must have completed a minimum of 2 hours of continuing education related to Hepatitis C. This is a one-time requirement. House Bill 2650 is the companion bill implementing the same requirement.

According to the Texas Department of Health, it was estimated in 1999 that over 300,000 Texans were infected with the Hepatitis C virus. There is no vaccine against Hepatitis C. Transmission is almost exclusively through exposure to blood from an infected person; transmission through other body fluids has little support at the present time.

Registered nurses are in positions to teach patients and/or the public about transmission, treatment, and prevention of this disease. Though standard precautions are routinely used in patient care settings, nurses need to be aware of the risk of exposure/transmission through contact with infected blood and blood products.

In order to implement and operationalize the requirements set forth in the above amended section of the NPA, the Board of Nurse Examiners adopts the amendments to the current rule language in §216.3 as proposed.

No comments were received regarding the proposed amendment.

The amendment is adopted under the authority of the Texas Occupations Code, Sections 301.151 and 301.152 which authorize the Board of Nurse Examiners to adopt and enforce rules consistent with its legislative authority under the Nursing Practice Act.

§216.3. Requirements.

Twenty contact hours of continuing education within the two years immediately preceding renewal of registration are required.

(1) Type I. Ten contact hours shall be obtained by participation in programs approved by a credentialing agency recognized by the board. The program shall meet all criteria listed in §216.4 of this title (relating to Criteria for Acceptable Continuing Education Activity). In addition, there shall be a nurse on the planning committee and target audience shall include nurses. The board recognizes agencies/organizations to approve providers and/or programs for Type I credit. A list of these agencies/organizations may be obtained from the board's office.

(2) Type II. The remaining 10 contact hours shall be obtained by participation in additional Type I programs or by participation in activities listed in §216.4 of this title.

(3) Requirements for the Advanced Practice Nurse. The licensee authorized by the Board as an advanced practice nurse (APN) is required to obtain 20 contact hours of continuing education within the previous two years of licensure.

(A) The required hours are not in addition to the requirements of paragraphs (1), (2), and (4) of this section.

(B) The 20 contact hours of continuing education must be appropriate to the advanced specialty area and role recognized by the Board.

(C) The APN who holds limited prescriptive authority must complete, in addition to the required contact hours in subparagraph (B) of this paragraph, at least 5 contact hours of continuing education in pharmacotherapeutics.

(D) Category I Continuing Medical Education (CME) contact hours will meet requirements for Type I contact hours as described in this chapter.

(4) For the biennium beginning 6/1/2002 and ending 6/1/2004, every license holder who renews a license to practice as a Registered Nurse in the State of Texas shall complete not less than two hours of continuing education relating to Hepatitis C. This requirement may be met through completion of either Type I or Type II approved continuing education activities, as set forth in Rule §216.4 of this title.

(A) The minimum 2 hours of continuing education requirement for Hepatitis C shall include information relevant to the prevention, assessment, and treatment of Hepatitis C.

(B) The required hours are not in addition to the requirements of paragraphs (1) and (2) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2002.

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CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.18

The Board of Nurse Examiners for the State of Texas adopts new 22 TAC §217.18 that includes language relating to Registered Nurse First Assistants (RNFA). The rule is adopted as proposed in the December 7, 2001 issue of the *Texas Register* (26 TexReg 10006). The text of the rule is adopted without changes and will not be republished.

HB 803, passed in the 77th Legislative Session, amends the Nursing Practice Act by adding §301.1525. The section defines a "nurse first assistant" as a registered nurse who is certified in perioperative nursing by an organization recognized by the Board and has completed a nurse first assistant program approved by an organization recognized by the Board. The new section grants the Board authority to develop rules relating to RNFAs. The purpose of §301.1525 was to effectuate a mechanism to allow reimbursement for RNs who first assist from third party payers.

In the past, the Board determined that RN first assisting is within the scope of practice of the registered nurse (January 1995 Board meeting). It was determined that RNs who elect to function in such a role should meet the requirements that are outlined in the Association of Perioperative Registered Nurses' (AORN's) position statement relating to RNFAs. The position statement and other RNFA information can be located at *www.aorn.org/clinical/rnfainfo.htm*. It was reported that currently practicing RNFA's were highly in favor of HB 803 and the new §301.1525.

The adoption of §217.18 establishes a regulatory definition of registered nurse first assistant consistent with §301.1525. As such, it defines "nurse first assistant" as a registered nurse who is certified in perioperative nursing by an organization recognized by the Board and has completed a nurse first assistant program approved by an organization recognized by the Board. Section 217.18 recognizes that current certification by the Certification Board Perioperative Nursing as a registered nurse first assistant (CRNFA) satisfies the definitional criteria of §301.1525. Additionally, §217.18 creates a registry for those RNFAs who meet the definitional criteria, reiterates the minimum standards required for all registered nurses practicing in the first assistant role, and recognizes AORN standards for first assisting.

Much discussion has been generated between Board staff and representatives of RNFA interests concerning the legislative requirement that the RNFA complete a "nurse first assistant program approved by an organization recognized by the Board" as written in §301.1525. The Board proposes the exact language of the statute in its rule. In this regard, however, the Certification Board Perioperative Nursing (CBPN) is currently the only organization directly involved in setting and enforcing standards for RNFA education programs. CBPN reviews and accepts programs appropriate for preparing RNs for the first assisting role and for sitting for the CRNFA certification exam. CBPN has written program acceptance criteria and requires programs to demonstrate compliance through a written application process for initial acceptance and continued compliance with program acceptance criteria. The rule is also broad enough to allow Board review and approval of other organizations who approve and review RNFA educational programs in the future.

The new rule alternatively states that the national certification examination given to CRNFAs will also satisfy the legislative requirement that a nurse first assistant complete a program approved by an organization recognized by the Board (see §301.1525). The CRNFA examination process requires a review of the educational qualifications of RNFAs and provides for a measure of competency in the first assistant role. The recognition of the national certification examination for CRNFAs is consistent with the Board's overall mission to protect the public health and safety.

Two comments were received from individuals who function in a perioperative nursing role. Neither individual is an RNFA, and both expressed concerns regarding nurses working in the scrub role. Both indicate that they may be asked to hold retractors, apply suction, cauterize tissue, etc as part of their functions in the scrub role. These nurses have requested more detailed clarification regarding tasks that are part of the scrub role versus those that are part of the first assistant role. The comments did not suggest any changes to the proposed text and did not object to the rule as written. The Board understands that there are some tasks that are performed by nurses functioning in the scrub role that are included within the scope of practice for RNFAs. When these tasks are properly delegated, the nurse functioning in the scrub role is not considered to be acting as a first assistant. Because scope of practice is dynamic in nature, developing lists of tasks could limit current and future scope of practice for RNs in the operating room who are not RNFAs. Specific issues related to scope of practice may need to be evaluated on a case by case basis and may vary based on the individual situation.

Two comments were received from the Texas RNFA Network and the Texas Nurses Association. Both organizations are supportive of the proposed rules if the Board also adopts a policy that individuals who completed a program accepted by the CBPN are determined to have met the requirement for completion of a program approved by an organization recognized by the Board. The statute provides the Board the authority to recognize an organization that approves first assistant educational programs. The proposed rule mimics the statutory language but does not identify and, therefore, limit the Board's ability to recognize such organizations. As stated in the preamble to the proposed rule and for purposes of this rule only, at this time the Board has chosen to recognize by policy the acceptance process utilized by CBPN when reviewing programs for examination eligibility as an "approval" process. Additionally, the rule also offers RNFAs the option of obtaining national certification as a CRNFA in lieu of completing a program approved by an organization recognized by the Board. The examination process requires a review of the RNFA's educational qualifications and provides for a measure of competency.

Finally, the Texas Nurses Association (TNA) suggests that the language of the rule may not clearly indicate whether the intent of the rule is to only protect the RNFA title or if it is also intended to restrict who may function in the RNFA role. TNA is concerned

that nurses may be functioning as first assistants under physician delegation who do not meet the requirements specified in subsection (a). TNA suggests the Board consider adopting changes to the rule to grandfather those functioning under delegated medical authority who are not using the RNFA title. It is clear the objective of HB 803 was to facilitate reimbursement for RNFA services. Nevertheless, the Board does not believe that it may properly create or recognize a non-reimbursable sub-category of RNFAs for those nurses who function under medically delegated authority but do not use the RNFA title. The BNE's stated policy since 1995 has been that an RNFA should meet the AORN standards before they hold themselves out as such. The proposed rule is consistent with this historic policy. Adoption of TNA's suggested language allowing first assisting without use of the title "RNFA" would require the BNE to reverse its policy that has been in place since 1995. The Board does not agree with the suggestion and declines to add the proposed amendments to the rule

The new section is adopted under the authority of the Texas Occupations Code, §301.151 and §301.1525 that 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 seeking approval of RNFAs. The proposed amendment affects the Nursing Practice Act, Texas Occupations Code, Sections 301.1525; Texas Insurance Code, Articles 3.70-3C, 21.52 and 20A-14; Texas Human Resources Code, §32.027; and Texas Labor Code, §408.029.

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 221. ADVANCED PRACTICE NURSES

22 TAC §221.4

The Board of Nurse Examiners for the State of Texas adopts an amendment to 22 TAC §221.4(b), relating to Advanced Practice Nurses and the requirement that they obtain national certification in the appropriate advanced practice role and specialty within two years of program completion. The amendment is adopted as proposed in the November 16, 2001 issue of the *Texas Register* (26 TexReg 9351). The amendment is adopted without changes and will not be republished.

Since 1996, advanced practice nurses have been required to obtain national certification in the appropriate advanced role and specialty area. The section of the rule pertaining to provisional authorization (new graduates) clearly states that the individual must have obtained national certification within two years of the program completion date, but this content was inadvertently omitted from the section on full authorization to practice.

The amendment was not intended to make significant substantive changes in the advanced practice rules of the Board. Rather the amendment seeks to clarify the national certification requirement in order to make it better understood by advanced practice nurse educators, advanced practice nurses in practice and applicants for advanced practice recognition. This particular requirement impacts an applicant's ability to be granted authorization to practice.

No comments were received regarding the proposed adoption.

The amendment to §221.4(b) is adopted under the authority of the Texas Occupations Code, §301.151 and §301.152 that authorizes the Board of Nurse Examiners to adopt and enforce rules consistent with its legislative authority under the Nursing Practice Act including rules relating to registered nurses approved, or seeking approval, as an advanced practice nurse. The new rules and concomitant repeal affect the Nursing Practice Act, Texas Occupations Code, §301.152 and §301.157 as they pertain to advance practice nursing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES

SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §§291.33, 291.34, 291.36

The Texas State Board of Pharmacy adopts amendments to §291.33, concerning Operational Standards, §291.34, concerning Records, and §291.36, concerning Class A Pharmacies Compounding Sterile Pharmaceuticals. The amendments are adopted with changes to the proposed text as published in the December 28, 2001, issue of the *Texas Register* (26 TexReg 10744).

The amendments: (1) implement the provisions of the Occupations Code §562.015, as added by Senate Bill 768, Texas Legislature, 77th Session, by referencing a "dispensing directive" for the communication of substitution instructions from practitioners to pharmacists; and (2) update citations to the new codified Texas Pharmacy Act as a result of the rule review process.

Written comments were received from the Texas Pharmacy Association, Albertson's, Eckerd Drugs, Brookshire Brothers Pharmacies, the National Association of Chain Drug Stores, the Texas Federation of Drug Stores, HEB Pharmacies, the

Pharmaceutical Research and Manufacturers of America, the Texas Optometry Board, the Texas Medical Association, the Texas Nurses Association, the Texas Academy of Physician Assistants, the Texas Pediatric Society, the Texas Academy of Internal Medicine Services, the Texas Association of Family Physicians, the Coalition of Nurses in Advanced Practice, the Texas Podiatric Medical Association, the Texas Osteopathic Medical Association, and an individual physician.

General Comments: One comment opposed the requirement to place the brand name wording on all prescriptions when the federal requirement was only for medicaid prescriptions. The Board disagrees and believes the changes to the statute require the wording on all written prescriptions when substitution is not allowed. Other provision have been made for verbal, electronic, and facsimile prescriptions when the prescription is not for a medicaid patient. Several comments suggested a vigorous educational program for all prescribers and pharmacists. The Board agrees and will work with the appropriate agencies and associations in an educational program.

Specific Comments §291.33(c)(3)(B)--Several comments indicated that the statement contained on the prescription should not be mandatory and should indicate that a pharmacist may, rather than will, substitute. The Board agrees and made appropriate changes. Several commentors suggested language to require a practitioner to clearly indicate to which prescriptions a dispensing directive refers when a prescription contains more than one prescription on the form. The Board concurs with this comment and made appropriate changes.

Section 291.33(c)(3)(C)--Two comments were received indicating that the rules should contain a requirement that a pharmacist contact the prescribing practitioner whenever substitution occurs during the first few months the dispensing directive is in effect. The Board disagrees and believes the objective can be accomplished through the educational program.

Section 291.33(c)(3)(C)(i)--Two comments were received with language to clarify the proposed language of clause (i)(I). The Board concurs with the comments and made the suggested changes. One comment suggested a new subparagraph stating that a facsimile prescription should be considered a written prescription drug order. The Board disagrees. The suggested language does not add to the clarity of the rules and conflict with other sections of the Board's rules. Two comments suggested a change to clause (i)(IV) to clarify that a pharmacist may only substitute when the general requirements of subparagraph (A) of this paragraph are met. The Board disagrees as the provisions of subparagraph (A) of this paragraph are already requirements for all substitutions.

Section 291.33(c)(3)(C)(iii)--Two comments wanted to delete the requirement for the specific wording "brand necessary" or "brand medically necessary" in subclauses (I) and (II) on electronic prescription drug orders. One commentor believes that the statute specifically requires an exemption from the use of one of the terms to prohibit substitution, and this rule do not allow for such an exemption. The Board disagrees and believes the rule as drafted does provide an exemption from the requirement since the prescriber is not required to write one of the statements in their own handwriting as with a written prescription. Two commentors suggested clarifying that the physician had only 30 days to follow-up with a prescription in subclause (III). The Board agrees and appropriate changes were made.

Section 291.33(c)(3)(C)(iv)--Several comments were received indicating that this clause is an inappropriate delegation of power to a federal agency. The Board agrees and deleted the requirement.

Section 291.34(b)(6) and §291.36(e)(2)(G)--Two comments suggested that Therapeutic Drug Interchange should not be deleted, as it suggest that therapeutic drug interchange is now allowed. The Board agrees and the two sections were added back to the rules.

The amendments are adopted under §§551.002, 554.051, and 562.015 (as amended by Senate Bill 768, Acts of the 77th Texas Legislature) of the Texas Pharmacy Act (Chapters 551 - 566, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.015 as authorizing the agency to establish a "dispensing directive" for the communication of substitution instructions from practitioners to pharmacists.

The statutes affected by the rules: Chapters 551 - 566, Texas Occupations Code.

§291.33. Operational Standards.

(a) Licensing requirements.

(1) A Class A pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(2) A Class A pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.4 of this title (relating to Change of Ownership).

(3) A Class A pharmacy which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.2 of this title (relating to Change of Location and/or Name).

(4) A Class A pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title (relating to Change of Managing Officers).

(5) A Class A pharmacy shall notify the board in writing within ten days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(6) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(7) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(8) A Class A pharmacy, licensed under the provisions of the Act, §560.051(a)(1), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(2) concerning Nuclear Pharmacy (Class B), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title

(relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(9) A Class A (community) pharmacy engaged in the compounding of sterile pharmaceuticals shall comply with the provisions of §291.36 of this title (relating to Class A Pharmacies Compounding Sterile Pharmaceuticals).

(10) A Class A (Community) pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.20 of this title (relating to Remote Pharmacy Services).

(b) Environment.

(1) General requirements.

(A) The pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be clean and in good operating condition.

(B) A Class A pharmacy shall have a sink with hot and cold running water within the pharmacy, exclusive of restroom facilities, available to all pharmacy personnel and maintained in a sanitary condition.

(C) A Class A pharmacy which serves the general public shall contain an area which is suitable for confidential patient counseling.

(i) Such counseling area shall:

(I) be easily accessible to both patient and pharmacists and not allow patient access to prescription drugs;

(II) be designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(ii) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(I) the proximity of the counseling area to the check-out or cash register area;

(II) the volume of pedestrian traffic in and around the counseling area;

(III) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(IV) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(D) The pharmacy shall be properly lighted and ventilated.

(E) The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of drugs; the temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(F) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, guide dogs accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(2) Special requirements for nonsterile compounding.

(A) Pharmacies regularly engaging in compounding shall have a designated and adequate area for the safe and orderly compounding of drug products, including the placement of equipment and materials. Pharmacies involved in occasional compounding shall prepare an area prior to each compounding activity which is adequate for safe and orderly compounding.

(B) Only personnel authorized by the responsible pharmacist shall be in the immediate vicinity of a drug compounding operation.

(C) A sink with hot and cold running water, exclusive of rest room facilities, shall be accessible to the compounding areas and be maintained in a sanitary condition. Supplies necessary for adequate washing shall be accessible in the immediate area of the sink and include:

(i) soap or detergent; and

(ii) air-driers or single-use towels.

(D) If drug products which require special precautions to prevent contamination, such as penicillin, are involved in a compounding operation, appropriate measures, including dedication of equipment for such operations or the meticulous cleaning of contaminated equipment prior to its use for the preparation of other drug products, must be utilized in order to prevent cross-contamination.

(3) Security.

(A) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(B) The prescription department shall be locked by key or combination so as to prevent access when a pharmacist is not on-site. However, the pharmacist-in-charge may designate persons who may enter the pharmacy to perform functions designated by the pharmacist-in-charge (e.g., janitorial services).

(4) Temporary absence of pharmacist.

(A) If a pharmacy is staffed by a single pharmacist, the pharmacist may leave the prescription department for breaks and meal periods without closing the prescription department and removing pharmacy technicians and other pharmacy personnel from the prescription department provided the following conditions are met:

(i) at least one certified pharmacy technician remains in the prescription department;

(ii) the pharmacist remains on-site at the licensed location of the pharmacy and available for an emergency;

(iii) the absence does not exceed 30 minutes at a time and a total of one hour in a 12 hour period;

(iv) the pharmacist reasonably believes that the security of the prescription department will be maintained in his or her absence. If in the professional judgment of the pharmacist, the pharmacist determines that the prescription department should close during his or her absence, then the pharmacist shall close the prescription department and remove the pharmacy technicians or other pharmacy personnel from the prescription department during his or her absence; and

(v) a notice is posted which includes the following information:

(I) the fact that pharmacist is on a break and the time the pharmacist will return; and

(II) the fact that pharmacy technicians may begin the processing of prescription drug orders or refills brought in during the pharmacist absence but the prescription or refill may not be delivered to the patient or the patient's agent until the pharmacist returns and verifies the accuracy of the prescription.

(B) During the time a pharmacist is absent from the prescription department, only pharmacy technicians who have completed the pharmacy's training program may perform the following duties, provided a pharmacist verifies the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent:

(i) initiating and receiving refill authorization requests;

(ii) entering prescription data into a data processing system;

(iii) taking a stock bottle from the shelf for a prescription;

(iv) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(v) affixing prescription labels and auxiliary labels to the prescription container. After January 1, 2001, only certified pharmacy technicians may affix prescription labels to prescription containers; and

(vi) prepackaging and labeling prepackaged drugs.

(C) Upon return to the prescription department, the pharmacist shall:

(i) conduct a drug regimen review as specified in subsection (c)(2) of this section; and

(ii) verify the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent.

(D) An agent of the pharmacist may deliver a prescription drug order to the patient or his or her agent provided a record of the delivery is maintained containing the following information:

(i) date of the delivery;

(ii) unique identification number of the prescription drug order;

(iii) patient's name;

(iv) patient's phone number or the phone number of the person picking up the prescription; and

(v) signature of the person picking up the prescription.

(E) Any prescription delivered to a patient when a pharmacist is not in the prescription department must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(F) During the times a pharmacist is absent from the prescription department a pharmacist intern shall be considered a certified pharmacy technician and may perform only the duties of a certified pharmacy technician.

(G) In pharmacies with two or more pharmacists on duty, the pharmacists shall stagger their breaks and meal periods so that the prescription department is not left without a pharmacist on duty.

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent, information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(i) the name and description of the drug or device;

(ii) dosage form, dosage, route of administration, and duration of drug therapy;

(iii) special directions and precautions for preparation, administration, and use by the patient;

(iv) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(v) techniques for self monitoring of drug therapy;

(vi) proper storage;

(vii) refill information; and

(viii) action to be taken in the event of a missed dose.

(B) Such communication:

(i) shall be provided with each new prescription drug order, once yearly on maintenance medications, and if the pharmacist deems appropriate, with prescription drug order refills. (For the purposes of this clause, maintenance medications are defined as any medication the patient has taken for one year or longer);

(ii) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) shall be communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication; and

(iv) shall be reinforced with written information. The following is applicable concerning this written information.

(I) Written information designed for the consumer such as the USP DI patient information leaflets shall be provided.

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(C) Only a pharmacist may verbally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(D) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(E) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable.

(i) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in subsection (b)(4) of this section or clause (ii) of this subparagraph.

(ii) An agent of the pharmacist may deliver a prescription drug order to the patient or his or her agent during short periods of time when a pharmacist is absent from the pharmacy, provided the short periods of time do not exceed two hours, and provided a record of the delivery is maintained containing the following information:

(I) date of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(iii) Any prescription delivered to a patient when a pharmacist is not in the pharmacy must meet the requirements described in subparagraph (F) of this paragraph.

(iv) A Class A pharmacy shall make available for use by the public a current or updated edition of the United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient), or another source of such information designed for the consumer.

(F) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient or his or her agent at the patient's residence or other designated location, the following is applicable.

(i) The information specified in subparagraph (A) of this paragraph shall be delivered with the dispensed prescription in writing.

(ii) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(iii) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and if applicable, toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(iv) The pharmacy shall maintain and use adequate storage or shipment containers and use shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of appropriate packaging material and/or devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process.

(v) The pharmacy shall use a delivery system which is designed to assure that the drugs are delivered to the appropriate patient."

(G) The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(2) Pharmaceutical care services.

(A) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, a pharmacist shall at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant:

(I) known allergies;

(II) rational therapy-contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions; and

(X) proper utilization, including overutilization or underutilization.

(ii) Upon identifying any clinically significant conditions, situations, or items listed in clause (i) of this subparagraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences.

(B) Other pharmaceutical care services which may be provided by pharmacists include, but are not limited to, the following:

(i) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practices;

(ii) administering immunizations and vaccinations under written protocol of a physician;

(iii) managing patient compliance programs;

(iv) providing preventative health care services; and

(v) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(3) Generic Substitution.

(A) General requirements.

(i) In accordance with Chapter 562 of the Act, a pharmacist may dispense a generically equivalent drug product if:

(I) the generic product costs the patient less than the prescribed drug product;

(II) the patient does not refuse the substitution; and

(III) the practitioner does not certify on the prescription form that a specific prescribed brand is medically necessary as specified in a dispensing directive described in subparagraph (C) of this paragraph.

(ii) If the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph, a pharmacist shall not substitute a generically equivalent drug product unless the pharmacist obtains verbal or written authorization from the practitioner and notes such authorization on the original prescription drug order.

(B) Prescription format for written prescription drug orders.

(i) A written prescription drug order issued in Texas may:

(I) be on a form containing a single signature line for the practitioner; and

(II) contain the following reminder statement on the face of the prescription: "A generically equivalent drug product may be dispensed unless the practitioner hand writes the words 'Brand Necessary' or 'Brand Medically Necessary' on the face of the prescription."

(ii) A pharmacist may dispense a prescription that is not issued on the form specified in clause (i) of this subparagraph, however, the pharmacist may dispense a generically equivalent drug product unless the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C)(i) of this paragraph.

(iii) The prescription format specified in clause (i) of this subparagraph does not apply to the following types of prescription drug orders:

(I) prescription drug orders issued by a practitioner in a state other than Texas;

(II) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(III) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(iv) In the event of multiple prescription orders appearing on one prescription form, the practitioner shall clearly identify to which prescription(s) the dispensing directive(s) apply. If the practitioner does not clearly indicate to which prescription(s) the dispensing directive(s) apply, the pharmacist may substitute on all prescriptions on the form.

(C) Dispensing directive.

(i) Written prescriptions.

(I) A practitioner may prohibit the substitution of a generically equivalent drug product for a brand name drug product by writing across the face of the written prescription, in the practitioner's own handwriting, the phrase "brand necessary" or "brand medically necessary."

(II) The dispensing directive shall:

(-a-) be in a format that protects confidentiality as required by the Health Insurance Portability and Accountability Act of 1996 (29 U.S.C. Section 1181 et seq.) and its subsequent amendments; and

(-b-) comply with federal and state law, including rules, with regard to formatting and security requirements.

(III) The dispensing directive specified in this paragraph may not be preprinted, rubber stamped, or otherwise reproduced on the prescription form.

(IV) After, June 1, 2002, a practitioner may prohibit substitution on a written prescription only by following the dispensing directive specified in this paragraph. Two-line prescription forms, check boxes, or other notations on an original prescription drug order which indicate "substitution instructions" are not valid methods to prohibit substitution, and a pharmacist may substitute on these types of written prescriptions.

(V) A written prescription drug order issued prior to June 1, 2002, but presented for dispensing on or after June 1, 2002, shall follow the substitution instructions on the prescription.

(ii) Verbal Prescriptions.

(I) If a prescription drug order is transmitted to a pharmacist orally, the practitioner or practitioner's agent shall prohibit substitution by specifying "brand necessary" or "brand medically necessary." The pharmacists shall note any substitution instructions by the practitioner or practitioner's agent, on the file copy of the prescription drug order. Such file copy may follow the one-line format indicated in subparagraph (B)(i) of this paragraph, or any other format that clearly indicates the substitution instructions.

(II) If the practitioner's or practitioner's agent does not clearly indicate that the brand name is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(III) To prohibit substitution on a verbal prescription reimbursed through the medical assistance program specified in 42 C.F.R., §447.331:

(-a-) the practitioner or the practitioner's agent shall verbally indicate that the brand is medically necessary; and

(-b-) the practitioner shall mail or fax a written prescription to the pharmacy which complies with the dispensing directive for written prescriptions specified in clause (i) of this subparagraph within 30 days.

(iii) Electronic prescription drug orders.

(I) To prohibit substitution, the practitioner or practitioner's agent shall note "brand necessary" or "brand medically necessary" on the electronic prescription drug order.

(II) If the practitioner or practitioner's agent does not clearly indicate on the electronic prescription drug order that the brand is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(III) To prohibit substitution on an electronic prescription drug order reimbursed through the medical assistance program specified in 42 C.F.R., §447.331, the practitioner shall fax a copy of the original prescription drug order which complies with the requirements of a written prescription drug order specified in clause (i) of this subparagraph within 30 days.

(iv) Prescriptions issued by out-of-state, Mexican, Canadian, or federal facility practitioners.

(I) The dispensing directive specified in this subsection does not apply to the following types of prescription drug orders:

(-a-) prescription drug orders issued by a practitioner in a state other than Texas;

(-b-) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(-c-) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(II) A pharmacist may not substitute on prescription drug orders identified in subclause (I) of this clause unless the practitioner has authorized substitution on the prescription drug order. If the practitioner has not authorized substitution on the written prescription drug order, a pharmacist shall not substitute a generically equivalent drug product unless:

(-a-) the pharmacist obtains verbal or written authorization from the practitioner (such authorization shall be noted on the original prescription drug order); or

(-b-) the pharmacist obtains written documentation regarding substitution requirements from the State Board of Pharmacy in the state, other than Texas, in which the prescription drug order was issued. The following is applicable concerning this documentation.

(-1-) The documentation shall state that a pharmacist may substitute on a prescription drug order issued in such other state unless the practitioner prohibits substitution on the original prescription drug order.

(-2-) The pharmacist shall note on the original prescription drug order the fact that documentation from such other state board of pharmacy is on file.

(-3-) Such documentation shall be updated yearly.

(D) Refills.

(i) Original substitution instructions. All refills, including prescriptions issued prior to June 1, 2001, shall follow the original substitution instructions or dispensing directive, unless otherwise indicated by the practitioner or practitioner's agent.

(ii) Narrow therapeutic index drugs.

(I) The board, in consultation with the Texas State Board of Medical Examiners, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.013, Occupations Code. The board has specified in §309.7 of this title (relating to dispensing responsibilities) that pharmacist shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication.

(-a-) Pharmacists may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.

(-b-) Practitioners may prohibit substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph.

(II) The board shall reconsider the contents of the list if the Federal Food and Drug Administration determines a new equivalence classification which indicates that certain drug products are equivalent but special notification to the patient and practitioner is required when substituting these products.

(4) Substitution of dosage form.

(A) As specified in §562.002 of the Act, a pharmacist may dispense a dosage form of a drug product different from that prescribed, such as a tablet instead of a capsule or liquid instead of tablets, provided:

(i) the patient consents to the dosage form substitution;

(ii) the pharmacist notifies the practitioner of the dosage form substitution; and

(iii) the dosage form so dispensed:

(I) contains the identical amount of the active ingredients as the dosage prescribed for the patient;

(II) is not an enteric-coated or time release product;

(III) does not alter desired clinical outcomes;

(B) Substitution of dosage form may not include the substitution of a product that has been compounded by the pharmacist unless the pharmacist contacts the practitioner prior to dispensing and obtains permission to dispense the compounded product.

(5) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This paragraph does not apply to generic substitution. For generic substitution, see the requirements of paragraph (3) of this subsection.

(A) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery, of the dispensed prescription to the patient. Such notification shall include:

(i) a description of the change;

(ii) the reason for the change;

(iii) whom to notify with questions concerning the change; and

(iv) instructions for return of the drug if not wanted by the patient.

(B) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(i) the date of the notification;

(ii) the method of notification;

(iii) a description of the change; and

(iv) the reason for the change.

(6) Prescription containers.

(A) A drug dispensed pursuant to a prescription drug order shall be dispensed in a child-resistant container unless:

(i) the patient or the practitioner requests the prescription not be dispensed in a child-resistant container; or

(ii) the product is exempted from requirements of the Poison Prevention Packaging Act of 1970.

(B) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(C) Prescription containers or closures shall not be re-used.

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label with at least the following information:

(i) name, address and phone number of the pharmacy;

(ii) unique identification number of the prescription;

(iii) date the prescription is dispensed;

(iv) initials or an identification code of the dispensing pharmacist;

(v) name of the prescribing practitioner;

(vi) name of the patient or if such drug was prescribed for an animal, the species of the animal and the name of the owner;

(vii) instructions for use;

(viii) quantity dispensed;

(ix) appropriate ancillary instructions such as storage instructions or cautionary statements such as warnings of potential harmful effects of combining the drug product with any product containing alcohol;

(x) if the prescription is for a Schedule II-IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(xi) if the pharmacist has selected a generically equivalent drug pursuant to the provisions of the Act, Chapters 562 and 563, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed;

(xii) the name of the advanced practice nurse or physician assistant, if the prescription is carried out or signed by an advanced practice nurse or physician assistant in compliance with Subtitle B, Chapter 157, Occupations Code; and

(xiii) the name and strength of the actual drug product dispensed, unless otherwise directed by the prescribing practitioner.

(I) The name shall be either:

(-a-) the brand name; or

(-b-) if no brand name, then the generic name and name of the manufacturer or distributor of such generic drug. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products or non-sterile compounded drug products having no brand name, the principal active ingredients shall be indicated on the label.)

(II) Except as provided in clause (xi) of this subparagraph, the brand name of the prescribed drug shall not appear on the prescription container label unless it is the drug product actually dispensed.

(B) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the system employed by the pharmacy in dispensing the prescription drug order adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) name of the patient;

(-e-) name of the prescribing practitioner; and

(II) sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(d) Equipment and supplies.

(1) Class A pharmacies dispensing prescription drug orders shall have the following equipment and supplies:

(A) typewriter or comparable equipment;

(B) refrigerator;

(C) adequate supply of child-resistant, light-resistant, tight, and if applicable, glass containers;

(D) adequate supply of prescription, poison, and other applicable labels;

(E) appropriate equipment necessary for the proper preparation of prescription drug orders; and

(F) metric-apothecary weight and measure conversion charts.

(2) If the community pharmacy compounds prescription drug orders, the pharmacy shall:

(A) have a Class A prescription balance, or analytical balance and weights which shall be properly maintained and inspected at least every three years by the appropriate authority as prescribed by local, state, or federal law or regulations; and

(B) have equipment and utensils necessary for the proper compounding of prescription drug orders. Such equipment and utensils used in the compounding process shall be:

(i) of appropriate design, appropriate capacity, and be operated within designed operational limits;

(ii) of suitable composition so that surfaces that contact components, in-process material, or drug products shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the drug product beyond acceptable standards;

(iii) cleaned and sanitized immediately prior to each use; and

(iv) routinely inspected, calibrated (if necessary), or checked to ensure proper performance.

(e) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(1) current copies of the following:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act and rules;

(C) Texas Controlled Substances Act and rules; and

(D) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

(2) at least one current or updated reference from each of the following categories:

(A) patient information:

(i) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient); or

(ii) a reference text or information leaflets which provide patient information;

(B) drug interactions: a reference text on drug interactions, such as Phillip D. Hansten's Drug Interactions;

(C) a general information reference text, such as:

(i) Facts and Comparisons with current supplements;

(ii) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(iii) American Hospital Formulary Service with current supplements; or

(iv) Remington's Pharmaceutical Sciences; and

(3) basic antidote information and the telephone number of the nearest Regional Poison Control Center.

(f) Drugs.

(1) Procurement and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(B) Prescription drugs and devices and nonprescription Schedule V controlled substances shall be stored within the prescription department or a locked storage area.

(C) All drugs shall be stored at the proper temperature, as defined by the following terms:

(i) controlled room temperature--temperature maintained thermostatically between 15 degrees and 30 degrees Celsius (59 degrees and 86 degrees Fahrenheit);

(ii) cool--temperature between 8 degrees and 15 degrees Celsius (46 degrees and 59 degrees Fahrenheit) which may, alternatively, be stored in a refrigerator unless otherwise specified on the labeling;

(iii) refrigerate--temperature maintained thermostatically between 2 degrees and 8 degrees Celsius (36 degrees and 46 degrees Fahrenheit); and

(iv) freeze--temperature maintained thermostatically between -20 degrees and -10 degrees Celsius (-4 degrees and 14 degrees Fahrenheit).

(2) Out-of-date drugs or devices.

(A) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(B) Outdated drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(3) Nonprescription Schedule V controlled substances.

(A) Schedule V controlled substances containing codeine, dihydrocodeine, or any of the salts of codeine or dihydrocodeine may not be distributed without a prescription drug order from a practitioner.

(B) A pharmacist may distribute nonprescription Schedule V controlled substances which contain no more than 15 milligrams of opium per 29.5729 ml or per 28.35 Gm provided:

(i) such distribution is made only by a pharmacist; a nonpharmacist employee may not distribute a nonprescription Schedule V controlled substance even if under the supervision of a pharmacist; however, after the pharmacist has fulfilled professional and legal responsibilities, the actual cash, credit transaction, or delivery may be completed by a nonpharmacist:

(ii) not more than 240 ml (eight fluid ounces), or not more than 48 solid dosage units of any substance containing opium, may be distributed to the same purchaser in any given 48-hour period without a prescription drug order;

(iii) the purchaser is at least 18 years of age; and

(iv) the pharmacist requires every purchaser not known to the pharmacist to furnish suitable identification (including proof of age where appropriate).

(C) A record of such distribution shall be maintained by the pharmacy in a bound record book. The record shall contain the following information:

(i) true name of the purchaser;

(ii) current address of the purchaser;

(iii) name and quantity of controlled substance purchased;

(iv) date of each purchase; and

(v) signature or written initials of the distributing pharmacist.

(4) Drugs, components, and materials used in nonsterile compounding.

(A) Drugs used in nonsterile compounding shall:

(i) meet official compendia requirements; or

(ii) be of a chemical grade in one of the following categories:

(I) Chemically Pure (CP);

(II) Analytical Reagent (AR); or

(III) American Chemical Society (ACS); or

(iii) in the professional judgment of the pharmacist, be of high quality and obtained from acceptable and reliable alternative sources.

(B) All components shall be stored in properly labeled containers in a clean, dry area, under proper temperatures as defined in paragraph (1) of this subsection.

(C) Drug product containers and closures shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the compounded drug product beyond the desired result.

(D) Components, drug product containers, and closures shall be rotated so that the oldest stock is used first.

(E) Container closure systems shall provide adequate protection against foreseeable external factors in storage and use that can cause deterioration or contamination of the compounded drug product.

(5) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(A) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(B) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(C) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(D) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.

(g) Prepackaging of drugs.

(1) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by supportive personnel under the direction and direct supervision of a pharmacist.

(2) The label of a prepackaged unit shall indicate:

(A) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(B) facility's lot number;

(C) expiration date; and

(D) quantity of the drug, if the quantity is greater than one.

(3) Records of prepackaging shall be maintained to show:

(A) name of the drug, strength, and dosage form;

(B) facility's lot number;

(C) manufacturer or distributor;

(D) manufacturer's lot number;

(E) expiration date;

(F) quantity per prepackaged unit;

(G) number of prepackaged units;

(H) date packaged;

(I) name, initials, or electronic signature of the prepacker; and

(J) signature, or electronic signature of the responsible pharmacist.

(4) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(h) Customized patient medication packages.

(1) Purpose. In lieu of dispensing two or more prescribed drug products in separate containers, a pharmacist may, with the consent of the patient, the patient's caregiver, or the prescriber, provide a customized patient medication package (patient med-pak).

(2) Definition. A patient med-pak is a package prepared by a pharmacist for a specific patient comprising a series of containers and containing two or more prescribed solid oral dosage forms. The patient med-pak is so designed or each container is so labeled as to indicate the day and time, or period of time, that the contents within each container are to be taken.

(3) Label.

(A) The patient med-pak shall bear a label stating:

(i) the name of the patient;

(ii) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(iii) the name, strength, physical description or identification, and total quantity of each drug product contained therein;

(iv) the directions for use and cautionary statements, if any, contained in the prescription drug order for each drug product contained therein;

(v) if applicable, a warning of the potential harmful effect of combining any form of alcoholic beverage with any drug product contained therein;

(vi) any storage instructions or cautionary statements required by the official compendia;

(vii) the name of the prescriber of each drug product;

(viii) the date of preparation of the patient med-pak and the beyond-use date assigned to the patient med-pak (which such beyond-use date shall not be later than 60 days from the date of preparation);

(ix) the name, address, and telephone number of the pharmacy;

(x) the initials or an identification code of the dispensing pharmacist; and

(xi) any other information, statements, or warnings required for any of the drug products contained therein.

(B) If the patient med-pak allows for the removal or separation of the intact containers therefrom, each individual container shall bear a label identifying each of the drug product contained therein.

(C) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the system employed by the pharmacy in dispensing the prescription drug order adequately:

(I) identifies the:

(-a-) pharmacy name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength each drug product dispensed;

(-d-) name of the patient;

(-e-) name of the prescribing practitioner of each drug product; and

(II) for each drug product sets forth the directions for use and cautionary statements, if any contained on the prescription drug order or required by law.

(4) Labeling. The patient med-pak shall be accompanied by a patient package insert, in the event that any drug contained therein is required to be dispensed with such insert as accompanying labeling. Alternatively, such required information may be incorporated into a single, overall educational insert provided by the pharmacist for the total patient med-pak.

(5) Packaging. In the absence of more stringent packaging requirements for any of the drug products contained therein, each container of the patient med-pak shall comply with official packaging standards. Each container shall be either not reclosable or so designed as to show evidence of having been opened.

(6) Guidelines. It is the responsibility of the dispensing pharmacist when preparing a patient med-pak, to take into account any applicable compendial requirements or guidelines and the physical and chemical compatibility of the dosage forms placed within each container, as well as any therapeutic incompatibilities that may attend the simultaneous administration of the drugs.

(7) Recordkeeping. In addition to any individual prescription filing requirements, a record of each patient med-pak shall be made and filed. Each record shall contain, as a minimum:

(A) the name and address of the patient;

(B) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(C) the name of the manufacturer or distributor and lot number for each drug product contained therein;

(D) information identifying or describing the design, characteristics, or specifications of the patient med-pak sufficient to allow subsequent preparation of an identical patient med-pak for the patient;

(E) the date of preparation of the patient med-pak and the beyond-use date that was assigned;

(F) any special labeling instructions; and

(G) the initials or an identification code of the dispensing pharmacist.

(i) Nonsterile compounding.

(1) Purpose. The purpose of this subsection is to provide standards for the compounding of nonsterile drug products in licensed pharmacies for dispensing and/or administration to humans or animals. Licensed pharmacies compounding nonsterile drug products shall comply with the following paragraphs in addition to all other provisions of this section and §§291.31, 291.32, 291.34, and 291.35 of this title (relating to Definitions, Personnel, Records, and Triplicate Prescription Requirements).

(2) General requirements.

(A) Nonsterile drug products may be compounded in licensed pharmacies:

(i) when there exists a valid pharmacist/patient/prescriber relationship and upon the presentation of a valid prescription drug order; or

(ii) in anticipation of future prescription drug orders based on routine, regularly observed prescribing patterns.

(B) Nonsterile compounding in anticipation of future prescription drug orders must be based upon a history of receiving valid prescriptions issued within an established pharmacist/patient/prescriber relationship, provided that in the pharmacist's professional judgment the quantity prepared is stable for the anticipated shelf time.

(i) The pharmacist's professional judgment should be based on criteria such as:

(I) physical and chemical properties of active ingredients;

(II) use of preservatives and/or stabilizing agents;

(III) dosage form;

(IV) storage conditions; and

(V) scientific, laboratory, or reference data.

(ii) Documentation of the criteria used to determine the stability for the anticipated shelf time must be maintained with the nonsterile compounding record.

(iii) Any product compounded in anticipation of future prescription drug orders shall be labeled. Such label shall contain:

(I) name and strength of the compounded medication or list of the active ingredients and strengths;

(II) facility's lot number;

(III) "use by" date as determined by the pharmacist using appropriate documented criteria as outlined in clause (i) of this subparagraph; and

(IV) quantity or amount in the container.

(C) Commercially available drug products may be compounded for individual patients under the provisions of subparagraph (A) of this paragraph provided the prescribing practitioner has requested that the drug product be compounded.

(D) Drug products may be compounded for the exclusive use of the pharmacy where the products are compounded. Compounded drug products may not be distributed for resale, including distribution to pharmacies under common ownership or control, except

that a practitioner may obtain compounded drug products for administration to patients, but not for dispensing. Products compounded for physician administration to patients shall be labeled. Such label shall contain:

(i) the statement: "For Office Use Only";

(ii) name and strength of the compounded medication or list of the active ingredients and strengths;

(iii) facility's control number;

(iv) "use by" date as determined by the pharmacist using appropriate documented criteria as outlined in subparagraph (B)(i) of this paragraph; and

(v) quantity or amount in the container.

(E) Compounding pharmacies/pharmacists may advertise and promote the fact that they provide nonsterile prescription compounding services, but shall not solicit business by promoting to compound specific drug products.

(3) Compounding process.

(A) Any person with an apparent illness or open lesion that may adversely affect the safety or quality of a drug product being compounded shall be excluded from direct contact with components, drug product containers, closures, any materials involved in the compounding process, and drug products until the condition is corrected.

(B) Personnel engaged in the compounding of drug products shall wear clean clothing appropriate to the operation being performed. Protective apparel, such as coats/jackets, aprons, hair nets, gowns, hand or arm coverings, or masks shall be worn as necessary to protect personnel from chemical exposure and drug products from contamination.

(C) At each step of the compounding process, the pharmacist shall ensure that components used in compounding are accurately weighed, measured, or subdivided as appropriate to conform to the formula being prepared.

(D) The pharmacist shall establish and conduct quality control procedures to monitor the output of compounded drug products for uniformity and consistency such as capsule weight variations, adequacy of mixing, clarity, or pH of solutions. Such procedures shall be documented in the nonsterile compounding record.

(E) Compounding records for all drugs compounded in anticipation of future prescription drug orders shall be maintained by the pharmacy electronically or manually as part of the prescription, formula record, formula book, or compounding log and shall include:

(i) the date of preparation;

(ii) facility's lot number;

(iii) manufacturer's lot number(s) and expiration date(s) for all components (if the original manufacturer's lot number(s) and expiration date(s) are not known, the pharmacy shall record the source of acquisition of the components);

(iv) a complete formula, including methodology and necessary equipment;

(v) signature or initials of the pharmacist or supportive person performing the compounding;

(vi) signature or initials of the pharmacist responsible for supervising supportive personnel and conducting in-process and finals checks of compounded products if supportive personnel perform the compounding function;

(vii) the brand name(s) of the raw materials, or if no brand name, the generic name(s) and the name(s) of the manufacturer(s) of the raw materials;

(viii) the quantity in units of finished products or grams of raw materials;

(ix) the package size and the number of units prepared;

(x) documentation of performance of quality control procedures; and

(xi) the criteria used to determine the "use by" date.

(F) Compounding records for all drugs compounded pursuant to an individual prescription and not in anticipation of future prescription drug orders shall be maintained by the pharmacy electronically or manually as part of the prescription, formula record, formula book, or compounding log and shall include:

(i) the date of preparation;

(ii) a complete formula which includes the brand name(s) of the raw materials, or if no brand name, the generic name(s) and name(s) of the manufacturer(s) of the raw materials and the quantities of each;

(iii) signature or initials of the pharmacist or supportive person performing the compounding;

(iv) signature or initials of the pharmacist responsible for supervising supportive personnel and conducting in-process and finals checks of compounded products if supportive personnel perform the compounding function;

(v) the quantity in units of finished products or grams of raw materials;

(vi) the package size and the number of units prepared; and

(vii) documentation of performance of quality control procedures. Documentation of the performance of quality control procedures is not required if the compounding process involves the mixing of two or more commercially available oral liquids or commercially available preparations when the final product is intended for external use.

(j) Automated devices and systems.

(1) Automated compounding or counting devices. If a pharmacy uses automated compounding or counting devices:

(A) the pharmacy shall have a method to calibrate and verify the accuracy of the automated compounding or counting device and document the calibration and verification on a routine basis;

(B) the devices may be loaded with bulk or unlabeled drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist;

(C) the label of an automated compounding or counting device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(D) records of loading bulk or unlabeled drugs into an automated compounding or counting device shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) manufacturer or distributor;

(iii) manufacturer's lot number;

(iv) expiration date;

(v) date of loading;

(vi) name, initials, or electronic signature of the person loading the automated compounding or counting device; and

(vii) signature or electronic signature of the responsible pharmacist; and

(E) the automated compounding or counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature to the record specified in subparagraph (D) of this paragraph.

(2) Automated pharmacy dispensing systems. This paragraph becomes effective September 1, 2000.

(A) Authority to use automated pharmacy dispensing systems. A pharmacy may use an automated pharmacy dispensing system to fill prescription drug orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated pharmacy dispensing system has been tested by the pharmacy and found to dispense accurately. The pharmacy shall make the results of such testing available to the Board upon request; and

(iii) the pharmacy will make the automated pharmacy dispensing system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Quality assurance program. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall operate according to a written program for quality assurance of the automated pharmacy dispensing system which:

(i) requires continuous monitoring of the automated pharmacy dispensing system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every six months and whenever any upgrade or change is made to the system and documents each such activity.

(C) Policies and procedures of operation.

(i) When an automated pharmacy dispensing system is used to fill prescription drug orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall establish requirements for operation of the automated pharmacy dispensing system and shall describe policies and procedures that:

(I) include a description of the policies and procedures of operation;

(II) provide for a pharmacist's review, approval, and accountability for the transmission of each original or new prescription drug order to the automated pharmacy dispensing system before the transmission is made;

(III) provide for access to the automated pharmacy dispensing system for stocking and retrieval of medications which is limited to licensed healthcare professionals or pharmacy technicians acting under the supervision of a pharmacist;

(IV) require prior to use, that a pharmacist checks, verifies, and documents that the automated pharmacy dispensing system has been accurately filled each time the system is stocked;

(V) provide for an accountability record to be maintained which documents all transactions relative to stocking and removing medications from the automated pharmacy dispensing system;

(VI) require a prospective drug regimen review is conducted as specified in subsection (c)(2) of this section; and

(VII) establish and make provisions for documentation of a preventative maintenance program for the automated pharmacy dispensing system.

(ii) A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(D) Recovery Plan. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated pharmacy dispensing system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated pharmacy dispensing system is experiencing downtime;

(ii) procedures for response when an automated pharmacy dispensing system is experiencing downtime;

(iii) procedures for the maintenance and testing of the written plan for recovery; and

(iv) procedures for notification of the Board, each patient of the pharmacy, and other appropriate agencies whenever an automated pharmacy dispensing system experiences downtime for more than two days of operation or a period of time which significantly limits the pharmacy's ability to provide pharmacy services.

(3) Final check of prescriptions dispensed using an automated pharmacy dispensing system. For the purpose of §291.32(b)(2) of this subchapter, a pharmacist must perform the final check of all prescriptions prior to delivery to the patient to ensure that the prescription is dispensed accurately as prescribed.

(A) This final check shall be considered accomplished if:

(i) a check of the final product is conducted by a pharmacist after the automated system has completed the prescription and prior to delivery to the patient; or

(ii) the following checks are conducted by a pharmacist:

(I) if the automated pharmacy dispensing system contains bulk stock drugs, a pharmacist verifies that those drugs have been accurately stocked as specified in paragraph (2)(C)(i)(IV) of this subsection; and

(II) a pharmacist checks the accuracy of the data entry of each original or new prescription drug order entered into the automated pharmacy dispensing system.

(B) If the final check is accomplished as specified in subparagraph (A)(ii) of this paragraph, the following additional requirements must be met.

(i) The dispensing process must be fully automated from the time the pharmacist releases the prescription to the automated

system until a completed, labeled prescription ready for delivery to the patient is produced.

(ii) The pharmacy has conducted initial testing and has a continuous quality assurance program which documents that the automated pharmacy dispensing system dispenses accurately as specified in paragraph (2)(A) and (B) of this subsection.

(iii) The automated pharmacy dispensing system documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (A)(ii) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who performs any other portion of the dispensing process.

(iv) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every month rather than every six months as specified in paragraph (2)(B) of this subsection.

(4) Automated checking device.

(A) For the purpose of this subsection, an automated checking device is a fully automated device which confirms, after dispensing but prior to delivery to the patient, that the correct drug and strength has been labeled with the correct label for the correct patient.

(B) For the purpose of §291.32(b)(2) of this subchapter, the final check of a dispensed prescription shall be considered accomplished using an automated checking device provided:

(i) a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed by a pharmacist:

(I) the prepackaged drug used to fill the order is checked by a pharmacist who verifies that the drug is labeled and packaged accurately; and

(II) a pharmacist checks the accuracy of each original or new prescription drug order.

(ii) the prescription is dispensed, labeled, and made ready for delivery to the patient in compliance with Class A (Community) Pharmacy rules; and

(iii) prior to delivery to the patient:

(I) the automated checking device confirms that the correct drug and strength has been labeled with the correct label for the correct patient; and

(II) a pharmacist performs all other duties required to ensure that the prescription has been dispensed safely and accurately as prescribed.

(C) If the final check is accomplished as specified in subparagraph (B) of this paragraph, the following additional requirements must be met.

(i) The pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient.

(ii) The pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (B)(i) of this paragraph; and

(II) the name(s) initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who perform any other portion of the dispensing process.

(iii) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly.

§291.34. Records

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), §291.35 of this title (relating to Triplicate Prescription Records), and §291.36 of this title (relating to Class A Pharmacies Dispensing Sterile Products) contained in Community Pharmacy (Class A) shall be kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.

(2) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(3) Records of controlled substances, other than prescription drug orders, listed in Schedules III-V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, readily retrievable means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(4) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(A) the records maintained in the alternative system contain all of the information required on the manual record; and

(B) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(b) Prescriptions.

(1) Professional responsibility.

(A) Pharmacists shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order they dispense. If the pharmacist questions the accuracy or authenticity of a prescription drug order, he/she shall verify the order with the practitioner prior to dispensing.

(B) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that the prescription is a valid prescription. A pharmacist may not dispense a prescription drug if the pharmacist knows or should have known that the prescription was issued on the basis of an Internet-based or telephonic consultation without a valid patient-practitioner relationship.

(C) Subparagraph (B) of this paragraph does not prohibit a pharmacist from dispensing a prescription when a valid patient-practitioner relationship is not present in an emergency situation (e.g. a practitioner taking calls for the patient's regular practitioner).

(2) Written prescription drug orders.

(A) Practitioner's signature.

(i) Except as noted in clause (ii) of this subparagraph, written prescription drug orders shall be:

(I) manually signed by the practitioner; or

(II) electronically signed by the practitioner using a system which electronically replicates the practitioner's manual signature on the written prescription, provided that security features of the system require the practitioner to authorize each use.

(ii) Prescription drug orders for Schedule II controlled substances shall be issued on an official prescription form as required by the Texas Controlled Substances Act, §481.075, and be manually signed by the practitioner.

(iii) A practitioner may sign a prescription drug order in the same manner as he would sign a check or legal document, e.g. J.H. Smith or John H. Smith.

(iv) Rubber stamped or otherwise reproduced signatures may not be used except as authorized in clause (i) of this subparagraph.

(v) The prescription drug order may not be signed by a practitioner's agent but may be prepared by an agent for the signature of a practitioner. However, the prescribing practitioner is responsible in case the prescription drug order does not conform in all essential respects to the law and regulations.

(B) Prescription drug orders written by practitioners in another state.

(i) Dangerous drug prescription orders. A pharmacist may dispense a prescription drug order for dangerous drugs issued by practitioners in a state other than Texas in the same manner as prescription drug orders for dangerous drugs issued by practitioners in Texas are dispensed.

(ii) Controlled substance prescription drug orders.

(I) A pharmacist may dispense prescription drug order for controlled substances in Schedule II issued by a practitioner in another state provided:

(-a-) the prescription is filled in compliance with a written plan approved by the Director of the Texas Department of Public Safety in consultation with the Board, which provides the manner in which the dispensing pharmacy may fill a prescription for a Schedule II controlled substance;

(-b-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule II controlled substances in such other state; and

(-c-) the prescription drug order is not dispensed after the end of the seventh day after the date on which the prescription is issued.

(II) A pharmacist may dispense prescription drug orders for controlled substances in Schedule III, IV, or V issued by a practitioner in another state provided:

(-a-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule III, IV, or V controlled substances in such other state;

(-b-) the prescription drug order is not dispensed or refilled more than six months from the initial date of issuance and may not be refilled more than five times; and

(-c-) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order is obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(C) Prescription drug orders written by practitioners in the United Mexican States or the Dominion of Canada.

(i) Controlled substance prescription drug orders. A pharmacist may not dispense a prescription drug order for a Schedule II, III, IV, or V controlled substance issued by a practitioner in the Dominion of Canada or the United Mexican States.

(ii) Dangerous drug prescription drug orders. A pharmacist may dispense a dangerous drug prescription issued by a person licensed in the Dominion of Canada or the United Mexican States as a physician, dentist, veterinarian, or podiatrist provided:

(I) the prescription drug order is an original written prescription; and

(II) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of dangerous drugs.

(D) Prescription drug orders carried out or signed by an advanced practice nurse or physician assistant.

(i) A pharmacist may dispense a prescription drug order for a dangerous drug which is carried out or signed by an advanced practice nurse or physician assistant provided:

(I) the prescription is for a dangerous drug and not for a controlled substance; and

(II) the advanced practice nurse or physician assistant is practicing in accordance with Subtitle B, Chapter 157, Occupations Code.

(ii) Each practitioner shall designate in writing the name of each advanced practice nurse or physician assistant authorized to carry out or sign a prescription drug order pursuant to Subtitle B, Chapter 157, Occupations Code. A list of the advanced practice nurses or physician assistants designated by the practitioner must be maintained in the practitioner's usual place of business. On request by a pharmacist, a practitioner shall furnish the pharmacist with a copy of the written authorization for a specific advanced practice nurse or physician assistant.

(E) Prescription drug orders for Schedule II controlled substances. No Schedule II controlled substance may be dispensed without a written prescription drug order of a practitioner on an official prescription form as required by the Texas Controlled Substances Act, §481.075.

(3) Verbal prescription drug orders.

(A) A verbal prescription drug order from a practitioner or a practitioner's designated agent may only be received by a pharmacist or a pharmacist-intern under the direct supervision of a pharmacist.

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to communicate prescriptions verbally for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense a verbal prescription drug order for a Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act.

(D) A pharmacist may not dispense a verbal prescription drug order for a dangerous drug or a controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(4) Electronic prescription drug orders. For the purpose of this subsection, prescription drug orders shall be considered the same as verbal prescription drug orders.

(A) An electronic prescription drug order may be transmitted by a practitioner or a practitioner's designated agent:

(i) directly to a pharmacy; or

(ii) through the use of a data communication device provided:

(I) the prescription information is not altered during transmission; and

(II) confidential patient information is not accessed or maintained by the operator of the data communication device unless the operator is authorized to receive the confidential information as specified in subsection (k) of this section.

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to electronically transmit prescriptions for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense an electronic prescription drug order for a:

(i) Schedule II controlled substance, except as authorized for faxed prescriptions in §481.074, Health and Safety Code;

(ii) Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act; or

(iii) dangerous drug or controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(5) Original prescription drug order records.

(A) Original prescriptions shall be maintained by the pharmacy in numerical order and remain legible for a period of two years from the date of filling or the date of the last refill dispensed.

(B) If an original prescription drug order is changed, such prescription order shall be invalid and of no further force and effect; if additional drugs are to be dispensed, a new prescription drug order with a new and separate number is required.

(C) Original prescriptions shall be maintained in three separate files as follows:

(i) prescriptions for controlled substances listed in Schedule II;

(ii) prescriptions for controlled substances listed in Schedule III-V; and

(iii) prescriptions for dangerous drugs and nonprescription drugs.

(D) Original prescription records other than prescriptions for Schedule II controlled substances may be stored on microfilm, microfiche, or other system which is capable of producing a direct image of the original prescription record, e.g., digitalized imaging system. If original prescription records are stored in a direct imaging system, the following is applicable:

(i) the record of refills recorded on the original prescription must also be stored in this system;

(ii) the original prescription records must be maintained in numerical order and separated in three files as specified in subparagraph (C) of this paragraph; and

(iii) the pharmacy must provide immediate access to equipment necessary to render the records easily readable.

(6) Prescription drug order information.

(A) All original prescriptions shall bear:

(i) name of the patient, or if such drug is for an animal, the species of such animal and the name of the owner;

(ii) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(iv) name and strength of the drug prescribed;

(v) quantity prescribed;

(vi) directions for use;

(vii) intended use for the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient; and

(viii) date of issuance.

(B) All original electronic prescription drug orders shall bear:

(i) name of the patient, if such drug is for an animal, the species of such animal, and the name of the owner;

(ii) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(iv) name and strength of the drug prescribed;

(v) quantity prescribed;

(vi) directions for use;

(vii) indications for use, unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(viii) date of issuance;

(ix) a statement which indicates that the prescription has been electronically transmitted, (e.g., Faxed to or electronically transmitted to:);

(x) name, address, and electronic access number of the pharmacy to which the prescription was transmitted;

(xi) telephone number of the prescribing practitioner;

(xii) date the prescription drug order was electronically transmitted to the pharmacy, if different from the date of issuance of the prescription; and

(xiii) if transmitted by a designated agent, the full name of the designated agent.

(C) All original written prescriptions for dangerous drugs carried out or signed by an advanced practice nurse or physician assistant in accordance with Subtitle B, Chapter 157, Occupations Code, shall bear:

(i) name and address of the patient;

(ii) name, address, and telephone number of the supervising practitioner;

(iii) name, identification number, and original signature of the advanced practice nurse or physician assistant;

(iv) address and telephone number of the clinic at which the prescription drug order was carried out or signed;

(v) name, strength, and quantity of the dangerous drug;

(vi) directions for use;

(vii) indications for use, if appropriate;

(viii) date of issuance; and

(ix) number of refills authorized.

(D) At the time of dispensing, a pharmacist is responsible for the addition of the following information to the original prescription:

(i) unique identification number of the prescription drug order;

(ii) initials or identification code of the dispensing pharmacist;

(iii) quantity dispensed, if different from the quantity prescribed;

(iv) date of dispensing, if different from the date of issuance; and

(v) brand name or manufacturer of the drug product actually dispensed, if the drug was prescribed by generic name or if a drug product other than the one prescribed was dispensed pursuant to the provisions of the Act, Chapters 562 and 563.

(7) Refills.

(A) Refills may be dispensed only in accordance with the prescriber's authorization as indicated on the original prescription drug order.

(B) If there are no refill instructions on the original prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original prescription drug order have been dispensed, authorization from the prescribing practitioner shall be obtained prior to dispensing any refills.

(C) Refills of prescription drug orders for dangerous drugs or nonprescription drugs.

(i) Prescription drug orders for dangerous drugs or nonprescription drugs may not be refilled after one year from the date of issuance of the original prescription drug order.

(ii) If one year has expired from the date of issuance of an original prescription drug order for a dangerous drug or nonprescription drug, authorization shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of the drug.

(D) Refills of prescription drug orders for Schedule III-V controlled substances.

(i) Prescription drug orders for Schedule III-V controlled substances may not be refilled more than five times or after six months from the date of issuance of the original prescription drug order, whichever occurs first.

(ii) If a prescription drug order for a Schedule III, IV, or V controlled substance has been refilled a total of five times or if six months have expired from the date of issuance of the original prescription drug order, whichever occurs first, a new and separate prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(E) A pharmacist may exercise his professional judgment in refilling a prescription drug order for a drug, other than a controlled substance listed in Schedule II, without the authorization of the prescribing practitioner, provided:

(i) failure to refill the prescription might result in an interruption of a therapeutic regimen or create patient suffering;

(ii) either:

(I) a natural or manmade disaster has occurred which prohibits the pharmacist from being able to contact the practitioner; or

(II) the pharmacist is unable to contact the practitioner after a reasonable effort;

(iii) the quantity of prescription drug dispensed does not exceed a 72-hour supply;

(iv) the pharmacist informs the patient or the patient's agent at the time of dispensing that the refill is being provided without such authorization and that authorization of the practitioner is required for future refills;

(v) the pharmacist informs the practitioner of the emergency refill at the earliest reasonable time;

(vi) the pharmacist maintains a record of the emergency refill containing the information required to be maintained on a prescription as specified in this subsection;

(vii) the pharmacist affixes a label to the dispensing container as specified in §291.33(c)(6) of this title; and

(viii) if the prescription was initially filled at another pharmacy, the pharmacist may exercise his professional judgment in refilling the prescription provided:

(I) the patient has the prescription container, label, receipt or other documentation from the other pharmacy which contains the essential information;

(II) after a reasonable effort, the pharmacist is unable to contact the other pharmacy to transfer the remaining prescription refills or there are no refills remaining on the prescription;

(III) the pharmacist, in his professional judgment, determines that such a request for an emergency refill is appropriate and meets the requirements of clauses (i) and (ii) of this subparagraph; and

(IV) the pharmacist complies with the requirements of clauses (iii)-(v) of this subparagraph.

(c) Patient medication records.

(1) A patient medication record system shall be maintained by the pharmacy for patients to whom prescription drug orders are dispensed.

(2) The patient medication record system shall provide for the immediate retrieval of information for the previous 12 months which is necessary for the dispensing pharmacist to conduct a prospective drug regimen review at the time a prescription drug order is presented for dispensing.

(3) The pharmacist-in-charge shall assure that a reasonable effort is made to obtain and record in the patient medication record at least the following information:

(A) full name of the patient for whom the drug is prescribed;

(B) address and telephone number of the patient;

(C) patient's age or date of birth;

(D) patient's gender;

(E) any known allergies, drug reactions, idiosyncrasies, and chronic conditions or disease states of the patient and the identity of any other drugs currently being used by the patient which may relate to prospective drug regimen review;

(F) pharmacist's comments relevant to the individual's drug therapy, including any other information unique to the specific patient or drug; and

(G) a list of all prescription drug orders dispensed (new and refill) to the patient by the pharmacy during the last two years. Such list shall contain the following information:

(i) date dispensed;

(ii) name, strength, and quantity of the drug dispensed;

(iii) prescribing practitioner's name;

(iv) unique identification number of the prescription; and

(v) name or initials of the dispensing pharmacists.

(4) A patient medication record shall be maintained in the pharmacy for two years. If patient medication records are maintained in a data processing system, all of the information specified in this subsection shall be maintained in a retrievable form for two years and information for the previous 12 months shall be maintained on-line.

(5) Nothing in this paragraph shall be construed as requiring a pharmacist to obtain, record, and maintain patient information other than prescription drug order information when a patient or patient's agent refuses to provide the necessary information for such patient medication records.

(d) Prescription drug order records maintained in a manual system.

(1) Original prescriptions shall be maintained in three files as specified in subsection (b)(5)(C) of this section.

(2) Refills.

(A) Each time a prescription drug order is refilled, a record of such refill shall be made:

(i) on the back of the prescription by recording the date of dispensing, the written initials or identification code of the dispensing pharmacist, and the amount dispensed. (If the pharmacist merely initials and dates the back of the prescription drug order, he or she shall be deemed to have dispensed a refill for the full face amount of the prescription drug order); or

(ii) on another appropriate, uniformly maintained, readily retrievable record, such as medication records, which indicates by patient name the following information:

(I) unique identification number of the prescription;

(II) name and strength of the drug dispensed;

(III) date of each dispensing;

(IV) quantity dispensed at each dispensing;

(V) initials or identification code of the dispensing pharmacist; and

(VI) total number of refills for the prescription.

(B) If refill records are maintained in accordance with subparagraph (A)(ii) of this paragraph, refill records for controlled substances in Schedule III-V shall be maintained separately from refill records of dangerous drugs and nonprescription drugs.

(3) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted on the original prescription, in addition to the documentation of dispensing the refill.

(4) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements:

(A) the transfer of original prescription drug order information for controlled substances listed in Schedules III, IV, or V is permissible between pharmacies on a one-time basis;

(B) the transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills;

(C) the transfer is communicated directly between pharmacists and/or pharmacist interns;

(D) both the original and the transferred prescription drug order are maintained for a period of two years from the date of last refill;

(E) the pharmacist or pharmacist intern transferring the prescription drug order information shall:

(i) write the word "void" on the face of the invalidated prescription drug order; and

(ii) record on the reverse of the invalidated prescription drug order the following information:

(I) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription drug order is transferred;

(II) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(III) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(IV) the date of the transfer;

(F) the pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(i) write the word "transfer" on the face of the transferred prescription drug order; and

(ii) record on the transferred prescription drug order the following information:

(I) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(II) original prescription number and the number of refills authorized on the original prescription drug order;

(III) number of valid refills remaining and the date of last refill, if applicable;

(IV) name, address, and if a controlled substance, the DEA registration number of the pharmacy from which such prescription information is transferred; and

(V) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(5) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in paragraph (4) of this subsection.

(e) Prescription drug order records maintained in a data processing system.

(1) General requirements for records maintained in a data processing system.

(A) Compliance with data processing system requirements. If a Class A (community) pharmacy's data processing system is not in compliance with this subsection, the pharmacy must maintain a manual recordkeeping system as specified in subsection (c) of this section.

(B) Original prescriptions. Original prescriptions shall be maintained in three files as specified in subsection (b)(5)(C) of this section.

(C) Requirements for backup systems.

(i) The pharmacy shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis, at least monthly, to assure that data is not lost due to system failure.

(ii) Data processing systems shall have a workable (electronic) data retention system which can produce an audit trail of drug usage for the preceding two years as specified in paragraph (2)(G) of this subsection.

(D) Change or discontinuance of a data processing system.

(i) Records of dispensing. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records of dispensing to the new data processing system; or

(II) purge the records of dispensing to a printout which contains the same information required on the daily printout as specified in paragraph (2)(B) of this subsection. The information on this hard-copy printout shall be sorted and printed by prescription number and list each dispensing for this prescription chronologically.

(ii) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records to the new data processing system; or

(II) purge the records to a printout which contains all of the information required on the original document.

(iii) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(E) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(2) Records of dispensing.

(A) Each time a prescription drug order is filled or refilled, a record of such dispensing shall be entered into the data processing system.

(B) The data processing system shall have the capacity to produce a daily hard-copy printout of all original prescriptions dispensed and refilled. This hard-copy printout shall contain the following information:

(i) unique identification number of the prescription;

(ii) date of dispensing;

(iii) patient name;

(iv) prescribing practitioner's name;

(v) name and strength of the drug product actually dispensed; if generic name, the brand name or manufacturer of drug dispensed;

(vi) quantity dispensed;

(vii) initials or an identification code of the dispensing pharmacist; and

(viii) if not immediately retrievable via CRT display, the following shall also be included on the hard-copy printout:

(I) patient's address;

(II) prescribing practitioner's address;

(III) practitioner's DEA registration number, if the prescription drug order is for a controlled substance;

(IV) quantity prescribed, if different from the quantity dispensed;

(V) date of issuance of the prescription drug order, if different from the date of dispensing; and

(VI) total number of refills dispensed to date for that prescription drug order.

(C) The daily hard-copy printout shall be produced within 72 hours of the date on which the prescription drug orders were dispensed and shall be maintained in a separate file at the pharmacy. Records of controlled substances shall be readily retrievable from records of noncontrolled substances.

(D) Each individual pharmacist who dispenses or refills a prescription drug order shall verify that the data indicated on the daily hard-copy printout is correct, by dating and signing such document in the same manner as signing a check or legal document (e.g., J.H. Smith, or John H. Smith) within seven days from the date of dispensing.

(E) In lieu of the printout described in subparagraph (B) of this paragraph, the pharmacy shall maintain a log book in which each individual pharmacist using the data processing system shall sign a statement each day, attesting to the fact that the information entered into the data processing system that day has been reviewed by him or her and is correct as entered. Such log book shall be maintained at the pharmacy employing such a system for a period of two years after the date of dispensing; provided, however, that the data processing system can produce the hard-copy printout on demand by an authorized agent of the Texas State Board of Pharmacy, the Texas Department of Public Safety, or the Drug Enforcement Administration. If no printer is available on site, the hard-copy printout shall be available within 48 hours with a certification by the individual providing the printout, which states that the printout is true and correct as of the date of entry and such information has not been altered, amended, or modified.

(F) The pharmacist-in-charge is responsible for the proper maintenance of such records and responsible that such data processing system can produce the records outlined in this section and that such system is in compliance with this subsection.

(G) The data processing system shall be capable of producing a hard-copy printout of an audit trail for all dispensings (original and refill) of any specified strength and dosage form of a drug (by either brand or generic name or both) during a specified time period.

(i) Such audit trail shall contain all of the information required on the daily printout as set out in subparagraph (B) of this paragraph.

(ii) The audit trail required in this subparagraph shall be supplied by the pharmacy within 48 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, Department of Public Safety, or Drug Enforcement Administration.

(H) Failure to provide the records set out in this subsection, either on site or within 48 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(I) The data processing system shall provide on-line retrieval (via CRT display or hard-copy printout) of the information set out in subparagraph (B) of this paragraph of:

(i) the original controlled substance prescription drug orders currently authorized for refilling; and

(ii) the current refill history for Schedule III, IV, and V controlled substances for the immediately preceding six-month period.

(J) In the event that a pharmacy which uses a data processing system experiences system downtime, the following is applicable:

(i) an auxiliary procedure shall ensure that refills are authorized by the original prescription drug order and that the maximum number of refills has not been exceeded or authorization from the prescribing practitioner shall be obtained prior to dispensing a refill; and

(ii) all of the appropriate data shall be retained for on-line data entry as soon as the system is available for use again.

(3) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted as follows:

(A) on the hard-copy prescription drug order;

(B) on the daily hard-copy printout; or

(C) via the CRT display.

(4) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements.

(A) The transfer of original prescription drug order information for controlled substances listed in Schedules III, IV, or V is permissible between pharmacies on a one-time basis only. However, pharmacies electronically sharing a real-time, on-line database may transfer up to the maximum refills permitted by law and the prescriber's authorization.

(B) The transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills.

(C) The transfer is communicated directly between pharmacists and/or pharmacist interns or as authorized in paragraph (5) of this subsection.

(D) Both the original and the transferred prescription drug orders are maintained for a period of two years from the date of last refill.

(E) The pharmacist or pharmacist intern transferring the prescription drug order information shall:

(i) write the word "void" on the face of the invalidated prescription drug order; and

(ii) record on the reverse of the invalidated prescription drug order the following information:

(I) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(II) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(III) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(IV) the date of the transfer.

(F) The pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(i) write the word "transfer" on the face of the transferred prescription drug order; and

(ii) record on the transferred prescription drug order the following information:

(I) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(II) original prescription number and the number of refills authorized on the original prescription drug order;

(III) number of valid refills remaining and the date of last refill, if applicable;

(IV) name, address, and if a controlled substance, the DEA registration number of the pharmacy from which such prescription drug order information is transferred; and

(V) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(G) Prescription drug orders may not be transferred by non-electronic means during periods of downtime except on consultation with and authorization by a prescribing practitioner; provided however, during downtime, a hard copy of a prescription drug order may be made available for informational purposes only, to the patient, a pharmacist or pharmacist intern, and the prescription may be read to a pharmacist or pharmacist intern by telephone.

(H) The original prescription drug order shall be invalidated in the data processing system for purposes of filling or refilling, but shall be maintained in the data processing system for refill history purposes.

(I) If the data processing system has the capacity to store all the information required in subparagraphs (E) and (F) of this paragraph, the pharmacist is not required to record this information on the original or transferred prescription drug order.

(J) The data processing system shall have a mechanism to prohibit the transfer or refilling of controlled substance prescription drug orders which have been previously transferred.

(5) Electronic transfer of prescription drug order information between pharmacies. Pharmacies electronically accessing the same prescription drug order records may electronically transfer prescription information if the following requirements are met.

(A) The original prescription is voided and the following information is documented in the records of the transferring pharmacy:

(i) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(ii) the name of the pharmacist or pharmacist intern receiving the prescription drug order information; and

(iii) the date of the transfer.

(B) Pharmacies not owned by the same person may electronically access the same prescription drug order records, provided the owner or chief executive officer of each pharmacy signs an agreement allowing access to such prescription drug order records.

(6) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in paragraphs (4) and (5) of this subsection.

(f) Limitation to one type of recordkeeping system. When filing prescription drug order information a pharmacy may use only one of the two systems described in subsection (d) or (e) of this section.

(g) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(1) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(2) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed and distributed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(3) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(A) the actual date of distribution;

(B) the name, strength, and quantity of controlled substances distributed;

(C) the name, address, and DEA registration number of the distributing pharmacy; and

(D) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(4) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(A) The pharmacy, practitioner, or other registrant who is receiving the controlled substances shall issue Copy 1 and Copy 2 of a DEA order form (DEA 222C) to the distributing pharmacy.

(B) The distributing pharmacy shall:

(i) complete the area on the DEA order form (DEA 222C) titled "To Be Filled in by Supplier";

(ii) maintain Copy 1 of the DEA order form (DEA 222C) at the pharmacy for two years; and

(iii) forward Copy 2 of the DEA order form (DEA 222C) to the Divisional Office of the Drug Enforcement Administration.

(h) Other records. Other records to be maintained by a pharmacy:

(1) a permanent log of the initials or identification codes which will identify each dispensing pharmacist by name (the initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes shall not be used);

(2) Copy 3 of DEA order form (DEA 222C) which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(3) a hard copy of the power of attorney to sign DEA 222C order forms (if applicable);

(4) suppliers' invoices of dangerous drugs and controlled substances; pharmacists or other responsible individuals shall verify that the controlled drugs listed on the invoices were actually received by clearly recording their initials and the actual date of receipt of the controlled substances;

(5) suppliers' credit memos for controlled substances and dangerous drugs;

(6) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements);

(7) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(8) a hard copy of the Schedule V nonprescription register book;

(9) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(10) a hard copy of any notification required by the Texas Pharmacy Act or the sections in this chapter, including, but not limited to, the following:

(A) reports of theft or significant loss of controlled substances to DEA, Department of Public Safety, and the board;

(B) notifications of a change in pharmacist-in-charge of a pharmacy; and

(C) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(i) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(1) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(A) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by Title 21, Code of Federal Regulations, §1304.04(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(B) The pharmacy maintains a copy of the notification required in subparagraph (A) of this paragraph.

(C) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(2) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(3) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(4) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(j) Ownership of pharmacy records. For the purposes of these sections, a pharmacy licensed under the Act is the only entity which may legally own and maintain prescription drug records.

(k) Confidentiality.

(1) A pharmacist shall provide adequate security of prescription drug orders, and patient medication records to prevent indiscriminate or unauthorized access to confidential health information. If prescription drug orders, requests for refill authorization, or other confidential health information are not transmitted directly between a pharmacy and a physician but are transmitted through a data communication device, confidential health information may not be accessed or maintained by the operator of the data communication device unless specifically authorized to obtain the confidential information by this subsection.

(2) Confidential records are privileged and may be released only to:

(A) the patient or the patient's agent;

(B) a practitioner or another pharmacist if, in the pharmacist's professional judgement, the release is necessary to protect the patient's health and well being;

(C) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(D) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(E) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(F) an insurance carrier or other third party payor authorized by a patient to receive such information.

§291.36. Class A Pharmacies Compounding Sterile Pharmaceuticals.

(a) Purpose. The purpose of this section is to provide standards for the preparation, labeling, and distribution of compounded sterile pharmaceuticals by licensed pharmacies, pursuant to a prescription drug order. The intent of these standards is to provide a minimum level of pharmaceutical care to the patient so that the patient's health is protected while striving to produce positive patient outcomes.

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

(1) ACPE--The American Council on Pharmaceutical Education.

(2) Act--The Texas Pharmacy Act, Chapter 551 - 556, Occupations Code, as amended.

(3) Accurately as prescribed--Dispensing, delivering, and/or distributing a prescription drug order:

(A) to the correct patient (or agent of the patient) for whom the drug or device was prescribed;

(B) with the correct drug in the correct strength, quantity, and dosage form ordered by the practitioner; and

(C) with correct labeling (including directions for use) as ordered by the practitioner. Provided, however, that nothing herein shall prohibit pharmacist substitution if substitution is conducted in strict accordance with applicable laws and rules, including Chapters 562 and 563 of the Texas Pharmacy Act.

(4) Advanced practice nurse--A registered nurse approved by the Texas State Board of Nurse Examiners to practice as an advanced practice nurse on the basis of completion of an advanced education program. The term includes a nurse practitioner, a nurse midwife, a nurse anesthetist, and a clinical nurse specialist.

(5) Airborne particulate cleanliness class--The level of cleanliness specified by the maximum allowable number of particles

per cubic foot of air as specified in Federal Standard 209E, et seq. For example:

(A) Class 100 is an atmospheric environment which contains less than 100 particles 0.5 microns in diameter per cubic foot of air;

(B) Class 10,000 is an atmospheric environment which contains less than 10,000 particles 0.5 microns in diameter per cubic foot of air; and

(C) Class 100,000 is an atmospheric environment which contains less than 100,000 particles 0.5 microns in diameter per cubic foot of air.

(6) Ancillary supplies--Supplies necessary for the administration of compounded sterile pharmaceuticals.

(7) Aseptic preparation--The technique involving procedures designed to preclude contamination of drugs, packaging, equipment, or supplies by microorganisms during processing.

(8) Automated compounding or counting device--An automated device that compounds, measures, counts, and or packages a specified quantity of dosage units for a designated drug product.

(9) Batch preparation compounding--Compounding of multiple sterile-product units, in a single discrete process, by the same individual(s), carried out during one limited time period. Batch preparation/compounding does not include the preparation of multiple sterile-product units pursuant to patient specific medication orders.

(10) Biological Safety Cabinet--Containment unit suitable for the preparation of low to moderate risk agents where there is a need for protection of the product, personnel, and environment, according to National Sanitation Foundation (NSF) Standard 49.

(11) Board--The Texas State Board of Pharmacy.

(12) Carrying out or signing a prescription drug order--The completion of a prescription drug order presigned by the delegating physician, or the signing of a prescription by an advanced practice nurse or physician assistant after the person has been designated with the Texas State Board of Medical Examiners by the delegating physician as a person delegated to sign a prescription. The following information shall be provided on each prescription:

(A) patient's name and address;

(B) name, strength, and quantity of the drug to be dispensed;

(C) directions for use;

(D) the intended use of the drug, if appropriate;

(E) the name, address, and telephone number of the physician;

(F) the name, address, telephone number, and identification number of the advanced practice nurse or physician assistant completing the prescription drug order;

(G) the date; and

(H) the number of refills permitted.

(13) Certified Pharmacy Technician--A pharmacy technician who:

(A) has completed the pharmacy technician training program of the pharmacy;

(B) has taken and passed the National Pharmacy Technician Certification Exam or other examination approved during an open meeting by the Board; and

(C) maintains a current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the Board.

(14) Clean room--A room in which the concentration of airborne particles is controlled and there are one or more clean zones according to Federal Standard 209E, et seq.

(15) Clean zone--A defined space in which the concentration of airborne particles is controlled to meet a specified airborne particulate cleanliness class.

(16) Compounding--The preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug or medication order or initiative based on the practitioner-patient pharmacist relationship in the course of professional practice;

(B) in anticipation of prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(C) for the purpose of or as an incident to research, teaching, or chemical analysis and not for sale or dispensing.

(17) Confidential record--Any health related record that contains information that identifies an individual and that is maintained by a pharmacy or pharmacist such as a patient medication record, prescription drug order, or medication drug order.

(18) Controlled area--A controlled area is the area designated for preparing sterile pharmaceuticals.

(19) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1-4 of the Texas Controlled Substances Act, as amended, or a drug, immediate precursor, or other substance included in Schedule I, II, III, IV, or V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(20) Critical areas--Any area in the controlled area where products or containers are exposed to the environment.

(21) Cytotoxic--A pharmaceutical that has the capability of killing living cells.

(22) Dangerous drug--Any drug or device that is not included in Penalty Groups 1-4 of the Controlled Substances Act and that is unsafe for self-medication or any drug or device that bears or is required to bear the legend:

(A) "Caution: federal law prohibits dispensing without prescription"; or

(B) "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."

(23) Data communication device--An electronic device that receives electronic information from one source and transmits or routes it to another (e.g., bridge, router, switch or gateway).

(24) Deliver or delivery--The actual, constructive, or attempted transfer of a prescription drug or device or controlled substance from one person to another, whether or not for a consideration.

(25) Designated agent--

(A) a licensed nurse, physician assistant, pharmacist, or other individual designated by a practitioner, and for whom the practitioner assumes legal responsibility, who communicates prescription drug orders to a pharmacist;

(B) a licensed nurse, physician assistant, or pharmacist employed in a health care facility to whom the practitioner communicates a prescription drug order;

(C) an advanced practice nurse or physician assistant authorized by a practitioner to carry out or sign a prescription drug order for dangerous drugs under Chapter 157 of the Medical Practice Act (Subtitle B, Occupations Code); or

(D) a person who is a licensed vocational nurse or has an education equivalent to or greater than that required for a licensed vocational nurse designated by the practitioner to communicate prescriptions for an advanced practice nurse or physician assistant authorized by the practitioner to sign prescription drug orders under Chapter 157 of the Medical Practice Act (Subtitle B, Occupations Code).

(26) Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component part or accessory, that is required under federal or state law to be ordered or prescribed by a practitioner.

(27) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(28) Dispensing pharmacist--The pharmacist responsible for the final check of the dispensed prescription before delivery to the patient.

(29) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(30) Downtime--Period of time during which a data processing system is not operable.

(31) Drug regimen review--An evaluation of prescription drug or medication orders and patient medication records for:

(A) known allergies;

(B) rational therapy--contraindications;

(C) reasonable dose and route of administration;

(D) reasonable directions for use;

(E) duplication of therapy;

(F) drug-drug interactions;

(G) drug-food interactions;

(H) drug-disease interactions;

(I) adverse drug reactions; and

(J) proper utilization, including overutilization or underutilization.

(32) Electronic prescription drug order--A prescription drug order which is transmitted by an electronic device to the receiver (pharmacy).

(33) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(34) Expiration date--The date (and time, when applicable) beyond which a product should not be used.

(35) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(36) Hard copy--A physical document that is readable without the use of a special device (i.e., cathode ray tube (CRT), microfiche reader, etc.).

(37) Medical Practice Act--The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended.

(38) New prescription drug order--A prescription drug order that:

(A) has not been dispensed to the patient in the same strength and dosage form by this pharmacy within the last year;

(B) is transferred from another pharmacy; and/or

(C) is a discharge prescription drug order. (Note: furlough prescription drug orders are not considered new prescription drug orders.)

(39) Original prescription--The:

(A) original written prescription drug orders; or

(B) original verbal or electronic prescription drug orders reduced to writing either manually or electronically by the pharmacist.

(40) Part-time pharmacist--A pharmacist who works less than full-time.

(41) Patient counseling--Communication by the pharmacist of information to the patient or patient's agent, in order to improve therapy by ensuring proper use of drugs and devices.

(42) Pharmacist-in-charge--The pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(43) Pharmaceutical care--The provision of drug therapy and other pharmaceutical services intended to assist in the cure or prevention of a disease, elimination or reduction of a patient's symptoms, or arresting or slowing of a disease process.

(44) Pharmacy technicians--Those individuals utilized in pharmacies whose responsibility it shall be to provide technical services that do not require professional judgment concerned with the preparation and distribution of drugs under the direct supervision of and responsible to a pharmacist. Pharmacy technician includes certified pharmacy technicians, pharmacy technicians, and pharmacy technician trainees.

(45) Pharmacy technician trainee--a pharmacy technician:

(A) participating in a pharmacy's technician training program; or

(B) a person currently enrolled in a technician training program accredited by the American Society of Health-System Pharmacists provided:

(i) the person is working during times the individual is assigned to a pharmacy as a part of the experiential component of the American Society of Health-System Pharmacists training program;

(ii) the person is under the direct supervision of and responsible to a pharmacist; and

(iii) the supervising pharmacist conducts in-process and final checks.

(46) Physician assistant--A physician assistant recognized by the Texas State Board of Medical Examiners as having the specialized education and training required under Subtitle B, Chapter 157, Occupations Code, and issued an identification number by the Texas State Board of Medical Examiners.

(47) Practitioner--

(A) a physician, dentist, podiatrist, veterinarian, or other person licensed or registered to prescribe, distribute, administer, or dispense a prescription drug or device in the course of professional practice in this state;

(B) a person licensed by another state in a health field in which, under Texas law, licensees in this state may legally prescribe dangerous drugs or a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, having a current federal Drug Enforcement Administration registration number, and who may legally prescribe Schedule II, III, IV, or V controlled substances in such other state; or

(C) a person licensed in the Dominion of Canada or the United Mexican States in a health field in which, under the laws of this state, a licensee may legally prescribe dangerous drugs;

(D) does not include a person licensed under the Texas Pharmacy Act.

(48) Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original commercial container into a prescription container for dispensing by a pharmacist to the ultimate consumer.

(49) Prescription drug--

(A) a substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) a drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) "Caution: federal law prohibits dispensing without prescription"; or

(ii) "Caution: federal law restricts this drug to use by or on order of a licensed veterinarian"; or

(C) a drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(50) Prescription drug order--

(A) an order from a practitioner or a practitioner's designated agent to a pharmacist for a drug or device to be dispensed; or

(B) an order pursuant to the Subtitle B, Chapter 157, Occupations Code.

(51) Process validation--Documented evidence providing a high degree of assurance that a specific process will consistently produce a product meeting its predetermined specifications and quality attributes.

(52) Quality assurance--The set of activities used to assure that the process used in the preparation of sterile drug products lead to products that meet predetermined standards of quality.

(53) Quality control--The set of testing activities used to determine that the ingredients, components (e.g., containers), and final sterile pharmaceuticals prepared meet predetermined requirements with respect to identity, purity, non-pyrogenicity, and sterility.

(54) Sample--A prescription drug which is not intended to be sold and is intended to promote the sale of the drug.

(55) State--One of the 50 United States of America, a U.S. territory, or the District of Columbia.

(56) Sterile pharmaceutical--A dosage form free from living micro-organisms.

(57) Texas Controlled Substances Act--The Texas Controlled Substances Act, Health and Safety Code, Chapter 481, as amended.

(58) Unit-dose packaging--The ordered amount of drug in a dosage form ready for administration to a particular patient, by the prescribed route at the prescribed time, and properly labeled with name, strength, and expiration date of the drug.

(59) Unusable drugs--Drugs or devices that are unusable for reasons such as they are adulterated, misbranded, expired, defective, or recalled.

(60) Written protocol--A physicians order, standing medical order, standing delegation order, or other order or protocol as defined by rule of the Texas State Board of Medical Examiners under the Texas Medical Practice Act.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General.

(i) Each Class A pharmacy compounding sterile pharmaceuticals shall have one pharmacist-in-charge who is employed on a full-time basis, who may be the pharmacist-in-charge for only one such pharmacy; provided, however, such pharmacist-in-charge may be the pharmacist-in-charge of more than one Class A pharmacy, if the additional Class A pharmacies are not open to provide pharmacy services simultaneously.

(ii) The pharmacist-in-charge shall comply with the provisions of §291.17 of this title (relating to Inventory Requirements).

(B) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(i) ensuring that drugs and/or devices are dispensed and delivered safely and accurately as prescribed;

(ii) that a pharmacist communicates to the patient or the patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgment, the pharmacist deems significant as specified in subsection (d)(3) of this section;

(iii) assuring that a pharmacist communicates to the patient or the patient's agent on his or her request, information concerning any prescription drugs dispensed to the patient by the pharmacy;

(iv) assuring that a reasonable effort is made to obtain, record, and maintain patient medication records;

(v) developing a system to assure that all pharmacy personnel responsible for compounding and/or supervising the compounding of sterile pharmaceuticals within the pharmacy receive appropriate education and training and competency evaluation;

(vi) establishing policies for procurement of drugs and devices and storage of all pharmaceutical materials including pharmaceuticals, components used in the compounding of pharmaceuticals, and drug delivery devices;

(vii) developing a system for the disposal and distribution of drugs from the Class A pharmacy;

(viii) developing a system for bulk compounding or batch preparation of drugs;

(ix) developing a system for the compounding, sterility assurance, quality assurance and quality control of sterile pharmaceuticals;

(x) participating in those aspects of the patient care evaluation program relating to pharmaceutical material utilization and effectiveness;

(xi) implementing the policies and decisions relating to pharmaceutical services;

(xii) maintaining records of all transactions of the Class A pharmacy necessary to maintain accurate control over and accountability for all pharmaceutical materials required by applicable state and federal laws and rules;

(xiii) developing a system to assure the maintenance of effective controls against the theft or diversion of prescription drugs, and records for such drugs;

(xiv) assuring that records in a data processing system are maintained such that the data processing system is in compliance with this section;

(xv) assuring that the pharmacy has a system to dispose of cytotoxic waste in a manner so as not to endanger the public health; and

(xvi) legal operation of the pharmacy, including meeting all inspection and other requirements of all state and federal laws or rules governing the practice of pharmacy.

(2) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by sufficient number of additional licensed pharmacists as may be required to operate the pharmacy competently, safely, and adequately to meet the needs of the patients of the pharmacy.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting his or her responsibilities in ordering, dispensing, and accounting for prescription drugs.

(iii) Pharmacists are solely responsible for the direct supervision of pharmacy technicians and for designating and delegating duties, other than those listed in subparagraph (B) of this paragraph, to pharmacy technicians. Each pharmacist:

(I) shall verify the accuracy of all acts, tasks, and functions performed by pharmacy technicians; and

(II) shall be responsible for any delegated act performed by pharmacy technicians under his or her supervision.

(iv) All pharmacists while on duty, shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(v) A pharmacist shall be accessible at all times to respond to patients' and other health professionals' questions and needs. Such access may be through a telephone which is answered 24 hours a day.

(vi) A dispensing pharmacist shall ensure that the drug is dispensed and delivered safely, and accurately as prescribed.

(B) Duties. Duties which may only be performed by a pharmacist are as follows:

(i) receiving verbal prescription drug orders and reducing these orders to writing, either manually or electronically;

(ii) interpreting and evaluating prescription drug orders;

(iii) selection of drug products;

(iv) interpreting patient medication records and performing drug regimen reviews;

(v) performing the final check of the dispensed prescription before delivery to the patient to ensure that the prescription has been dispensed accurately as prescribed;

(vi) communicating to the patient or patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgment, the pharmacist deems significant as specified in paragraph (3) of this subsection;

(vii) communicating to the patient or the patient's agent on his or her request, information concerning any prescription drugs dispensed to the patient by the pharmacy;

(viii) assuring that a reasonable effort is made to obtain, record, and maintain patient medication records; and

(ix) performing a specific act of drug therapy management for a patient delegated to a pharmacist by a written protocol from a physician licensed in this state in compliance with the Medical Practice Act.

(3) Pharmacy technicians.

(A) Qualifications.

(i) General. All pharmacy technicians shall:

(I) have a high school or equivalent degree, e.g., GED, or be currently enrolled in a program which awards such a degree; and

(II) complete a structured didactic and experiential training program, which provides instruction and experience in the areas listed in subparagraph (D) of this paragraph.

(III) Effective January 1, 2001, all pharmacy technicians must have taken and passed the National Pharmacy Technician Certification Exam or other examination approved during an open meeting by the Board or be a pharmacy technician trainee.

(ii) Pharmacy Technician Trainee.

(I) A person shall be designated as a pharmacy technician trainee while participating in a pharmacy's technician training program in preparation for the National Pharmacy Technician Certification Exam or other examination approved during an open meeting by the Board.

(II) A person may be designated a pharmacy technician trainee for no more than one year. A person may not be a technician trainee if they fail to pass the certification exam within this one year training period. This subclause does not apply to a pharmacy technician trainee working in a pharmacy as part of a training program accredited by the American Society of Health-System Pharmacists or an individual enrolled in a health science technology education program in a Texas high school.

(III) Individuals enrolled in a health science technology education program in a Texas high school that is accredited by the Texas Education Agency, may be designated as a pharmacy technician trainee for up to two years provided:

(-a-) the work as a pharmacy technician is concurrent with enrollment in a health science technology education program, which may include:

(-1-) partial semester breaks such as spring breaks;

(-2-) between semesters; and

(-3-) whole semester breaks provided the individual was enrolled in the health science technology education program in the immediate preceding semester and is scheduled with the high school to attend in the immediate subsequent semester;

(-b-) the individual is under the direct supervision of and responsible to a pharmacist; and

(-c-) the supervising pharmacist verifies the accuracy of all acts, tasks, or functions performed by the individual.

(iii) Certified Pharmacy Technicians.

(I) All certified pharmacy technicians shall have taken and passed the National Pharmacy Technician Certification Exam or other examination approved during an open meeting by the Board and maintain a current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the Board.

(II) A certified pharmacy technician shall publicly display their current certification certificate in the technician's primary place of practice and a copy of their current certification certificate in all other pharmacies where the technician performs the duties of a technician.

(B) Duties.

(i) pharmacy technicians may not perform any of the duties listed in paragraph (2)(B) of this subsection.

(ii) A pharmacist may delegate to pharmacy technicians any nonjudgmental technical duty associated with the preparation and distribution of prescription drugs provided:

(I) a pharmacist verifies the accuracy of all acts, tasks, and functions performed by pharmacy technicians; and

(II) pharmacy technicians are under the direct supervision of and responsible to a pharmacist.

(iii) Pharmacy technicians may perform only nonjudgmental technical duties associated with the preparation and distribution of prescription drugs, including but not limited to the following.

(I) initiating and receiving refill authorization requests;

(II) entering prescription data into a data processing system;

(III) taking a stock bottle from the shelf for a prescription;

(IV) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(V) affixing prescription labels and auxiliary labels to the prescription container provided:

(-a-) the pharmacy technician has completed the education and training requirements outlined in subparagraphs (A) and (D) of this paragraph; and

(-b-) effective January 1, 2001, only certified pharmacy technicians may affix a label to a prescription container.

(VI) reconstituting medications;

(VII) prepackaging and labeling prepackaged drugs;

(VIII) loading bulk unlabeled drugs into an automated dispensing system provided a pharmacist verifies that the system is properly loaded prior to use;

(IX) compounding sterile pharmaceuticals provided:

(-a-) the pharmacy technician has completed the education and training specified in paragraph (4) of this subsection and the pharmacy technician is supervised by a pharmacist who has completed the training specified in paragraph (4) of this subsection; and

(-b-) effective January 1, 2001, the pharmacy technicians:

(-1-) are either certified pharmacy technicians or technician trainees;

(-2-) have completed the training specified in paragraph (4) of this subsection; and

(-3-) are supervised by a pharmacist who has completed the training specified in paragraph (4) of this subsection, conducts in-process and final checks, and affixes his or her initials to the appropriate quality control records.

(X) compounding non-sterile prescription drug orders; and

(XI) bulk compounding.

(iv) Certified pharmacy technicians. Effective January 1, 2001, only certified pharmacy technicians may:

(I) affix a label to a prescription container; and

(II) compound sterile pharmaceuticals.

(C) Ratio of pharmacist to pharmacy technicians.

(i) The ratio of pharmacists to pharmacy technicians may not exceed 1:2 provided that only one pharmacy technician may be engaged in the compounding of sterile pharmaceuticals.

(ii) The ratio of pharmacists to pharmacy technicians may be 1:3 provided that at least one of the three technicians is certified and only one may be engaged in the compounding of sterile pharmaceuticals.

(D) Training.

(i) pharmacy technicians shall complete initial training as outlined by the pharmacist-in-charge in a training manual which includes training and experience as outlined in subparagraph (E) of this

paragraph prior to the regular performance of their duties. Such training:

(I) shall include training and experience as outlined in subparagraph (E) of this paragraph; and

(II) may not be transferred to another pharmacy unless:

(-a-) the pharmacies are under common ownership and control and have a common training program; and

(-b-) the pharmacist-in-charge of each pharmacy in which the pharmacy technician works certifies that the pharmacy technician is competent to perform the duties assigned in that pharmacy.

(ii) A pharmacy technician shall be designated a pharmacy technician trainee until completing the full training program. A pharmacy technician trainee:

(I) may perform all of the duties of a pharmacy technician except affix a label to a prescription;

(II) may be designated a pharmacy technician trainee for no longer than one year except as specified in subparagraph (A)(ii) of this paragraph; and

(III) shall be counted in the pharmacist to pharmacy technician ratio.

(iii) The pharmacist-in-charge shall assure the continuing competency of pharmacy technicians through-in-service education and training to supplement initial training.

(iv) The pharmacist-in-charge shall document the completion of the training program and certify the competency of pharmacy technicians completing the training. A written record of initial and in-service training of pharmacy technicians shall be maintained and contain the following information:

(I) name of the person receiving the training;

(II) date(s) of the training;

(III) general description of the topics covered;

(IV) a statement or statements that certifies that the pharmacy technician is competent to perform the duties assigned;

(V) name of the person supervising the training; and

(VI) signature of the pharmacy technician and the pharmacist-in-charge or other pharmacist employed by the pharmacy and designated by the pharmacist-in-charge as responsible for training of pharmacy technicians.

(v) A person who has previously completed training as a pharmacy technician, or a licensed nurse or physician assistant is not required to complete the entire training program if the person is able to show competency through a documented assessment of competency. Such competency assessment may be conducted by personnel designated by the pharmacist-in-charge, but the final acceptance of competency must be approved by the pharmacist-in-charge.

(E) Training program. Pharmacy technicians training shall be outlined in a training manual. Such training manual shall, at a minimum, contain the following:

(i) written procedures and guidelines for the use and supervision of pharmacy technicians. Such procedures and guidelines shall:

(I) specify the manner in which the pharmacist responsible for the supervision of pharmacy technicians will supervise such personnel and verify the accuracy and completeness of all acts, task and functions performed by such personnel; and

(II) specify duties which may and may not be performed by pharmacy technicians; and

(ii) instruction in the following areas and any additional areas appropriate to the duties of pharmacy technicians in the pharmacy:

(I) Orientation;

(II) Job descriptions;

(III) Communication techniques;

(IV) Laws and rules;

(V) Security and safety;

(VI) Prescription drugs:
(-a-) Basic pharmaceutical nomenclature;
(-b-) Dosage forms;

(VII) Prescription drug orders:
(-a-) Prescribers;
(-b-) Directions for use;
(-c-) Commonly-used abbreviations and symbols;
(-d-) Number of dosage units;
(-e-) Strength and systems of measurement;
(-f-) Route of administration;
(-g-) Frequency of administration;
(-h-) Interpreting directions for use;

(VIII) Prescription drug order preparation:
(-a-) Creating or updating patient medication records;
(-b-) Entering prescription drug order information into the computer or typing the label in a manual system;
(-c-) Selecting the correct stock bottle;
(-d-) Accurately counting or pouring the appropriate quantity of drug product;
(-e-) Selecting the proper container;
(-f-) Affixing the prescription label;
(-g-) Affixing auxiliary labels, if indicated; and
(-h-) Preparing the finished product for inspection and final check by pharmacists;

(IX) Other functions;

(X) Drug product prepackaging;

(XI) Compounding of non-sterile pharmaceuticals;

(XII) Written policy and guidelines for use of and supervision of pharmacy technicians.

(4) Special education, training, and evaluation requirements for pharmacy personnel compounding or responsible for the direct supervision of pharmacy personnel compounding sterile pharmaceuticals.

(A) General.

(i) All pharmacy personnel preparing sterile pharmaceuticals shall receive didactic and experiential training and competency evaluation through demonstration, testing (written or practical) as outlined by the pharmacist-in-charge and described in the policy and

procedure or training manual. Such training shall include instruction and experience in the following areas:

(I) aseptic technique;

(II) critical area contamination factors;

(III) environmental monitoring;

(IV) facilities;

(V) equipment and supplies;

(VI) sterile pharmaceutical calculations and terminology;

(VII) sterile pharmaceutical compounding documentation;

(VIII) quality assurance procedures;

(IX) aseptic preparation procedures including proper gowning and gloving technique;

(X) handling of cytotoxic and hazardous drugs, if applicable; and

(XI) general conduct in the controlled area.

(ii) The aseptic technique of each person compounding or responsible for the direct supervision of personnel compounding sterile pharmaceuticals shall be observed and evaluated as satisfactory through written or practical tests and process validation and such evaluation documented.

(iii) Although process validation may be incorporated into the experiential portion of a training program, process validation must be conducted at each pharmacy where an individual compounds sterile pharmaceuticals. No product intended for patient use shall be compounded by an individual until the on-site process validation test indicates that the individual can competently perform aseptic procedures, except that a pharmacist may temporarily compound sterile pharmaceuticals and supervise pharmacy technicians compounding sterile pharmaceuticals without process validation provided the pharmacist:

(I) has completed a recognized course in an accredited college of pharmacy or a course sponsored by an American Council on Pharmaceutical Education approved provider which provides 20 hours of instruction and experience in the areas listed in this subparagraph; and

(II) completes the on-site process validation within seven days of commencing work at the pharmacy.

(iv) Process validation procedures for assessing the preparation of specific types of sterile pharmaceuticals shall be representative of all types of manipulations, products, and batch sizes that personnel preparing that type of pharmaceutical are likely to encounter.

(v) The pharmacist-in-charge shall assure continuing competency of pharmacy personnel through in-service education, training, and process validation to supplement initial training. Personnel competency shall be evaluated:

(I) during orientation and training prior to the regular performance of those tasks;

(II) whenever the quality assurance program yields an unacceptable result;

(III) whenever unacceptable techniques are observed; and

(IV) at least on an annual basis.

(B) Pharmacists.

(i) All pharmacists who compound sterile pharmaceuticals or supervise pharmacy technicians compounding sterile pharmaceuticals shall:

(I) complete through a single course, a minimum of 20 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may be through:

(-a-) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(-b-) completion of a recognized course in an accredited college of pharmacy or a course sponsored by an American Council on Pharmaceutical Education approved provider which provides 20 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph; and

(II) possess knowledge about:

(-a-) aseptic processing;

(-b-) quality control and quality assurance as related to environmental, component, and end-product testing;

(-c-) chemical, pharmaceutical, and clinical properties of drugs;

(-d-) container, equipment, and closure system selection; and

(-e-) sterilization techniques.

(ii) The required experiential portion of the training programs specified in this subparagraph must be supervised by an individual who has already completed training as specified in subparagraph (B) or (C) of this paragraph.

(C) Pharmacy technicians. In addition to the qualifications and training outlined in paragraph (3) of this subsection, all pharmacy technicians who compound sterile pharmaceuticals shall:

(i) have a high school or equivalent education;

(ii) either:

(I) complete through a single course, a minimum of 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may be obtained through the:

(-a-) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(-b-) completion of a course sponsored by an ACPE approved provider which provides 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph; or

(II) completion of a training program which is accredited by the American Society of Health-System Pharmacists (formerly the American Society of Hospital Pharmacists). Individuals enrolled in training programs accredited by the American Society of Health-System Pharmacists may compound sterile pharmaceuticals in a licensed pharmacy provided:

(-a-) the compounding occurs only during times the individual is assigned to a pharmacy as a part of the experiential component of the American Society of Health-System Pharmacists training program;

(-b-) the individual is under the direct supervision of and responsible to a pharmacist who has completed training as specified in subparagraph (B) of this paragraph; and

(-c-) the supervising pharmacist conducts in-process and final checks; and

(iii) on January 1, 2001, discontinue preparation of sterile pharmaceuticals if the technician has not taken and passed the National Pharmacy Technician Certification Exam or other examination approved during an open meeting by the Board. Such pharmacy technicians may continue to compound sterile pharmaceuticals during the interim between the effective date of these rules and January 1, 2001, if they maintain documentation of completion of the training specified in clause (ii) of this subparagraph.

(iv) acquire the required experiential portion of the training programs specified in this subparagraph under the supervision of an individual who has already completed training as specified in subparagraph (B) or (C) of this paragraph.

(D) Documentation of Training. A written record of initial and in-service training and the results of written or practical testing and process validation of pharmacy personnel shall be maintained and contain the following information:

(i) name of the person receiving the training or completing the testing or process validation;

(ii) date(s) of the training, testing, or process validation;

(iii) general description of the topics covered in the training or testing or of the process validated;

(iv) name of the person supervising the training, testing, or process validation; and

(v) signature (first initial and last name or full signature) of the person receiving the training or completing the testing or process validation and the pharmacist-in-charge or other pharmacist employed by the pharmacy and designated by the pharmacist-in-charge as responsible for training, testing, or process validation of personnel.

(5) Identification of pharmacy personnel. Pharmacy personnel shall be identified as follows.

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacy technician trainee, pharmacy technician, or a certified pharmacy technician.

(B) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist intern.

(C) Pharmacists. All pharmacists shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist.

(d) Operational standards.

(1) Licensing requirements.

(A) A Class A pharmacy compounding sterile pharmaceuticals shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) A Class A pharmacy compounding sterile pharmaceuticals which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.4 of this title (relating to Change of Ownership).

(C) A Class A pharmacy compounding sterile pharmaceuticals which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.2 of this title (relating to Change of Location and/or Name).

(D) A Class A pharmacy compounding sterile pharmaceuticals owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title (relating to Change of Managing Officers).

(E) A Class A pharmacy compounding sterile pharmaceuticals shall notify the board in writing within ten days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(F) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(G) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(H) A Class A pharmacy compounding sterile pharmaceuticals, licensed under the provisions of the Act, §560.051(a)(1), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(2), concerning nuclear pharmacy (Class B), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(I) A Class A pharmacy engaged in nonsterile compounding of drug products shall comply with the provisions of §§291.31 - 291.34 of this title (relating to Definitions, Personnel, Operational Standards, and Records for Class A (Community) Pharmacies) to the extent such rules are applicable to nonsterile compounding of drug products.

(J) A Class A (Community) pharmacy compounding sterile pharmaceuticals which is engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.20 of this title (relating to Remote Pharmacy Services).

(2) Environment.

(A) General requirements.

(i) The pharmacy shall be enclosed and lockable.

(ii) The pharmacy shall have adequate space necessary for the storage, compounding, labeling, dispensing, and sterile preparation of drugs prepared in the pharmacy, and additional space, depending on the size and scope of pharmaceutical services.

(iii) The pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(iv) A sink with hot and cold running water, exclusive of restroom facilities, designated primarily for use of admixtures, shall be available within the pharmacy facility to all pharmacy personnel and shall be maintained in a sanitary condition at all times.

(v) The pharmacy shall be properly lighted and ventilated.

(vi) The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of drugs; the temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(vii) If prescription drug orders are delivered to the patient at the pharmacy, the pharmacy shall contain an area which is suitable for confidential patient counseling.

(I) Such counseling area shall:

(-a-) be easily accessible to both patient and pharmacists and not allow patient access to prescription drugs;

(-b-) be designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(II) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(-a-) the proximity of the counseling area to the check-out or cash register area;

(-b-) the volume of pedestrian traffic in and around the counseling area;

(-c-) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(-d-) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(viii) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, guide dogs accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(B) Special requirements for the compounding of sterile pharmaceuticals. When the pharmacy compounds sterile pharmaceuticals, the following is applicable.

(i) Aseptic environment control device(s). The pharmacy shall prepare sterile pharmaceuticals in an appropriate aseptic environmental control device(s) or area, such as a laminar air flow hood, biological safety cabinet, or clean room which is capable of maintaining at least Class 100 conditions during normal activity. The aseptic environmental control device(s) shall:

(I) be certified by an independent contractor according to Federal Standard 209E, et seq, for operational efficiency at least every six months or when it is relocated; and

(II) have pre-filters inspected periodically and replaced as needed, in accordance with written policies and procedures, and the inspection and/or replacement date documented.

(ii) Controlled area. The pharmacy shall have a designated controlled area for the compounding of sterile pharmaceuticals that is functionally separate from areas for the preparation of non-sterile pharmaceuticals and is constructed to minimize the opportunities for particulate and microbial contamination. This controlled area for the preparation of sterile pharmaceuticals shall:

(I) have a controlled environment that is aseptic or contains an aseptic environmental control device(s);

(II) be clean, well lighted, and of sufficient size to support sterile compounding activities;

(III) be used only for the compounding of sterile pharmaceuticals;

(IV) be designed to avoid outside traffic and air flow;

(V) have non-porous and washable floors or floor covering to enable regular disinfection;

(VI) be ventilated in a manner not interfering with aseptic environmental control conditions;

(VII) have hard cleanable walls and ceilings (acoustical ceiling tiles that are coated with an acrylic paint are acceptable);

(VIII) have drugs and supplies stored on shelving areas above the floor to permit adequate floor cleaning;

(IX) contain only the appropriate compounding supplies and not be used for bulk storage for supplies and materials.

(iii) End-product evaluation.

(I) The responsible pharmacist shall verify that the sterile pharmaceutical was compounded accurately with respect to the use of correct ingredients, quantities, containers, and reservoirs.

(II) end product sterility testing according to policies and procedures, which include a statistically valid sampling plan and acceptance criteria for the sampling and testing, shall be performed if deemed appropriate by the pharmacist-in-charge;

(III) the pharmacist-in-charge shall establish a mechanism for recalling all products of a specific batch if end-product testing procedures yield unacceptable results.

(iv) Automated compounding or counting device. If automated compounding or counting devices are used, the pharmacy shall have a method to calibrate and verify the accuracy of automated compounding or counting devices used in aseptic processing and document the calibration and verification on a routine basis.

(v) Cytotoxic drugs. In addition to the requirements specified in clause (i) of this subparagraph, if the product is also cytotoxic, the following is applicable.

(I) General.

(-a-) All personnel involved in the compounding of cytotoxic products shall wear appropriate protective apparel, such as masks, gloves, and gowns or coveralls with tight cuffs.

(-b-) Appropriate safety and containment techniques for compounding cytotoxic drugs shall be used in conjunction with aseptic techniques required for preparing sterile pharmaceuticals.

(-c-) Disposal of cytotoxic waste shall comply with all applicable local, state, and federal requirements.

(-d-) Prepared doses of cytotoxic drugs must be dispensed, labeled with proper precautions inside and outside, and distributed in a manner to minimize patient contact with cytotoxic agents.

(II) Aseptic environment control device(s).

(-a-) Cytotoxic drugs must be prepared in a vertical flow biological safety cabinet.

(-b-) If the vertical flow biological safety cabinet is also used to prepare non-cytotoxic sterile pharmaceuticals, the cabinet must be thoroughly cleaned prior to its use to prepare non-cytotoxic sterile pharmaceuticals.

(C) Security requirements.

(i) The pharmacy shall have locked storage for Schedule II controlled substances and other controlled drugs requiring additional security.

(ii) All areas occupied by a pharmacy shall be capable of being locked by key or combination, so as to prevent access by unauthorized personnel when a pharmacist is not on-site.

(iii) The pharmacy may authorize personnel to gain access to that area of the pharmacy containing dispensed sterile pharmaceuticals, in the absence of the pharmacist, for the purpose of retrieving dispensed prescriptions to deliver to patients. If the pharmacy allows such after-hours access, the area containing the dispensed sterile pharmaceuticals shall be an enclosed and lockable area separate from the area containing undispensed prescription drugs. A list of the authorized personnel having such access shall be in the pharmacy's policy and procedure manual.

(iv) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(D) Temporary absence of pharmacist.

(i) If a pharmacy is staffed by a single pharmacist, the pharmacist may leave the prescription department for breaks and meal periods without closing the prescription department and removing pharmacy technicians and other pharmacy personnel from the prescription department provided the following conditions are met:

(I) at least one certified pharmacy technician remains in the prescription department;

(II) the pharmacist remains on-site at the licensed location of the pharmacy and available for an emergency;

(III) the absence does not exceed 30 minutes at a time and a total of one hours in a 12 hour period;

(IV) the pharmacist reasonably believes that the security of the prescription department will be maintained in his or her absence. If in the professional judgment of the pharmacist, the pharmacist determines that the prescription department should close during his or her absence, then the pharmacist shall close the prescription department and remove the pharmacy technicians and other pharmacy personnel from the prescription department during his or her absence; and

(V) a notice is posted which includes the following information:

(-a-) the fact that pharmacist is on a break and the time the pharmacist will return; and

(-b-) the fact that pharmacy technicians may begin the processing of prescription drug orders or refills brought in during the pharmacist absence but the prescription or refill may not be delivered to the patient or the patient's agent until the pharmacist returns and verifies the accuracy of the prescription.

(ii) During the time a pharmacist is absent from the prescription department, only pharmacy technicians who have completed the pharmacy's training program may perform the following duties, provided a pharmacist verifies the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent:

(I) initiating and receiving refill authorization requests;

(II) entering prescription data into a data processing system;

(III) taking a stock bottle from the shelf for a prescription;

(IV) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(V) affixing prescription labels and auxiliary labels to the prescription container. After January 1, 2001, only certified pharmacy technicians may affix prescription labels to prescription containers; and

(VI) prepackaging and labeling prepackaged drugs.

(iii) Upon return to the prescription department, the pharmacist shall:

(I) conduct a drug regimen review as specified in paragraph (4)(A)(ii) of this subsection; and

(II) verify the accuracy of all acts, tasks, and functions performed by pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent.

(iv) An agent of the pharmacist may deliver a prescription drug order to the patient or his or her agent provided a record of the delivery is maintained containing the following information:

(I) date of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(v) Any prescription delivered to a patient when a pharmacist is not in the prescription department must meet the requirements for a prescription delivered to a patient as described in paragraph (3)(A)(v) of this subsection.

(vi) During the times a pharmacist is absent from the prescription department a pharmacist intern shall be considered a certified pharmacy technician and may perform only the duties of a certified pharmacy technician.

(vii) In pharmacies with two or more pharmacists on duty, the pharmacists shall stagger their breaks and meal periods so that the prescription department is not left without a pharmacist on duty.

(3) Prescription dispensing and delivery.

(A) Patient counseling and provision of drug information.

(i) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent, information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(I) the name and description of the drug or device;

(II) dosage form, dosage, route of administration, and duration of drug therapy;

(III) special directions and precautions for preparation, administration, and use by the patient;

(IV) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(V) techniques for self monitoring of drug therapy;

(VI) proper storage;

(VII) refill information; and

(VIII) action to be taken in the event of a missed dose.

(ii) Such communication:

(I) shall be provided with each new prescription drug order, once yearly on maintenance medications, and if the pharmacist deems appropriate, with prescription drug order refills. (For the purposes of this clause, maintenance medications are defined as any medication the patient has taken for one year or longer);

(II) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(III) shall be communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication; and

(IV) shall be reinforced with written information. The following is applicable concerning this written information.

(-a-) Written information designed for the consumer such as the USP DI Patient Information Leaflets shall be provided.

(-b-) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(-c-) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-1-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-2-) the pharmacist documents the fact that no written information was provided; and

(-3-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(iii) Only a pharmacist may verbally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(iv) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(v) In addition to the requirements of clauses (i) - (iv) of this subparagraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable.

(I) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in paragraph (2)(D) of this subsection or subclause (II) of this clause.

(II) An agent of the pharmacist may deliver a prescription drug order to the patient or his or her agent during short periods of time when a pharmacist is absent from the pharmacy, provided the short periods of time do not exceed two hours, and provided a record of the delivery is maintained containing the following information:

(-a-) date of the delivery;

(-b-) unique identification number of the prescription drug order;

(-c-) patient's name;

(-d-) patient's phone number or the phone number of the person picking up the prescription; and

(-e-) signature of the person picking up the prescription.

(III) Any prescription delivered to a patient when a pharmacist is not in the pharmacy must meet the requirements described in clause (vi) of this subparagraph.

(IV) A Class A pharmacy compounding sterile pharmaceuticals that delivers prescriptions to patients or their agents on-site shall make available for use by the public a current or updated edition of the United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient), or another source of such information, such as patient information leaflets.

(vi) In addition to the requirements of clauses (i) - (iv) of this subparagraph, if a prescription drug order is delivered to the patient or his or her agent at the patient's residence or other designated location, the following is applicable.

(I) The information specified in clause (i) of this subparagraph shall be delivered with the dispensed prescription in writing.

(II) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(III) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and if applicable, toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(IV) The pharmacist-in-charge shall assure that:

(-a-) the pharmacy maintain and use adequate storage or shipment containers and shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of appropriate packaging material and/or devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process; and

(-b-) the pharmacy uses a delivery system which is designed to assure that the drugs are delivered to the appropriate patient.

(vii) The provisions of this subparagraph do not apply to patients in facilities where drugs are administered to patients by a person authorized to do so by the laws of the state (i.e., nursing homes).

(B) Generic Substitution. A pharmacist may substitute on a prescription drug order issued for a brand name product provided the substitution is authorized and performed in compliance with Chapter 309 of this title (relating to Generic Substitution).

(C) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This subparagraph does not apply to generic substitution. For generic substitution, see the requirements of subparagraphs (E) and (F) of this paragraph.

(i) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery, of the dispensed prescription to the patient. Such notification shall include:

(I) a description of the change;

(II) the reason for the change;

(III) whom to notify with questions concerning the change; and

(IV) instructions for return of the drug if not wanted by the patient.

(ii) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(I) the date of the notification;

(II) the method of notification;

(III) a description of the change; and

(IV) the reason for the change.

(D) Prescription containers.

(i) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(ii) Prescription containers or closures shall not be re-used.

(E) Labeling.

(i) At the time of delivery of the drug, the dispensing container of a sterile pharmaceutical shall bear a label with at least the following information:

(I) name, address and phone number of the pharmacy, including a phone number which is answered 24 hours a day;

(II) date dispensed;

(III) name of prescribing practitioner;

(IV) name of patient;

(V) directions for use, including infusion rate and directions to the patient for the addition of additives, if applicable;

(VI) unique identification number of the prescription;

(VII) name and amount of the base solution and of each drug added unless otherwise directed by the prescribing practitioner;

(VIII) initials or identification code of the person preparing the product and the pharmacist who checked and released the final product;

(IX) expiration date of the preparation based on published data;

(X) appropriate ancillary instructions, such as storage instructions or cautionary statements, including cytotoxic/biohazardous warning labels where applicable;

(XI) if the prescription is for a Schedule II-IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(XII) if the pharmacist has selected a generically equivalent drug pursuant to the provisions of the Act, Chapters 562 and 563, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed; and

(XIII) the name of the advanced practice nurse or physician assistant, if the prescription is carried out by an advanced practice nurse or physician assistant in compliance with Subtitle B, Chapter 157, Occupations Code.

(ii) The dispensing container is not required to bear the label specified in clause (i) of this subparagraph if:

(I) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care facility (e.g., nursing home, hospice, hospital);

(II) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(III) the drug is not in the possession of the ultimate user prior to administration;

(IV) the pharmacist-in-charge has determined that the institution:

(-a-) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(-b-) maintains records of ordering, receipt, and administration of the drug(s); and

(-c-) provides for appropriate safeguards for the control and storage of the drug(s);

(V) the system employed by the pharmacy in dispensing the prescription drug order adequately identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) the name of the patient;

(-e-) name of the prescribing practitioner; and

(VI) the system employed by the pharmacy in dispensing the prescription drug order adequately sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(4) Pharmaceutical care services.

(A) The following pharmaceutical care services shall be provided by pharmacists of the pharmacy.

(i) Drug utilization review. A systematic ongoing process of drug utilization review shall be designed, followed, and documented to increase the probability of desired patient outcomes and decrease the probability of undesired outcomes from drug therapy.

(ii) Drug regimen review.

(I) For the purpose of promoting therapeutic appropriateness, a pharmacist shall evaluate prescription drug orders and patient medication records for:

(-a-) known allergies;

(-b-) rational therapy--contraindications;

(-c-) reasonable dose and route of administration;

(-d-) reasonable directions for use;

(-e-) duplication of therapy;

(-f-) drug-drug interactions;

(-g-) drug-food interactions;

(-h-) drug-disease interactions;

(-i-) adverse drug reactions;

(-j-) proper utilization, including overutilization or underutilization; and

(-k-) clinical laboratory or clinical monitoring methods to monitor and evaluate drug effectiveness, side effects, toxicity, or adverse effects, and appropriateness to continued use of the drug in its current regimen.

(II) Upon identifying any clinically significant conditions, situations, or items listed in subclause (I) of this clause, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences.

(iii) Patient care guidelines.

(I) Primary provider. There shall be a designated physician primarily responsible for the patient's medical care. There shall be a clear understanding between the physician, the patient, and the pharmacy of the responsibilities of each in the areas of the delivery of care, and the monitoring of the patient. This shall be documented in the patient medication record (PMR).

(II) Patient training. The pharmacist-in-charge shall develop policies that assure that the patient and/or patient's caregiver receives information regarding drugs and their safe and appropriate use, including instruction regarding:

(-a-) appropriate disposition of hazardous solutions and ancillary supplies;

(-b-) proper disposition of controlled substances in the home;

(-c-) self-administration of drugs, where appropriate;

(-d-) emergency procedures, including how to contact an appropriate individual in the event of problems or emergencies related to drug therapy; and

(-e-) if the patient or patient's caregiver prepares sterile preparations in the home, the following additional information shall be provided:

(-1-) safeguards against microbial contamination, including aseptic techniques for compounding intravenous admixtures and aseptic techniques for injecting additives to premixed intravenous solutions;

(-2-) appropriate storage methods, including storage durations for sterile pharmaceuticals and expirations of self-mixed solutions;

(-3-) handling and disposition of premixed and self-mixed intravenous admixtures; and

(-4-) proper disposition of intravenous admixture compounding supplies such as syringes, vials, ampules, and intravenous solution containers.

(III) Pharmacist-patient relationship. It is imperative that a pharmacist-patient relationship be established and maintained throughout the patient's course of therapy. This shall be documented in the patient's medication record (PMR).

(IV) Patient monitoring. The pharmacist-in-charge shall develop policies to ensure that:

(-a-) the patient's response to drug therapy is monitored and conveyed to the appropriate health care provider; and

(-b-) the first dose of any new drug therapy is administered in the presence of an individual qualified to monitor for and respond to adverse drug reactions.

(B) Other pharmaceutical care services which may be provided by pharmacists include, but are not limited to, the following:

(i) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practice Act;

(ii) administering immunizations and vaccinations under written protocol of a physician;

(iii) managing patient compliance programs;

(iv) providing preventative health care services; and

(v) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(5) Equipment and supplies. Class A pharmacies compounding sterile pharmaceuticals shall have the following equipment and supplies:

(A) typewriter or comparable equipment;

(B) refrigerator and, if sterile pharmaceuticals are stored in the refrigerator, a system or device (i.e., thermometer) to monitor the temperature daily to ensure that proper storage requirements are met;

(C) adequate supply of prescription, poison, and other applicable labels;

(D) appropriate equipment necessary for the proper preparation of prescription drug orders;

(E) metric-apothecary weight and measure conversion charts;

(F) if the pharmacy compounds prescription drug orders which require the use of a balance, a Class A prescription balance, or analytical balance and weights. Such balance shall be properly maintained and inspected at least every three years by the appropriate authority as prescribed by local, state, or federal law or regulations.

(G) appropriate disposal containers for used needles, syringes, etc., and if applicable, cytotoxic waste from the preparation of chemotherapeutic agents, and/or biohazardous waste;

(H) temperature controlled delivery containers;

(I) infusion devices, if applicable;

(J) all necessary supplies, including:

(i) disposable needles, syringes, and other aseptic mixing;

(ii) disinfectant cleaning solutions;

(iii) hand washing agents with bacteriocidal action;

(iv) disposable, lint free towels or wipes;

(v) appropriate filters and filtration equipment;

(vi) cytotoxic spill kits, if applicable; and

(vii) masks, caps, coveralls or gowns with tight cuffs, shoe covers, and gloves, as applicable.

(6) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules; and

(iv) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

(B) at least one current or updated reference from each of the following categories:

(i) patient information (if prescriptions are delivered to patients or their agents on-site):

(I) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient); or

(II) a reference text or information leaflets which provide patient information;

(ii) drug interactions. A reference text on drug interactions, such as Hansten's and Horn's Drug Interactions;

(iii) a general information reference text, such as:

(I) Facts and Comparisons with current supplements;

(II) United States Pharmacopeia Dispensing Information, Volume I (Drug Information for the Healthcare Provider);

(III) AHFS Drug Information with current supplements;

(IV) Remington's Pharmaceutical Sciences; or

(V) Micromedex;

(iv) sterile pharmaceuticals. A current or updated reference text on injectable drug products, such as Handbook on Injectable Drug Products;

(C) a specialty reference appropriate for the scope of pharmacy services provided by the pharmacy, e.g., if the pharmacy prepares cytotoxic drugs, a reference text on the preparation of cytotoxic drugs, such as Procedures for Handling Cytotoxic Drugs;

(D) patient education manuals; and

(E) basic antidote information and the telephone number of the nearest regional poison control center.

(7) Drugs.

(A) Procurement and storage.

(i) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(ii) Prescription drugs and devices shall be stored within the prescription department or a locked storage area.

(iii) All drugs shall be stored at the proper temperature, as defined by the following terms.

(I) Cold--Any temperature not exceeding 8 degrees Centigrade (46 degrees Fahrenheit). A refrigerator is a cold place in which the temperature is maintained thermostatically between 2 and 8 degrees Centigrade (36 and 46 degrees Fahrenheit). A freezer is a cold place in which the temperature is maintained thermostatically between -20 and -10 degrees Centigrade (-4 and -14 degrees Fahrenheit).

(II) Cool--Any temperature between 8 and 15 degrees Centigrade (46 and 59 degrees Fahrenheit). An article for which storage in a cool place is directed may, alternatively, be stored in a refrigerator unless otherwise specified in the labeling.

(III) Room temperature--The temperature prevailing in a working area. Controlled room temperature is a temperature thermostatically between 15 and 30 degrees Centigrade (59 and 86 degrees Fahrenheit).

(IV) Warm--Any temperature between 30 and 40 degrees Centigrade (86 and 104 degrees Fahrenheit).

(V) Excessive heat--Temperature above 40 degrees Centigrade (104 degrees Fahrenheit).

(VI) Protection from freezing where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to destructive alteration of the dosage form, the container label bears an appropriate instruction to protect the product from freezing.

(B) Out-of-date and other unusable drugs or devices.

(i) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(ii) Outdated and other unusable drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(C) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(i) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(ii) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(iii) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(iv) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.

(8) Prepackaging of drugs and loading bulk drugs into automated compounding or counting devices.

(A) Prepackaging of drugs.

(i) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist.

(ii) The label of a prepackaged unit shall indicate:

(I) brand name and strength of the drug; or if no brand name then the generic name, strength, and name of the manufacturer or distributor;

(II) facility's unique lot number;

(III) expiration date based on currently available literature; and

(IV) quantity of the drug, if the quantity is greater than one.

(iii) Records of prepackaging shall be maintained to show:

(I) name of the drug, strength, and dosage form;

(II) facility's unique lot number;

(III) manufacturer or distributor;

(IV) manufacturer's lot number;

(V) expiration date;

(VI) quantity per prepackaged unit;

(VII) number of prepackaged units;

(VIII) date packaged;

(IX) name, initials, signature, or electronic signature of the prepacker; and

(X) signature or electronic signature of the responsible pharmacist.

(iv) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(B) Loading bulk drugs into automated compounding or counting devices.

(i) Automated compounding or counting devices may be loaded with bulk drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist.

(ii) The label of an automated compounding or counting device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor.

(iii) Records of loading bulk drugs into an automated compounding or counting device shall be maintained to show:

(I) name of the drug, strength, and dosage form;

(II) manufacturer or distributor;

(III) manufacturer's lot number;

(IV) expiration date;

(V) date of loading;

(VI) name, initials, signature, or electronic signature of the person loading the automated compounding or counting device; and

(VII) signature or electronic signature of the responsible pharmacist.

(iv) The automated compounding or counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature or electronic signature to the record specified in clause (iii) of this subparagraph.

(9) Sterile pharmaceuticals.

(A) Batch preparation.

(i) Master work sheet. A master work sheet shall be developed and approved by a pharmacist for each batch of sterile pharmaceuticals to be prepared. Once approved, a duplicate of the master work sheet shall be used as the preparation work sheet from which each batch is prepared and on which all documentation for that batch occurs. The master work sheet shall contain at a minimum:

(I) the formula;

(II) the components;

(III) the compounding directions;

(IV) a sample label;

(V) evaluation and testing requirements;

(VI) sterilization method(s);

(VII) specific equipment used during aseptic preparation (e.g., specific automated compounding or counting device); and

(VIII) storage requirements.

(ii) Preparation work sheet. The preparation work sheet for each batch of sterile pharmaceuticals shall document the following:

(I) identity of all solutions and ingredients and their corresponding amounts, concentrations, or volumes;

(II) manufacturer lot number for each component;

(III) component manufacturer or suitable identifying number;

(IV) container specifications (e.g., syringe, pump cassette);

(V) unique lot or control number assigned to batch;

(VI) expiration date of batch-prepared products;

(VII) date of preparation;

(VIII) name, initials, or electronic signature of the person(s) involved in the preparation;

(IX) name, initials, or electronic signature of the responsible pharmacist;

(X) end-product evaluation and testing specifications, if applicable; and

(XI) comparison of actual yield to anticipated yield, when appropriate.

(iii) Label. The label of each batch prepared sterile pharmaceutical shall bear at a minimum:

(I) the unique lot number assigned to the batch;

(II) all solution and ingredient names, amounts, strengths, and concentrations, when applicable;

(III) quantity;

(IV) expiration date and time, when applicable;

(V) appropriate ancillary instructions, such as storage instructions or cautionary statements, including cytotoxic warning labels where appropriate; and

(VI) device-specific instructions, when appropriate.

(B) Expiration date.

(i) The expiration date assigned shall be based on currently available drug stability information and sterility considerations or appropriate in-house or contract service stability testing.

(ii) Sources of drug stability information shall include the following:

(I) references (e.g., Remington's Pharmaceutical Sciences, Handbook on Injectable Drugs);

(II) manufacturer recommendations; and

(III) reliable, published research.

(iii) When interpreting published drug stability information, the pharmacist shall consider all aspects of the final sterile product being prepared (e.g., drug reservoir, drug concentration, storage conditions).

(iv) Methods used for establishing expiration dates shall be documented.

(C) Quality control. There shall be a documented, ongoing quality control program that monitors and evaluates personnel performance, equipment and facilities. Procedures shall be in place to assure that the pharmacy is capable of consistently preparing pharmaceuticals which are sterile and stable. Quality control procedures shall include, but are not limited to, the following:

(i) recall procedures;

(ii) storage and dating;

(iii) documentation of appropriate functioning of refrigerator, freezer, and other equipment;

(iv) documentation of aseptic environmental control device(s) certification at least every six months and the regular replacement of pre-filters as necessary; and

(v) a process to evaluate and confirm the quality of the prepared pharmaceutical product.

(D) Quality assurance.

(i) There shall be a documented, ongoing quality assurance program for monitoring and evaluating personnel performance and patient outcomes to assure an efficient drug delivery process, patient safety, and positive clinical outcomes.

(ii) There shall be documentation of quality assurance audits at regular, planned intervals including infection control, sterile technique, delivery systems/times, order transcription accuracy, drug administration systems, adverse drug reactions, and drug therapy appropriateness.

(iii) A plan for corrective action of program of problems identified by quality assurance audits shall be developed which includes procedures for documentation of identified problems and action taken.

(iv) A periodic evaluation of the effectiveness of the quality assurance activities shall be completed and documented.

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under this section shall be kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies.

(B) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(C) Records of controlled substances, other than original prescription drug orders, listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, "readily retrievable" means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(D) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(i) the records maintained in the alternative system contain all of the information required on the manual record; and

(ii) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(2) Prescriptions.

(A) Professional responsibility.

(i) Pharmacists shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order they dispense. If the pharmacist questions the accuracy or authenticity of a prescription drug order, he/she shall verify the order with the practitioner prior to dispensing.

(ii) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that the prescription is a valid prescription. A pharmacist may not dispense a prescription drug if the pharmacist knows or should have known that the prescription was issued on the basis of an Internet-based or telephonic consultation without a valid patient-practitioner relationship.

(iii) Clause (ii) of this subparagraph does not prohibit a pharmacist from dispensing a prescription when a valid patient-practitioner relationship is not present in an emergency situation (e.g. a practitioner taking calls for the patient's regular practitioner).

(B) Written prescription drug orders.

(i) Practitioner's signature.

(I) Except as noted in subclause (II) of this clause, written prescription drug orders shall be:

(-a-) manually signed by the practitioner; or

(-b-) electronically signed by the practitioner using a system which electronically replicates the practitioner's manual

signature on the written prescription, provided that security features of the system require the practitioner to authorize each use.

(II) Prescription drug orders for Schedule II controlled substances shall be issued on an official prescription form as required by the Texas Controlled Substances Act, §481.075, and be manually signed by the practitioner.

(III) A practitioner may sign a prescription drug order in the same manner as he would sign a check or legal document, e.g., J.H. Smith or John H. Smith.

(IV) Rubber stamped or otherwise reproduced signatures may not be used except as authorized in subclause (I) of this clause.

(V) The prescription drug order may not be signed by a practitioner's agent but may be prepared by an agent for the signature of a practitioner. However, the prescribing practitioner is responsible in case the prescription drug order does not conform in all essential respects to the law and regulations.

(ii) Prescription drug orders written by practitioners in another state.

(I) Dangerous drug prescription orders. A pharmacist may dispense a prescription drug order for dangerous drugs issued by practitioners in a state other than Texas in the same manner as prescription drug orders for dangerous drugs issued by practitioners in Texas are dispensed.

(II) Controlled substance prescription drug orders.

(-a-) A pharmacist may dispense prescription drug order for controlled substances in Schedule II issued by a practitioner in another state provided:

(-1-) the prescription is filled in compliance with a written plan approved by the Director of the Texas Department of Public Safety in consultation with the Board, which provides the manner in which the dispensing pharmacy may fill a prescription for a Schedule II controlled substance;

(-2-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule II controlled substances in such other state; and

(-3-) the prescription drug order is not dispensed after the end of the seventh day after the date on which the prescription is issued.

(-b-) A pharmacist may dispense prescription drug orders for controlled substances in Schedule III, IV, or V issued by a practitioner in another state provided:

(-1-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration registration number, and who may legally prescribe Schedule III, IV, or V controlled substances in such other state;

(-2-) the prescription drug order is not dispensed or refilled more than six months from the initial date of issuance and may not be refilled more than five times; and

(-3-) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order is obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(iii) Prescription drug orders written by practitioners in the United Mexican States or the Dominion of Canada.

(I) Controlled substance prescription drug orders. A pharmacist may not dispense a prescription drug order for a Schedule II, III, IV, or V controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States.

(II) Dangerous drug prescription drug orders. A pharmacist may dispense a dangerous drug prescription issued by a person licensed in the Dominion of Canada or the United Mexican States as a physician, dentist, veterinarian, or podiatrist provided:

(-a-) the prescription drug order is an original written prescription; and

(-b-) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of dangerous drugs.

(iv) Prescription drug orders carried out or signed by an advanced practice nurse or physician assistant.

(I) A pharmacist may dispense a prescription drug order for a dangerous drug which is carried out or signed by an advanced practice nurse or physician assistant provided:

(-a-) the prescription is for a dangerous drug and not for a controlled substance; and

(-b-) the advanced practice nurse or physician assistant is practicing in accordance with Subtitle B, Chapter 157, Occupations Code.

(II) Each practitioner shall designate in writing the name of each advanced practice nurse or physician assistant authorized to carry out or sign a prescription drug order pursuant to Subtitle B, Chapter 157, Occupations Code. A list of the advanced practice nurses or physician assistants designated by the practitioner must be maintained in the practitioner's usual place of business. On request by a pharmacist, a practitioner shall furnish the pharmacist with a copy of the written authorization for a specific advanced practice nurse or physician assistant.

(v) Prescription drug orders for Schedule II controlled substances. No Schedule II controlled substance may be dispensed without a written prescription drug order of a practitioner on an official prescription form as required by the Texas Controlled Substances Act, §481.075.

(C) Verbal prescription drug orders.

(i) A verbal prescription drug order from a practitioner or a practitioner's designated agent may only be received by a pharmacist or a pharmacist-intern under the direct supervision of a pharmacist.

(ii) A practitioner shall designate in writing the name of each agent authorized by the practitioner to communicate prescriptions verbally for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(iii) A pharmacist may not dispense a verbal prescription drug order for a Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act.

(iv) A pharmacist may not dispense a verbal prescription drug order for a dangerous drug or a controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(D) Electronic prescription drug orders. For the purpose of this subparagraph, electronic prescription drug orders shall be considered the same as verbal prescription drug orders.

(i) An electronic prescription drug order may be transmitted by a practitioner or a practitioner's designated agent:

(I) directly to a pharmacy; or

(II) through the use of a data communication device provided:

(-a-) the prescription information is not altered during transmission; and

(-b-) confidential patient information is not accessed or maintained by the operator of the data communication device unless the operator is authorized to receive the confidential information as specified in paragraph (11) of this subsection.

(ii) A practitioner shall designate in writing the name of each agent authorized by the practitioner to electronically transmit prescriptions for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(iii) A pharmacist may not dispense an electronic prescription drug order for a:

(I) Schedule II controlled substance except as authorized for faxed prescriptions in §481.074, Health and Safety Code;

(II) Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act; or

(III) dangerous drug or controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(E) Original prescription drug order records.

(i) Original prescriptions shall be maintained by the pharmacy in numerical order and remain legible for a period of two years from the date of filling or the date of the last refill dispensed.

(ii) If an original prescription drug order is changed, such prescription order shall be invalid and of no further force and effect; if additional drugs are to be dispensed, a new prescription drug order with a new and separate number is required.

(iii) Original prescriptions shall be maintained in one of the following formats:

(I) in three separate files as follows:

(-a-) prescriptions for controlled substances listed in Schedule II;

(-b-) prescriptions for controlled substances listed in Schedule III - V; and

(-c-) prescriptions for dangerous drugs and nonprescription drugs; or

(II) within a patient medication record system provided that original prescriptions for controlled substances are maintained separate from original prescriptions for noncontrolled substances and official prescriptions for Schedule II controlled substances are maintained separate from all other original prescriptions.

(iv) Original prescription records other than prescriptions for Schedule II controlled substances may be stored on microfilm, microfiche, or other system which is capable of producing a direct image of the original prescription record, e.g., digitalized imaging system. If original prescription records are stored in a direct imaging system, the following is applicable.

(I) The record of refills recorded on the original prescription must also be stored in this system.

(II) The original prescription records must be maintained in numerical order and as specified in clause (iii) of this subparagraph.

(III) The pharmacy must provide immediate access to equipment necessary to render the records easily readable.

(F) Prescription drug order information.

(i) All original prescriptions shall bear:

(I) name of the patient;

(II) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(III) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(IV) name and strength of the drug prescribed;

(V) quantity prescribed;

(VI) directions for use;

(VII) intended use for the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(VIII) date of issuance; and

(IX) if telephoned to the pharmacist by a designated agent, the full name of the designated agent.

(ii) All original prescriptions for dangerous drugs carried out by an advanced practice nurse or physician assistant in accordance with Subtitle B, Chapter 157, Occupations Code, shall bear:

(I) name and address of the patient;

(II) name, address, and telephone number of the practitioner;

(III) name, address, telephone number, identification number, and original signature of the advanced practice nurse or physician assistant;

(IV) name, strength, and quantity of the dangerous drug;

(V) directions for use;

(VI) the intended use of the drug, if appropriate;

(VII) date of issuance; and

(VIII) number of refills authorized.

(iii) All original electronic prescription drug orders shall bear:

(I) name of the patient;

(II) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as patient medication records;

(III) name and strength of the drug prescribed;

(IV) quantity prescribed;

(V) directions for use;

(VI) intended use for the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(VII) date of issuance;

(VIII) a statement which indicates that the prescription has been electronically transmitted (e.g., Faxed to or electronically transmitted to:);

(IX) name, address, and electronic access number of the pharmacy to which the prescription was transmitted;

(X) telephone number of the prescribing practitioner;

(XI) date the prescription drug order was electronically transmitted to the pharmacy, if different from the date of issuance of the prescription; and

(XII) if transmitted by a designated agent, the full name of the designated agent.

(iv) At the time of dispensing, a pharmacist is responsible for the addition of the following information to the original prescription:

(I) unique identification number of the prescription drug order;

(II) initials or identification code of the person who compounded the sterile pharmaceutical and the pharmacist who checked and released the product;

(III) name, quantity, lot number, and expiration date of each product used in compounding the sterile pharmaceutical; and

(IV) date of dispensing, if different from the date of issuance.

(G) Refills.

(i) Refills may be dispensed only in accordance with the prescriber's authorization as indicated on the original prescription drug order. Such refills may be indicated as authorization to refill the prescription drug order a specified number of times or for a specified period of time period, such as the duration of therapy.

(ii) If there are no refill instructions on the original prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original prescription drug order have been dispensed, authorization from the prescribing practitioner shall be obtained prior to dispensing any refills.

(iii) Refills of prescription drug orders for dangerous drugs or nonprescription drugs shall be dispensed as follows.

(I) Prescription drug orders for dangerous drugs or nonprescription drugs may not be refilled after one year from the date of issuance of the original prescription order.

(II) If one year has expired from the date of issuance of an original prescription drug order for a dangerous drug or nonprescription drug, authorization shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of the drug.

(iv) Refills of prescription drug orders for Schedule III - V controlled substances shall be dispensed as follows.

(I) Prescription drug orders for Schedule III - V controlled substances may not be refilled more than five times or after six months from the date of issuance of the original prescription drug order, whichever occurs first.

(II) If a prescription drug order for a Schedule III, IV, or V controlled substance has been refilled a total of five times or if six months have expired from the date of issuance of the original prescription drug order, whichever comes first, a new and separate prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(v) A pharmacist may exercise his professional judgment in refilling a prescription drug order for a drug, other than a controlled substance listed in Schedule II, without the authorization of the prescribing practitioner, provided:

(I) failure to refill the prescription might result in an interruption of a therapeutic regimen or create patient suffering;

(II) either:

(-a-) a natural or manmade disaster has occurred which prohibits the pharmacist from being able to contact the practitioner; or

(-b-) the pharmacist is unable to contact the practitioner after a reasonable effort;

(III) the quantity of prescription drug dispensed does not exceed a 72-hour supply;

(IV) the pharmacist informs the patient or the patient's agent at the time of dispensing that the refill is being provided without such authorization and that authorization of the practitioner is required for future refills;

(V) the pharmacist informs the practitioner of the emergency refill at the earliest reasonable time;

(VI) the pharmacist maintains a record of the emergency refill containing the information required to be maintained on a prescription as specified in this paragraph;

(VII) the pharmacist affixes a label to the dispensing container as specified in this paragraph; and

(VIII) if the prescription was initially filled at another pharmacy, the pharmacist may exercise his professional judgment in refilling the prescription provided:

(-a-) the patient has the prescription container, label, receipt or other documentation from the other pharmacy which contains the essential information;

(-b-) after a reasonable effort, the pharmacist is unable to contact the other pharmacy to transfer the remaining prescription refills or there are no refills remaining on the prescription;

(-c-) the pharmacist, in his professional judgment, determines that such a request for an emergency refill is appropriate and meets the requirements of subclauses (I) and (II) of this clause; and

(IX) the pharmacist complies with the requirements of subclauses (III) - (V) of this clause.

(3) Prescription drug order records maintained in a manual system.

(A) Original prescriptions. Original prescriptions shall be maintained in three files as specified in paragraph (2)(E)(iii) of this subsection.

(B) Refills.

(i) Each time a prescription drug order is refilled, a record of such refill shall be made:

(I) on the back of the prescription by recording the date of dispensing, the written initials or identification code of the dispensing pharmacist and the amount dispensed. (If the pharmacist merely initials and dates the back of the prescription drug order, he or she shall be deemed to have dispensed a refill for the full face amount of the prescription drug order); or

(II) on another appropriate, uniformly maintained, readily retrievable record, such as patient medication records, which indicates by patient name the following information:

(-a-) unique identification number of the prescription;

(-b-) name, strength, and lot number of each drug product used in compounding the sterile pharmaceutical;

(-c-) date of each dispensing;

(-d-) quantity dispensed at each dispensing;

(-e-) initials or identification code of person who compounded the sterile pharmaceutical and the pharmacist who checks and releases the final product; and

(-f-) total number of refills for the prescription.

(ii) If refill records are maintained in accordance with clause (i)(II) of this subparagraph, refill records for controlled substances in Schedule III - V shall be maintained separately from refill records of dangerous drugs and nonprescription drugs.

(C) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted on the original prescription, in addition to the documentation of dispensing the refill.

(D) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements.

(i) The transfer of original prescription drug order information for controlled substances listed in Schedules III, IV, or V is permissible between pharmacies on a one-time basis.

(ii) The transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills.

(iii) The transfer is communicated directly between pharmacists and/or pharmacist interns.

(iv) Both the original and the transferred prescription drug order are maintained for a period of two years from the date of last refill.

(v) The pharmacist or pharmacist intern transferring the prescription drug order information shall:

(I) write the word "void" on the face of the invalidated prescription drug order; and

(II) record on the reverse of the invalidated prescription drug order the following information:

(-a-) the name, address, and, if a controlled substance, the DEA registration number of the pharmacy to which such prescription drug order is transferred;

(-b-) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(-c-) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(-d-) the date of the transfer.

(vi) The pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(I) write the word "transfer" on the face of the transferred prescription drug order; and

(II) record on the transferred prescription drug order the following information:

(-a-) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(-b-) original prescription number and the number of refills authorized on the original prescription drug order;

(-c-) number of valid refills remaining and the date of last refill, if applicable;

(-d-) name, address, and, if a controlled substance, the DEA registration number of the pharmacy from which such prescription information is transferred; and

(-e-) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(E) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in subparagraph (D) of this paragraph.

(4) Prescription drug order records maintained in a data processing system.

(A) General requirements for records maintained in a data processing system.

(i) Compliance with data processing system requirements. If a pharmacy's data processing system is not in compliance with this subsection, the pharmacy must maintain a manual recordkeeping system as specified in paragraph (3) of this subsection.

(ii) Original prescriptions. Original prescriptions shall be maintained as specified in paragraph (2)(E)(iii) of this subsection.

(iii) Requirements for backup systems.

(I) The pharmacy shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis, at least monthly, to assure that data is not lost due to system failure.

(II) Data processing systems shall have a workable (electronic) data retention system which can produce an audit trail of drug usage for the preceding two years as specified in subparagraph (B)(vii) of this paragraph.

(iv) Change or discontinuance of a data processing system.

(I) Records of dispensing. A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records of dispensing to the new data processing system; or

(-b-) purge the records of dispensing to a printout which contains the same information required on the daily printout as specified in subparagraph (B) of this paragraph. The information on this hard-copy printout shall be sorted and printed by prescription number and list each dispensing for this prescription chronologically.

(II) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records to the new data processing system; or

(-b-) purge the records to a printout which contains all of the information required on the original document.

(III) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(v) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(B) Records of dispensing.

(i) Each time a prescription drug order is filled or refilled, a record of such dispensing shall be entered into the data processing system.

(ii) The data processing system shall have the capacity to produce a daily hard-copy printout of all original prescriptions dispensed and refilled. This hard-copy printout shall contain the following information:

(I) unique identification number of the prescription;

(II) date of dispensing;

(III) patient name;

(IV) prescribing practitioner's name;

(V) name and amount of each drug product used in compounding the sterile pharmaceutical;

(VI) total quantity dispensed;

(VII) initials or an identification code of the dispensing pharmacist; and

(VIII) if not immediately retrievable via CRT display, the following shall also be included on the hard-copy printout:

(-a-) patient's address;

(-b-) prescribing practitioner's address;

(-c-) practitioner's DEA registration number, if the prescription drug order is for a controlled substance;

(-d-) quantity prescribed, if different from the quantity dispensed;

(-e-) date of issuance of the prescription drug order, if different from the date of dispensing; and

(-f-) total number of refills dispensed to date for that prescription drug order.

(iii) The daily hard-copy printout shall be produced within 72 hours of the date on which the prescription drug orders were dispensed and shall be maintained in a separate file at the pharmacy. Records of controlled substances shall be readily retrievable from records of noncontrolled substances.

(iv) Each individual pharmacist who dispenses or refills a prescription drug order shall verify that the data indicated on the daily hard-copy printout is correct, by dating and signing such document in the same manner as signing a check or legal document (e.g., J.H. Smith or John H. Smith) within seven days from the date of dispensing.

(v) In lieu of the printout described in clause (ii) of this subparagraph, the pharmacy shall maintain a log book in which each individual pharmacist using the data processing system shall sign a statement each day, attesting to the fact that the information entered into the data processing system that day has been reviewed by him or her and is correct as entered. Such log book shall be maintained at the pharmacy employing such a system for a period of two years after the date of dispensing; provided, however, that the data processing system can produce the hard-copy printout on demand by an authorized agent of the Texas State Board of Pharmacy, Texas Department of Public Safety, or Drug Enforcement Administration. If no printer is available on site, the hard-copy printout shall be available within 48 hours with a certification by the individual providing the printout which states that the printout is true and correct as of the date of entry and such information has not been altered, amended, or modified.

(vi) The pharmacist-in-charge is responsible for the proper maintenance of such records and responsible that such data processing system can produce the records outlined in this section and that such system is in compliance with this subsection.

(vii) The data processing system shall be capable of producing a hard-copy printout of an audit trail for all dispensings (original and refill) of any specified strength and dosage form of a drug (by either brand or generic name or both) during a specified time period.

(I) Such audit trail shall contain all of the information required on the daily printout as set out in clause (ii) of this subparagraph.

(II) The audit trail required in this subparagraph shall be supplied by the pharmacy within 48 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, Texas Department of Public Safety, or Drug Enforcement Administration.

(viii) Failure to provide the records set out in this paragraph, either on site or within 48 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(ix) The data processing system shall provide on-line retrieval (via CRT display or hard-copy printout) of the information set out in clause (ii) of this subparagraph of:

(I) the original controlled substance prescription drug orders currently authorized for refilling; and

(II) the current refill history for Schedule III - V controlled substances for the immediately preceding six-month period.

(x) In the event that a pharmacy which uses a data processing system experiences system downtime, the following is applicable:

(I) an auxiliary procedure shall ensure that refills are authorized by the original prescription drug order and that the maximum number of refills has not been exceeded or authorization from the prescribing practitioner shall be obtained prior to dispensing a refill; and

(II) all of the appropriate data shall be retained for on-line data entry as soon as the system is available for use again.

(C) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted as follows:

(i) on the hard-copy prescription drug order;

(ii) on the daily hard-copy printout; or

(iii) via the CRT display.

(D) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements.

(i) The transfer of original prescription drug order information for controlled substances listed in Schedules III, IV, or V is permissible between pharmacies on a one-time basis only. However, pharmacies electronically sharing a real-time, on-line database may transfer up to the maximum refills permitted by law and the prescriber's authorization.

(ii) The transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills.

(iii) The transfer is communicated directly between pharmacists and/or pharmacist interns or as authorized in paragraph (3)(D) of this subsection.

(iv) Both the original and the transferred prescription drug orders are maintained for a period of two years from the date of last refill.

(v) The pharmacist or pharmacist intern transferring the prescription drug order information shall:

(I) write the word "void" on the face of the invalidated prescription drug order; and

(II) record on the reverse of the invalidated prescription drug order the following information:

(-a-) the name, address, and, if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(-b-) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(-c-) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(-d-) the date of the transfer.

(vi) The pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(I) write the word "transfer" on the face of the transferred prescription drug order; and

(II) record on the transferred prescription drug order the following information:

(-a-) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(-b-) original prescription number and the number of refills authorized on the original prescription drug order;

(-c-) number of valid refills remaining and the date of last refill, if applicable;

(-d-) name, address, and, if a controlled substance, the DEA registration number of the pharmacy from which such prescription drug order information is transferred; and

(-e-) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(vii) Prescription drug orders may not be transferred by non-electronic means during periods of downtime except on consultation with and authorization by a prescribing practitioner; provided however, during downtime, a hard copy of a prescription drug order may be made available for informational purposes only, to the patient, a pharmacist or pharmacist intern, and the prescription may be read to a pharmacist or pharmacist intern by telephone.

(viii) The original prescription drug order shall be invalidated in the data processing system for purposes of filling or refilling, but shall be maintained in the data processing system for refill history purposes.

(ix) If the data processing system has the capacity to store all the information required in clause (v) and (vi) of this subparagraph, the pharmacist is not required to record this information on the original or transferred prescription drug order.

(x) The data processing system shall have a mechanism to prohibit the transfer or refilling of controlled substance prescription drug orders which have been previously transferred.

(E) Electronic transfer of prescription drug order information between pharmacies. Pharmacies electronically accessing the same prescription drug order records may electronically transfer prescription information if the following requirements are met.

(i) The original prescription is voided and the following information is documented in the records of the transferring pharmacy;

(I) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(II) the name of the pharmacist or pharmacist intern receiving the prescription drug order information; and

(III) the date of the transfer.

(ii) Pharmacies not owned by the same person may electronically access the same prescription drug order records, provided the owner or chief executive officer of each pharmacy signs an agreement allowing access to such prescription drug order records.

(F) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in subparagraph (D) of this paragraph.

(5) Limitation to one type of recordkeeping system. When filing prescription drug order information a pharmacy may use only one of the two systems described in paragraph (3) or (4) of this subsection.

(6) Policy and procedure manual. A policy and procedure manual as it relates to the sterile pharmaceuticals shall be maintained at the pharmacy and be available for inspection. The manual shall include policies and procedures for:

(A) pharmaceutical care services;

(B) handling, storage, and disposal of cytotoxic/biohazardous drugs and waste;

(C) disposal of unusable drugs, supplies, and returns;

(D) security;

(E) equipment;

(F) sanitation;

(G) reference materials;

(H) drug selection and procurement;

(I) drug storage;

(J) drug administration to include infusion devices, drug delivery systems, and first dose monitoring;

(K) drug labeling;

(L) delivery of drugs;

(M) recordkeeping;

(N) controlled substances;

(O) investigational drugs, including the obtaining of protocols from the principal investigator;

(P) quality assurance/quality control;

(Q) duties and education and training of professional and nonprofessional staff; and

(R) emergency preparedness plan, to include continuity of patient and public safety.

(7) Patient Medication Record (PMR). A PMR shall be maintained for each patient of the pharmacy. The PMR shall contain at a minimum the following.

(A) Patient information:

(i) patient's full name, gender, and date of birth;

(ii) weight and height;

(iii) known drug sensitivities and allergies to drugs and/or food;

(iv) primary diagnosis and chronic conditions;

(v) other drugs the patient is receiving;

(vi) documentation of patient training;

(vii) pharmacist's comments relevant to the individual's drug therapy, including any other information unique to the specific patient or drug.

(B) Prescription drug order information:

(i) date of dispensing each sterile pharmaceutical;

(ii) unique identification number of the prescription;

(iii) physician's name;

(iv) name, quantity, and lot number of each product used in compounding the sterile pharmaceutical;

(v) quantity dispensed; and

(vi) directions for use and method of administration, including infusion rate if applicable.

(C) Nothing in this paragraph shall be construed as requiring a pharmacist to obtain, record, and maintain patient information other than prescription drug order information when a patient or patient's agent refuses to provide the necessary information for such patient medication records.

(8) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy or other registrant, without being registered to distribute, under the following conditions.

(A) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(B) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed and distributed by the pharmacy during each calendar year in which the pharmacy is registered; if during the same calendar year it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(C) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(i) the actual date of distribution;

(ii) the name, strength, and quantity of controlled substances distributed;

(iii) the name, address, and DEA registration number of the distributing pharmacy; and

(iv) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(D) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(i) The pharmacy, practitioner or other registrant who is receiving the controlled substances shall issue copy 1 and copy 2 of a DEA order form (DEA 222) to the distributing pharmacy.

(ii) The distributing pharmacy shall:

(I) complete the area on the DEA order form (DEA 222) titled TO BE FILLED IN BY SUPPLIER;

(II) maintain copy 1 of the DEA order form (DEA 222) at the pharmacy for two years; and

(III) forward copy 2 of the DEA order form (DEA 222) to the divisional office of the Drug Enforcement Administration at the close of the month during which the order is filled.

(9) Other records. Other records to be maintained by a pharmacy:

(A) a permanent log of the initials or identification codes which will identify each dispensing pharmacist by name (the initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes shall not be used);

(B) copy 3 of DEA order form (DEA 222) which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(C) a hard copy of the power of attorney to sign DEA 222 order forms (if applicable);

(D) suppliers' invoices of dangerous drugs and controlled substances; pharmacists or other responsible individuals shall verify that the controlled drugs listed on the invoices were actually received by clearly recording their initials and the actual date of receipt of the controlled substances;

(E) suppliers' credit memos for controlled substances and dangerous drugs;

(F) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements);

(G) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(H) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(I) a hard copy of any notification required by the Texas Pharmacy Act or these sections, including, but not limited to, the following:

(i) reports of theft or significant loss of controlled substances to DEA, DPS, and the board;

(ii) notifications of a change in pharmacist-in-charge of a pharmacy; and

(iii) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(10) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(A) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(i) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by the Code of Federal Regulations, Title 21, §1304.04(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(ii) The pharmacy maintains a copy of the notification required in clause (i) of this subparagraph.

(iii) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(B) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(C) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(D) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(E) Ownership of pharmacy records. For purposes of these sections, a pharmacy licensed under the Act is the only entity which may legally own and maintain prescription drug records.

(11) Confidentiality.

(A) A pharmacist shall provide adequate security of prescription drug order and patient medication records to prevent indiscriminate or unauthorized access to confidential health information. If prescription drug orders, requests for refill authorization, or other confidential health information are not transmitted directly between a pharmacy and a physician but are transmitted through a data communication device, confidential health information may not be accessed or maintained by the operator of the data communication device unless specifically authorized to obtain the confidential information by this subsection.

(B) Confidential records are privileged and may be released only to:

(i) the patient or the patient's agent;

(ii) a practitioner or another pharmacist if, in the pharmacist's professional judgement, the release is necessary to protect the patient's health and well being;

(iii) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(iv) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(v) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(vi) an insurance carrier or other third party payor authorized by a patient to receive such information.

(f) Triplicate prescription requirements. The Texas State Board of Pharmacy adopts by reference the rules promulgated by the Texas Department of Public Safety, which are set forth in Subchapter F of 37 TAC §§13.101 - 13.113 concerning triplicate prescriptions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER C. NUCLEAR PHARMACY (CLASS B)

22 TAC §§291.52, 291.54, 291.55

The Texas State Board of Pharmacy adopts amendments to §291.52, concerning Definitions, §291.54, concerning Operational Standards, and §291.55, concerning Records. The amendments are adopted without changes to the proposed text as published in the December 28, 2001, issue of the *Texas Register* (26 TexReg 10756), and will not be republished.

The amendments: (1) implement the provisions of the Occupations Code §562.015, as added by Senate Bill 768, Texas Legislature, 77th Session, by referencing a "dispensing directive" for the communication of substitution instructions from practitioners to pharmacists; and (2) update citations to the new codified Texas Pharmacy Act as a result of the rule review process.

No comments were received.

The amendment is adopted under §§551.002, 554.051, and 562.015 (as amended by Senate Bill 768, Acts of the 77th Texas Legislature) of the Texas Pharmacy Act (Chapters 551 - 566, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.015 as authorizing the agency to establish a "dispensing directive" for the communication of substitution instructions from practitioners to pharmacists.

The statutes affected by the rules: Chapters 551 - 566, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 309. GENERIC SUBSTITUTION

The Texas State Board of Pharmacy adopts a repeal of §§309.1 - 309.8, concerning Generic Substitution and simultaneously adopts new §§309.1 - 309.8, concerning Generic Substitution. The new §§309.2 - 309.4 and §309.6 are adopted with changes to the proposed text as published in the December 28, 2001, issue of the *Texas Register* (26 TexReg 10760). The repeal of §§309.1 - 309.8 and new §309.1 and §§309.5, 309.7, and 309.8 are adopted without changes to the proposed text as published and will not be republished.

The new rules: (1) implement the provisions of the Occupations Code §562.015, as added by Senate Bill 768, Texas Legislature, 77th Session, by establishing a "dispensing directive" for the communication of substitution instructions from practitioners to pharmacists; and (2) update citations to the new codified Texas Pharmacy Act as a result of the rule review process.

Written comments were received from the Texas Pharmacy Association, Albertson's, Eckerd Drugs, Brookshire Brothers Pharmacies, the National Association of Chain Drug Stores, the Texas Federation of Drug Stores, HEB Pharmacies, the Pharmaceutical Research and Manufacturers of America, the Texas Optometry Board, the Texas Medical Association, the Texas Nurses Association, the Texas Academy of Physician Assistants, the Texas Pediatric Society, the Texas Academy of Internal Medicine Services, the Texas Association of Family Physicians, the Coalition of Nurses in Advanced Practice, the Texas Podiatric Medical Association, the Texas Osteopathic Medical Association, and an individual physician.

General Comments: One comment opposed the requirement to place the brand name wording on all prescriptions when the federal requirement was only for medicaid prescriptions. The Board disagrees and believes the changes to the statute require the wording on all written prescriptions when substitution is not allowed. Other provision have been made for verbal, electronic, and facsimile prescriptions when the prescription is not for a medicaid patient. Several comments suggested a vigorous educational program for all prescribers and pharmacists. The Board agrees and will work with the appropriate agencies and associations in an educational program.

Specific Comments:

Section 309.2--Two comments were received indicating that the definition of electronic prescription drug order should not include facsimile because it conflict with other sections of the amendment. The Board agrees and amended the definition and included a definition of facsimile. Another commentor indicated that the definition of practitioner needs to include a therapeutic optometrist. The Board agrees and amended the definition appropriately.

Section 309.3(b)--Several comments indicated that the statement contained on the prescription should not be mandatory and should indicate that a pharmacist may, rather than will, substitute. The Board agrees and made appropriate changes. Two comments indicated that paragraph (2) should add a reference to subsection (a)(1). The Board disagrees and believes the general requirements of subsection (a)(1) are implicit. Several commentors suggested language to require a practitioner to clearly indicate to which prescriptions a dispensing directive refers when a prescription contains more than one prescription on the form. The Board concurs with this comment and made appropriate changes.

Section 309.3(c)(1)--Two comments were received with language to clarify the proposed language of subparagraph (A). The Board concurs with the comments and made the suggested changes. One comment suggested a new subparagraph stating that a facsimile prescription should be considered a written prescription drug order. The Board disagrees. The suggested language does not add to the clarity of the rules and conflict with other sections of the Board's rules. Two comments suggested a change to subparagraph (D) to clarify that a pharmacist may only substitute when the general requirements of subsection (a) are met. The Board disagrees as the provisions of (a) are already requirements for all substitutions

Section 309.3(c)(3)--Two comments wanted to delete the requirement for the specific wording "brand necessary" or "brand medically necessary" in subparagraphs (A) and (B) on electronic prescription drug orders. One commentor believes that the statute specifically requires an exemption from the use of one of the terms to prohibit substitution, and this rule do not allow for such an exemption. The Board disagrees and believes the rule as drafted does provide an exemption from the requirement since the prescriber is not required to write one of the statements in their own handwriting as with a written prescription. Two commentors suggested clarifying that the physician had only 30 days to follow-up with a prescription in subparagraph (C). The Board agrees and appropriate changes were made.

Section 309.3(c)(4)--Several comments were received indicating that this paragraph is an inappropriate delegation of power to a federal agency. The Board agrees and deleted the requirement.

Section 309.4--One comment was received suggesting a change to clarify that only one generic substitution sign posted in a pharmacy is required to be in compliance with the requirements. The Board agrees and made appropriate changes.

22 TAC §§309.1 - 309.8

The repeal is adopted under §§551.002, 554.051, and 562.015 (as amended by Senate Bill 768, Acts of the 77th Texas Legislature) of the Texas Pharmacy Act (Chapters 551 - 566, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.015 as authorizing the agency to establish a "dispensing directive" for the communication of substitution instructions from practitioners to pharmacists.

The statutes affected by the repeal: Chapters 551 - 566, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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22 TAC §§309.1 - 309.8

The new rules are adopted under §§551.002, 554.051, and 562.015 (as amended by Senate Bill 768, Acts of the 77th Texas Legislature) of the Texas Pharmacy Act (Chapters 551 - 566, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.015 as authorizing the agency to establish a "dispensing directive" for the communication of substitution instructions from practitioners to pharmacists.

The statutes affected by the rules: Chapters 551 - 566, Texas Occupations Code.

§309.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any term not defined in this section shall have the definition set out in the Act, §551.003 and Chapter 562.

(1) Act--The Texas Pharmacy Act, Occupations Code, Subtitle J, as amended.

(2) Data communication device--An electronic device that receives electronic information from one source and transmits or routes it to another (e.g., bridge, router, switch, or gateway).

(3) Electronic prescription drug order--A prescription drug order which is transmitted by an electronic device to the receiver (pharmacy). Electronic prescription drug order includes computer to computer transmission, but does not include facsimile prescription drug orders.

(4) Facsimile prescription drug order--A prescription drug order which is transmitted by an electronic device which sends an exact image to the receiver (pharmacy).

(5) Generically equivalent--A drug that is pharmaceutically equivalent and therapeutically equivalent to the drug prescribed.

(6) Pharmaceutically equivalent--Drug products that have identical amounts of the same active chemical ingredients in the same dosage form and that meet the identical compendial or other applicable standards of strength, quality, and purity according to the United States Pharmacopoeia or another nationally recognized compendium.

(7) Therapeutically equivalent--Pharmaceutically equivalent drug products that, if administered in the same amounts, will provide the same therapeutic effect, identical in duration and intensity.

(8) Original prescription--The:

(A) original written prescription drug orders; or

(B) original verbal or electronic prescription drug orders reduced to writing either manually or electronically by the pharmacist.

(9) Practitioner--

(A) A person licensed or registered to prescribe, distribute, administer, or dispense a prescription drug or device in the course of professional practice in this state, including a physician, dentist, podiatrist, therapeutic optometrist, or veterinarian but excluding a person licensed under this subtitle;

(B) A person licensed by another state, Canada, or the United Mexican States in a health field in which, under the law of this state, a license holder in this state may legally prescribe a dangerous drug;

(C) A person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration registration number and who may legally prescribe a Schedule II, III, IV, or V controlled substance, as specified under Chapter 481, Health and Safety Code, in that other state; or

(D) An advanced practice nurse or physician assistant to whom a physician has delegated the authority to carry out or sign prescription drug orders under §§157.052, 157.053, 157.054, 157.0541, or 157.0542, Occupations Code.

§309.3. Generic Substitution.

(a) General requirements.

(1) In accordance with Chapter 562 of the Act, a pharmacist may dispense a generically equivalent drug product if:

(A) the generic product costs the patient less than the prescribed drug product;

(B) the patient does not refuse the substitution; and

(C) the practitioner does not certify on the prescription form that a specific prescribed brand is medically necessary as specified in a dispensing directive described in subsection (c) of this section.

(2) If the practitioner has prohibited substitution through a dispensing directive in compliance with subsection (c) of this section,

a pharmacist shall not substitute a generically equivalent drug product unless the pharmacist obtains verbal or written authorization from the practitioner and notes such authorization on the original prescription drug order.

(b) Prescription format for written prescription drug orders.

(1) A written prescription drug order issued in Texas may:

(A) be on a form containing a single signature line for the practitioner; and

(B) contain the following reminder statement on the face of the prescription: "A generically equivalent drug product may be dispensed unless the practitioner hand writes the words 'Brand Necessary' or 'Brand Medically Necessary' on the face of the prescription."

(2) A pharmacist may dispense a prescription that is not issued on the form specified in paragraph (1) of this subsection, however, the pharmacist may dispense a generically equivalent drug product unless the practitioner has prohibited substitution through a dispensing directive in compliance with subsection (c)(1) of this section.

(3) The prescription format specified in paragraph (1) of this subsection does not apply to the following types of prescription drug orders:

(A) prescription drug orders issued by a practitioner in a state other than Texas;

(B) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(C) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(4) In the event of multiple prescription orders appearing on one prescription form, the practitioner shall clearly identify to which prescription(s) the dispensing directive(s) apply. If the practitioner does not clearly indicate to which prescription(s) the dispensing directive(s) apply, the pharmacist may substitute on all prescriptions on the form.

(c) Dispensing directive.

(1) Written prescriptions.

(A) A practitioner may prohibit the substitution of a generically equivalent drug product for a brand name drug product by writing across the face of the written prescription, in the practitioner's own handwriting, the phrase "brand necessary" or "brand medically necessary."

(B) The dispensing directive shall:

(i) be in a format that protects confidentiality as required by the Health Insurance Portability and Accountability Act of 1996 (29 U.S.C. Section 1181 et seq.) and its subsequent amendments; and

(ii) comply with federal and state law, including rules, with regard to formatting and security requirements.

(C) The dispensing directive specified in this paragraph may not be preprinted, rubber stamped, or otherwise reproduced on the prescription form.

(D) After, June 1, 2002, a practitioner may prohibit substitution on a written prescription only by following the dispensing directive specified in this paragraph. Two-line prescription forms, check boxes, or other notations on an original prescription drug order which indicate "substitution instructions" are not valid methods to prohibit substitution, and a pharmacist may substitute on these types of written prescriptions.

(E) A written prescription drug order issued prior to June 1, 2002, but presented for dispensing on or after June 1, 2002, shall follow the substitution instructions on the prescription.

(2) Verbal Prescriptions.

(A) If a prescription drug order is transmitted to a pharmacist orally, the practitioner or practitioner's agent shall prohibit substitution by specifying "brand necessary" or "brand medically necessary." The pharmacists shall note any substitution instructions by the practitioner or practitioner's agent, on the file copy of the prescription drug order. Such file copy may follow the one-line format indicated in subsection (b)(1) of this section, or any other format that clearly indicates the substitution instructions.

(B) If the practitioner's or practitioner's agent does not clearly indicate that the brand name is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(C) To prohibit substitution on a verbal prescription reimbursed through the medical assistance program specified in 42 C.F.R., §447.331:

(i) the practitioner or the practitioner's agent shall verbally indicate that the brand is medically necessary; and

(ii) the practitioner shall mail or fax a written prescription to the pharmacy which complies with the dispensing directive for written prescriptions specified in paragraph (1) of this subsection within 30 days.

(3) Electronic prescription drug orders.

(A) To prohibit substitution, the practitioner or practitioner's agent shall note "brand necessary" or "brand medically necessary" in the electronic prescription drug order.

(B) If the practitioner or practitioner's agent does not clearly indicate in the electronic prescription drug order that the brand is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(C) To prohibit substitution on an electronic prescription drug order reimbursed through the medical assistance program specified in 42 C.F.R., §447.331, the practitioner shall fax a copy of the original prescription drug order which complies with the requirements of a written prescription drug order specified in paragraph (1) of this subsection within 30 days.

(4) Prescriptions issued by out-of-state, Mexican, Canadian, or federal facility practitioners.

(A) The dispensing directive specified in this subsection does not apply to the following types of prescription drug orders:

(i) prescription drug orders issued by a practitioner in a state other than Texas;

(ii) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(iii) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(B) A pharmacist may not substitute on prescription drug orders identified in subparagraph (A) of this paragraph unless the practitioner has authorized substitution on the prescription drug

order. If the practitioner has not authorized substitution on the written prescription drug order, a pharmacist shall not substitute a generically equivalent drug product unless:

(i) the pharmacist obtains verbal or written authorization from the practitioner (such authorization shall be noted on the original prescription drug order); or

(ii) the pharmacist obtains written documentation regarding substitution requirements from the State Board of Pharmacy in the state, other than Texas, in which the prescription drug order was issued. The following is applicable concerning this documentation.

(I) The documentation shall state that a pharmacist may substitute on a prescription drug order issued in such other state unless the practitioner prohibits substitution on the original prescription drug order.

(II) The pharmacist shall note on the original prescription drug order the fact that documentation from such other state board of pharmacy is on file.

(III) Such documentation shall be updated yearly.

(d) Substitution of dosage form.

(1) As specified in §562.012 of the Act, a pharmacist may dispense a dosage form of a drug product different from that prescribed, such as tablets instead of capsules or liquid instead of tablets, provided:

(A) the patient consents to the dosage form substitution;

(B) the pharmacist notifies the practitioner of the dosage form substitution; and

(C) the dosage form so dispensed:

(i) contains the identical amount of the active ingredients as the dosage prescribed for the patient;

(ii) is not an enteric-coated or time release product; and

(iii) does not alter desired clinical outcomes;

(2) Substitution of dosage form may not include the substitution of a product that has been compounded by the pharmacist unless the pharmacist contacts the practitioner prior to dispensing and obtains permission to dispense the compounded product.

(e) Refills.

(1) Original substitution instructions.

(A) All refills, shall follow the original substitution instructions, unless otherwise indicated by the practitioner or practitioner's agent

(B) Prescriptions issued prior to June 1, 2002, on the two-line form shall follow the substitution instructions on the form.

(2) Narrow therapeutic index drugs.

(A) The board, in consultation with the Texas State Board of Medical Examiners, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.013, Occupations Code. The board has specified in §309.7 of this title (relating to dispensing responsibilities) that pharmacist shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication.

(i) Pharmacists may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.

(ii) Practitioners may prohibit substitution through a dispensing directive in compliance with subsection (c) of this section.

(B) The board shall reconsider the contents of the list if the Federal Food and Drug Administration determines a new equivalence classification which indicates that certain drug products are equivalent but special notification to the patient and practitioner is required when substituting these products.

§309.4. Patient Notification.

(a) Substitution notification. A pharmacist who selects a generically equivalent drug product as authorized by Subchapter A, Chapter 562 of the Act shall:

(1) personally, or through his or her agent or employee and prior to delivery of a generically equivalent drug product, inform the patient or the patient's agent that a less expensive generically equivalent drug product has been substituted for the brand prescribed and the patient's or the patient's agent's right to refuse such substitution; or

(2) cause to be displayed, in a prominent place that is in clear public view where prescription drugs are dispensed, a sign in block letters not less than one inch in height that reads, in both English and Spanish: TEXAS LAW ALLOWS A LESS EXPENSIVE GENERICALLY EQUIVALENT DRUG TO BE SUBSTITUTED FOR CERTAIN BRAND NAME DRUGS UNLESS YOUR PHYSICIAN DIRECTS OTHERWISE. YOU HAVE A RIGHT TO REFUSE SUCH SUBSTITUTION. CONSULT YOUR PHYSICIAN OR PHARMACIST CONCERNING THE AVAILABILITY OF A SAFE, LESS EXPENSIVE DRUG FOR YOUR USE. LAS LEYES DE TEXAS PERMITEN QUE SE SUSTITUYA UNA MEDICINA GENERICAMENTE EQUIVALENTE Y MENOS CARA POR CIERTAS MEDICINAS DE MARCA RECONOCIDA A MENOS QUE SU MEDICO INSTRUYA DE OTRA MANERA. UD. TIENE EL DERECHO DE REHUSAR DICHA SUSTITUCION. CONSULTE A SU MEDICO O FARMACEUTICO CON REFERENCIA A LA DISPONIBILIDAD DE UNA MEDICINA SEGURA Y MENOS CARA PARA SU USO. By the display of a sign as set out in this paragraph, a pharmacy shall be deemed in compliance with this subsection. Only one sign is required to be displayed in a pharmacy in order to be in compliance with this subsection.

(3) A pharmacist complies with the requirements of this subsection if an employee or agent of the pharmacist notifies a purchaser as required by paragraph (1) of this subsection. The patient or patient's agent shall have the right to refuse substitution.

(b) Inpatient notification exemption. Institutional pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

§309.6. Records.

(a) When the pharmacist dispenses a generically equivalent drug pursuant to the Subchapter A, Chapter 562 of the Act, the following information shall be noted on the original written or hard-copy of the oral prescription drug order:

(1) any substitution instructions communicated orally to the pharmacist by the practitioner or practitioner's agent or a notation that no substitution instructions were given; and

(2) the name and strength of the actual drug product dispensed shall be noted on the original or hard-copy prescription drug order. The name shall be either:

(A) the brand name and strength; or

(B) the generic name, strength, and name of the manufacturer or distributor of such generic drug. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products having no brand name, the principal active ingredients shall be indicated on the prescription.)

(b) If a pharmacist refills a prescription drug order with a generically equivalent product from a different manufacturer or distributor than previously dispensed, the pharmacist shall record on the prescription drug order the information required in subsection (a) of this section for the product dispensed on the refill.

(c) If a pharmacy utilizes patient medication records for recording prescription information, the information required in subsection (a) and (b) of this section shall be recorded on the patient medication records.

(d) The National Drug Code (NDC) of a drug or any other code may be indicated on the prescription drug order at the discretion of the pharmacist, but such code shall not be used in place of the requirements of subsections (a) and (b) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
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Texas State Board of Pharmacy
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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER D. ADVERTISING, ENDORSEMENTS AND CERTIFICATES

22 TAC §573.30

The Texas Board of Veterinary Medical Examiners adopts amendments to §573.30, concerning Advertising. The amended section is adopted without changes to the proposed text as published in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9356).

This section addresses the issue of whether all forms of veterinarian advertising, including telephone directory yellow pages, must include the name of the veterinarian providing the advertised services. Because the Board believes that (1) the Veterinary Licensing Act generally discourages restrictions on advertising by veterinarians; (2) it may in many cases be impractical for groups of veterinary professionals to list individual names in certain forms of advertising; and (3) most health professions do not require the individual listing of professionals' names on clinics and other establishments in their advertising of services, the existing requirement that advertising include the veterinarian's full name in all cases is deleted. However, a veterinarian may not engage in false, deceptive, or misleading advertising under any circumstances.

One comment was received on the proposed amendments. Karl Black, D.V.M., opposes the section because he believes that the public is harmed if persons have no way of knowing with whom they are dealing at an advertised clinic. He believes that there is a loss of accountability by the profession. The Board believes that a citizen can still be informed of who is offering services at a clinic by calling the clinic and making the inquiry. He can also, upon finding out the names of the veterinarians, call the Board and inquire about possible prior disciplinary actions against the veterinarian. The Board does not believe that a veterinarian is not accountable for his services simply because his name is not listed in a clinic's banner advertisement; thus, the Board declines to change the amended rule as proposed.

The amendments are adopted under the authority of §801.151(a) of the Texas Occupations Code which gives the Board authority to adopt rules necessary to administer the Veterinary Licensing 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.

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Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners
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Proposal publication date: November 16, 2001
For further information, please call: (512) 305-7555

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22 TAC §573.35

The Texas Board of Veterinary Medical Examiners adopts amendments to §573.35, concerning Display of License. The amended section is adopted with changes to the proposed text as published in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9357).

The change adds a last sentence to the section which clarifies that photocopies of the original veterinary license and current license renewal certificate are acceptable. The purpose of the amended section is to clarify the location where a veterinarian's Texas license must be displayed. The current rule specifies the office as the display location. Because mobile and relief veterinarians do not have a specific office, the section is amended to specify display of the license at a practice location. Display of an original license and renewal certificate are no longer required because of the impracticality of mobile and relief veterinarians having to carry an original with them. A legible photocopy of each document is acceptable. The license must be displayed where it is visible to the public.

No comments were received concerning this section.

The amended section is adopted under the authority of the Texas Occupations Code, §801.151(a). The Board interprets §801.151(a) as authorizing it to adopt rules necessary to administer the Veterinary Licensing Act.

§573.35. Display of License.

Each veterinarian, including a relief veterinarian, shall post or display at the veterinarian's practice location, whether mobile or fixed, his or her license to practice veterinary medicine and the most recent license renewal certificate. These documents must be displayed where they are visible to the public. A legible photocopy of the original documents is acceptable.

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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Ron Allen
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SUBCHAPTER E. PRESCRIBING AND/OR DISPENSING MEDICATIONS

22 TAC §573.43

The Texas Board of Veterinary Medical Examiners adopts amendments to §573.43, concerning Misuse of DEA Narcotics Registration. The amended section is adopted without changes to the proposed text as published in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9357).

The amendments update the current exception to the requirement that a veterinarian (licensee) may not prescribe, dispense or deliver controlled substances unless the licensee is registered with the federal Drug Enforcement Administration (DEA) and the Texas Department of Public Safety (DPS). The requirement of DEA registration is currently waived if, among other things, a DEA registered veterinarian employs the unregistered veterinarian. Because in corporate or other large practices it is often difficult to determine who the unregistered veterinarian's employer is, the section is amended to allow the registered veterinarian to be the "supervisor or employer" of the unregistered veterinarian. The amendments also address the appropriate scope of administering controlled substances by a unregistered veterinarian working under the employment or supervision of a DEA registered licensee. The current rule prohibits an unregistered licensee from "prescribing" a controlled substance to a patient. In actual practice, the unregistered licensee must be able to prescribe controlled substances to a patient in certain circumstances. The amended section allows that practice to continue, but prohibits the unregistered licensee from "writing a prescription" for controlled substances which is properly within the scope of duties of the registered veterinarian.

One comment was received from Mr. Ellis Gilleland. Mr. Gilleland alleges that by removing the employment provisions in the section, the Board is creating a loophole which will enhance drug diversion. The Board notes that the amendments do not remove the employment requirement but rather expand the requirement to include supervised employees.

The amended section is adopted under the authority of the Texas Occupations Code, §801.151(a). The Board interprets §801.151(a) as authorizing it to adopt rules necessary to administer the Veterinary Licensing 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 February 25, 2002.

TRD-200201161
Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners
Effective date: March 17, 2002
Proposal publication date: November 16, 2001
For further information, please call: (512) 305-7555

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SUBCHAPTER G. OTHER PROVISIONS

22 TAC §573.64

The Texas Board of Veterinary Medical Examiners adopts amendments to §573.64, concerning Continuing Education Requirements. The amended section is adopted without changes to the proposed text as published in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9358).

The existing section requires that veterinarians maintain records to support continuing education credits claimed each year and that the records be provided for inspection to Board investigators upon request. Board investigators often find during an inspection of a veterinarian's office that the records are in another location, such as at home. This creates delays in completing inspections. The amendments require that the records be made available at the practice location for Board investigators to examine, thus making Board inspections more efficient and less time consuming.

No comments were received concerning this section.

The amended section is adopted under the authority of the Texas Occupations Code §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing 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.

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Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7555

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22 TAC §573.74

The Texas Board of Veterinary Medical Examiners adopts new §573.74, concerning Duty to Cooperate with Board. The section is adopted without changes to the proposed text as published in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9359).

The Board had found that often it is unable to timely complete inspections or complaint investigations because of delays in receiving important information requested from veterinarians. The new section will require veterinarians to cooperate fully with any Board inspection or investigation and to respond within twenty-one days to requests for information. This time requirement can be waived if the Board requests a different response date because of an emergency or other unusual situation, or if the veterinarian is unable for good cause to meet the response date and requests a different response date. Adoption of the section will make Board inspections and investigations more efficient and less time consuming and costly.

No comments were received concerning this section.

The new section is adopted under the authority of the Texas Occupations Code §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing 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.

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Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7555

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22 TAC §573.75

The Texas Board of Veterinary Medical Examiners adopts new §573.75, concerning Notification of Licensee Addresses without changes to the proposed text as published in the November 16, 2001, issue of the *Texas Register* (26 TexReg 9359).

Texas Occupations Code §801.156 requires that the Board maintain a "registry" of each veterinarian's name, residence address and business address. The Board attempts to maintain a record of each veterinarian's physical address, mailing address and home address, but there is currently no rule setting out what information is needed. As a result, a veterinarian may inform the Board that he has no physical address because he is located in a remote area, or he may use a post office box number as his business address. In either case, it becomes difficult for an investigator to locate the veterinarian for inspections or for other needs. A question may also arise as to the correct address for relief and mobile veterinarians who do not have a constant physical business address. The Board adopts the new section to address these concerns and fully inform veterinarians of the Board's need for accurate addresses. The section requires complete information which includes name, clinic or practice name, physical business address, mailing address, and residence address. Clarifying language speaks to the address of a veterinarian at a remote location, and relief and mobile veterinarians. A veterinarian is required to notify the Board of any change of name, address or name of clinic within 60 days after the change takes place.

The Board has received one comment from Susan Hopper, D.V.M., opposing the section's requirement that a residence address be provided to the Board. Dr. Hopper writes that this requirement is a violation of her privacy. The Board responds that the requirement of a residence address is set out in the Veterinary Licensing Act and thus there is no discretion by the Board on requiring this address. Thus, the section will not be changed in response to the comment.

The new section is adopted under the authority of the Texas Occupations Code §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing 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.

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Ron Allen
Executive Director
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7555

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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES

SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.45

The Texas Board of Professional Land Surveying adopts an amendment to §661.45, concerning examinations, without changes to the proposed text as published in the January 4, 2002, issue of the *Texas Register* (27 TexReg 33) and will not be republished.

The purpose of this amendment is to allow examination applicants to use data collectors during the examination.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 5282c, §9, which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable

and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this 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 February 21, 2002.

TRD-200201068
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: March 13, 2002
Proposal publication date: January 4, 2002
For further information, please call: (512) 452-9427

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CHAPTER 663. STANDARDS OF RESPONSIBILITY AND RULES OF CONDUCT SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.18

The Texas Board of Professional Land Surveying adopts an amendment to §663.18, concerning Certification, without changes to the proposed text as published in the January 4, 2002, issue of the *Texas Register* (27 TexReg 34) and will not be republished.

The amendment creates a new subsection (c). The amendment is necessary so that surveyors will be afforded a method to release preliminary plats for limited purposes.

Previously the Texas Board of Professional Land Surveying proposed an amendment to §663.18 in the September 7, 2001, issue of the *Texas Register* (26 TexReg 6838). That version was withdrawn in the January 4, 2002, issue of the *Texas Register* (27 TexReg 125). Comments were received regarding the September amendment. The comments received were incorporated into the latest proposed amendment. No comments were received regarding adoption of this amendment.

The amendment is adopted under Section 9 of Professional Land Surveying Practices Act which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this 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 February 21, 2002.

TRD-200201069
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: March 13, 2002
Proposal publication date: January 4, 2002
For further information, please call: (512) 452-9427

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 1. TEXAS BOARD OF HEALTH SUBCHAPTER V. NEGOTIATION AND MEDIATION OF CERTAIN CONTRACT DISPUTES

25 TAC §§1.431 - 1.447

The Texas Department of Health (department) adopts new rules §§1.431 - 1.447 concerning certain procedures in the negotiation and mediation of breach of contract claims. The rules are adopted without changes to the proposed text as published in the December 14, 2001, issue of the *Texas Register* (26 TexReg 10203), and therefore the sections will not be republished. Specifically, the new rules bring the department into compliance with Government Code, Chapter 2260.

The 76th Legislature added Chapter 2260 to the Government Code to provide persons who contract with the state a procedure to resolve certain contract claims against the state. A contractor may assert a breach of contract claim against the state and the state may file a counterclaim against the contractor. If negotiation of the claim and counterclaim, if any, is unsuccessful, both parties may agree to mediate the claim, or the contractor can choose to have a contested case hearing in front of the State Office of Administrative Hearings. The statute provides that each unit of state government with rulemaking authority shall develop rules to govern the negotiation and mediation of a claim under Chapter 2260. These final rules are in response to that mandate.

No comments were received on the proposed rules.

The new sections are adopted under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance imposed by law on the board, the department, and the Commissioner of Health, and the Government Code, §2260.052, which requires each unit of state government with rulemaking authority to adopt rules to govern the negotiation and mediation of certain contract claims under Chapter 2260.

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 February 22, 2002.

TRD-200201122

Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: March 14, 2002
Proposal publication date: December 14, 2001
For further information, please call: (512) 458-7236

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SUBCHAPTER W. PRIVACY POLICY

25 TAC §1.502, §1.503

The Texas Department of Health (department) withdraws §1.501, and adopts new §1.502 and §1.503, concerning an individual's right to request information collected by the department; how to request the department to correct information that is incorrect; and the procedure the department will use to correct information that is incorrect. Sections 1.502 and 1.503 are adopted with changes to the proposed text published in the December 14, 2001 issue of the *Texas Register* (26 TexReg 10206).

Section 1.501 was withdrawn from the rule because it merely restates the statutory rights of notice and is not a necessary part of the rule. Section 1.502 was amended to incorporate a recommended change. Section 1.503 was amended to correct a typographical error. The new sections will ensure the department's compliance with House Bill 1922, 77th Legislative Session 2001, which adopted new Government Code, Chapter 559, concerning Government Privacy Policy. Government Code, Chapter 559, concerning Government Privacy Policy, requires each state governmental body that collects information about an individual by means of a form, that the individual completes and files with the governmental body, whether in a paper or electronic format, to prominently state on the paper form and post on the internet site a notice of the individual's right, with few exceptions to be informed of the information that the governmental body collects about the individual, the right to receive and review information under the Public Information Act and the right to have the state governmental body to correct information which is found to be incorrect. These rules implement the requirements of Government Code, Chapter 559.

There were no comments received from the public on the proposed rules. Several comments were received from individuals and programs from within the department. The comments and the department's responses follow:

Comment: One commentor suggested that §1.501, concerning Right to Notice merely restates the requirements of Government Code, Chapter 559, and is not a necessary part of the department's rule, and in the interest of brevity and clarity should not be included in the department's rule.

Response: The department agrees with this comment. The section is simply a restatement of the requirements of law and is not required by the Administrative Procedure Act regarding the purpose of agency rules. Also this section is included in the department's policy and procedure for implementing the rule. The department has withdrawn the entire section from the department's rules.

Comment: Concerning the rules in general, several programs were concerned that the integrity of the department's official records would be affected if a person were allowed to request that the records be changed, and felt that these programs and records should be exempt from the rule.

Response: The department disagrees with the comments. The rule contains safeguards that protect the integrity of the department's official records. These rules apply only to forms submitted by individuals about the individuals, and only if the information is incorrect. For example, birth and death records do not fall within the rule because these records, while submitted on a form of this agency, and collected by this agency, are not submitted by the individuals to whom the record relates. Further, there are legal processes and other laws, and rules within the department that require records of this type to be changed only as allowed or required by law. Section 1.503(e) also clarifies that the department cannot alter or destroy an original agency record or document in its possession except as required or authorized by law. The rule also informs that it does not apply to information that was correct when submitted but as a result of intervening time and events is now incorrect. Examples of these would be, a change in name, age, professional credentials or licensure, or marital status. The department has other rules, policies and procedures for correcting this information. It is not necessary to exclude forms or programs from the rule if the rule is not otherwise applicable. No change was made as a result of these comments.

Comment: Concerning the rules in general, the department received several comments regarding the fiscal impact on state and local governments. The commentors indicated that there would be actual costs incurred in printing the notices and programming changes in the web sites, and the fiscal note did not take these costs into account.

Response: The fiscal impact of the law, and these rules implementing the law, on state and local government was determined by the Legislative Budget Board. The fiscal note to HB 1922 indicated "no significant fiscal impact on the state is anticipated". This statement was made based on information received from source agencies. The Texas Department of Health is specifically listed as one of the source agencies. from whom fiscal impact was requested. (See Fiscal Note, To: Honorable Bill Ratliff, Lt. Governor and Honorable James E. "Pete" Laney, Speaker of the House, From: John Keel, Director, Legislative Budget Board. Dated May 24, 2001.) At the time the rule was proposed no fiscal impact had been identified.

Upon further inquiry to the affected programs there will be a direct fiscal impact on the agency for the actual costs incurred in printing and mailing the notices and programming changes required to add the notice to the department's web sites. The exact amount has not been determined. Estimates from programs that will be most affected and who have reported the estimated increase of providing the notice by mail are in excess of $10,000 for the first fiscal year, and for each year thereafter until the notice has been incorporated into all pre-printed forms. However many of the programs did not provide estimated costs for providing the notice, so the estimated total cost to the entire department has not been determined. The comments required no change to the rule.

Comment: One commentor requested that the language of §1.502(c)(1), be modified to indicate that page and paragraph will only be required if known to the requestor.

Response: The department agrees with the comment and has included the suggested modification in the final rule.

The commentors were legal staff from within the Office of General Counsel and staff from department programs.

The new sections are adopted under the Health and Safety Code, §12.001(b)(1) under which the Board of Health has

authority to adopt rules for its procedure and performance of each duty imposed by law on the board, the department, or the commissioner.

§1.502. Individual's Right to Correction of Incorrect Information.

(a) An individual who finds that the information collected by and in the possession of the department on a form or through electronic media is incorrect, has a right to have the department correct the information. The individual has no right to change information that was correct when submitted, but is no longer correct. An individual cannot request a change on a form that is submitted by another individual, except when they have legal authority to act on behalf of the other individual.

(b) The individual must submit the correction request in writing to the program within the department that is in possession of the information. The program may be identified by correspondence received by the individual from the department, a request for public information from the individual, or the program to whom the form was submitted by the individual.

(c) The correction request must:

(1) specifically identify the program where the records are located and include the document name, and if known, the page and paragraph;

(2) specifically identify the information which the individual believes is incorrect;

(3) provide the department with sufficient information to establish that the information is incorrect and was incorrect at the time it was submitted by the individual; and

(4) provide the correct information.

§1.503. Correction Procedure.

(a) The program within the department will provide an acknowledgement of receipt of the correction request to the requesting individual within 10 days from the receipt of the request.

(b) The program with custody and control of the information will review the information identified by the individual as incorrect and determine whether the information is in fact incorrect in the department's record.

(1) If the department determines that the information is incorrect in an electronic record or form, an individual with authority to access the information will enter the correction into the record by electronic media, at or near the place where the incorrect information appears with the date, and reason for the correction, by whom the correction was requested, and by whom the correction was made.

(2) If the department determines that the information is incorrect in a paper record or form, an individual with authority to access the information will insert the information as submitted by the individual requesting the correction, along with an entry of the date, and the name of the individual inserting the correction.

(3) If the department determines that the information is correct, no correction will be made to the information, and no entry of the request for correction will be made in the department's record.

(c) The program or division within the department will notify the individual that the record is already correct or has been corrected and provide the individual with a copy of the corrected information.

(d) The department cannot charge or bill a requesting individual for correction of an incorrect record.

(e) The department cannot alter or destroy an original agency record or document in its possession except as required or authorized by law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2002.

TRD-200201121
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: March 14, 2002
Proposal publication date: December 14, 2001
For further information, please call: (512) 458-7236

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES
SUBCHAPTER K. EPILEPSY PROGRAM

The Texas Department of Health (department) adopts the repeal of §§37.211 - 37.224 and new §§37.211 - 37.222, concerning the Epilepsy Program. Sections 37.211 and 37.217 are adopted with changes to the proposed text as published in the November 9, 2001, issue of the *Texas Register* (26 TexReg 9007). Sections 37.212 - 37.216, and Sections 37.218 - 37.222 are adopted without changes and therefore the sections will not be republished.

In accordance with the requirements of the Government Code, §2001.039, the sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. The new rules reflect any required revision following the review as described in this preamble.

The department published a notice of Intent to Review for §§37.211 - 37.224 in the *Texas Register* on August 31, 2001 (26 TexReg 6736). No comments were received as a result of the publication of the notice.

Specifically, the new sections cover purpose; delegation of authority; definitions; recipient requirements; residency and residency documentation requirements; applications and eligibility date; financial criteria; limitations and benefits provided; participating providers; notice of intent to take actions and reconsideration; and notice and fair hearing.

The new rules define medical, financial, and residency requirements, benefits and limitations for applicants, the selection criteria and selection process for providers, and the reconsideration and fair hearing process.

No comments were received on the proposal during the comment period.

The following changes were made due to department staff comments to improve the accuracy of the sections.

Change: Concerning §37.211(b), the word "code" was capitalized to be consistent with the Health and Safety Code cite.

Change: Concerning §37.217(a), changes were made to reflect upcoming revisions to department policy regarding the publication of Requests for Proposals.

25 TAC §§37.211 - 37.224

The repeals are adopted under the Texas Health and Safety Code, §40.003, which provides the Texas Board of Health (board) with the authority to adopt rules to define the scope of the epilepsy program and the medical and financial standards for eligibility; 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.

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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Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: November 9, 2001
For further information, please call: (512) 458-7236

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25 TAC §§37.211 - 37.222

The new sections are adopted under the Texas Health and Safety Code, §40.003, which provides the Texas Board of Health (board) with the authority to adopt rules to define the scope of the epilepsy program and the medical and financial standards for eligibility; 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.

§37.211. General.

(a) Purpose. The purpose of this chapter is to establish rules for the Epilepsy Program. The authority for these rules is granted in the Texas Health and Safety Code, Chapter 40.

(b) Delegation of Authority. Under the Texas Health and Safety Code, Chapter 11, §11.013, the Board of Health (board) delegates to the Commissioner of Health (commissioner), or to the person acting as commissioner in the commissioner's absence, the authority to administer the Epilepsy Program, exclusive of rulemaking authority.

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

(1) Action -- A denial, termination, suspension or reduction of Epilepsy Program services or eligibility.

(2) Applicant -- An individual whose application for Epilepsy Program benefits has been submitted to a contracted provider and has not received a final determination of eligibility. This includes an individual whose application is submitted by a representative or person with legal authority to act for the individual.

(3) Board -- The Texas Board of Health.

(4) Commissioner -- The commissioner of the Texas Department of Health.

(5) Contracted Provider -- Any individual or entity with Epilepsy Program approval to furnish covered services to Epilepsy Program recipients.

(6) Department -- The Texas Department of Health.

(7) Epilepsy -- A chronic neurological condition characterized by abnormal electrical discharges in the brain manifested by two or more seizures. It is characterized by sudden, brief attacks of altered consciousness, motor activity, or sensory phenomena. Convulsive seizures are the most common form of attacks, but any recurrent seizure pattern is considered epilepsy.

(8) Fair hearing -- The informal hearing process the department follows under §37.219 of this title (relating to Notice and Fair Hearing).

(9) Final decision -- A decision that is reached by a decision maker after conducting a fair hearing under this title.

(10) Recipient -- An individual who is eligible to receive Epilepsy Program benefits.

(11) Reconsideration -- The administrative process the Epilepsy Program follows under §37.218 of this title (relating to Notice of Intent to Take Action and Reconsideration).

(12) Request for Proposal (RFP) -- A document intended to solicit proposals from interested parties which details qualifications and plans for provision of a specific service or range of services. Services may be targeted to a selected geographic area and/or special population group, or statewide coverage.

§37.217. Participating Providers.

(a) Selection of Service Providers. Providers are solicited and selected by a Request for Proposal (RFP) process. An organization may apply to become a contracted provider by responding to an RFP to participate in the Epilepsy Program that has been published in accordance with Texas Department of Health (department) policy. The RFP must be accompanied by documentation which is acceptable to the department and which is sufficient to demonstrate that the organization:

(1) can provide the range of medical, non-medical and support activities outlined in the RFP and deemed necessary by the department to effectively serve eligible persons in the designated geographic area;

(2) agrees to comply with the department's Uniform Grant Management Standards as promulgated by the State of Texas Governor's Office; and

(3) agrees to cooperate with the department in accordance with Texas Health and Safety Code, Chapter 40; Title 25 Texas Administrative Code §§37.211 - 37.222; and the Texas Family Code, §231.006.

(b) Provision of Services. Epilepsy Program services shall be furnished by providers under contract with the department.

(c) Suspension or Termination of Service Providers. Any contracted provider may be terminated or suspended from participation in the Epilepsy Program for any of the following reasons:

(1) providing false or misleading information regarding any participation criteria;

(2) a material breach of any contract or agreement with the Epilepsy Program;

(3) failure to maintain the participation criteria contained in subsection (a) of this section.

(d) Appeal of Termination or Suspension. A contracted provider may appeal a termination or a suspension through the department's reconsideration and fair hearings process, as contained in §37.218 of this title (relating to Notice of Intent to Take Action and Reconsideration) and §37.219 of this title (relating to Notice and Fair Hearing).

(1) The Epilepsy Program may not terminate program participation until a final decision is rendered under the department's reconsideration and fair hearing process.

(2) The Epilepsy Program shall not enter into, extend, or renew a contract or agreement with a contracted provider until a final decision is rendered under the department's reconsideration and fair hearings process.

(3) A contracted provider may not appeal a termination of a contract which results from limitations in appropriations or funding for covered services or benefits or which terminates under its own terms.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200201132
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: March 17, 2002
Proposal publication date: November 9, 2001
For further information, please call: (512) 458-7236

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CHAPTER 129. OPTICIANS' REGISTRY

25 TAC §129.4

The Texas Department of Health (department) adopts an amendment to §129.4 concerning the voluntary registration and regulation of dispensing opticians. Section 129.4 is adopted without changes to the proposed text as published in the November 9, 2001, issue of the *Texas Register* (26 TexReg 9015), and therefore the section will not be republished.

Specifically, the amendment covers fees and is necessary to implement provisions of House Bill 3465, 77th Legislature, 2001, which amended the Occupations Code, Chapter 352 (Opticians' Registry Act) to remove the cap on registration and renewal fees. Additionally, the amendment is necessary to increase fees in order to cover the costs of administering the program.

The following comments were received concerning the proposed section. Following each comment is the department's response and any resulting change(s).

Comment: Concerning §129.4(a)(3) and (4), one commenter opposed the increase in registration fees and recommends the increase should effect all occupations requiring registration or licensure.

Response: The department disagrees. The fees set out in §129.4 have not been increased since 1991, while the fees for other professions regulated by the department have been raised as needed during that time. No change was made as a result of this comment.

Comment: Concerning §129.4(a)(3) and (4), one commenter opposed the increase in registration fees because opticians who own and operate a business where contact lenses are dispensed must also have a permit to dispense contact lenses. The commenter also expressed concern over the fact that although the opticians' registry is voluntary, other regulations such as Medicaid reimbursement, make the registration necessary. This results in opticians having to hold multiple registrations or permits, each requiring separate fees. The commenter recommended dropping the registry altogether "because it never was able to help the Optical Profession."

Response: The department disagrees. The department is authorized and required under the Occupations Code, Chapter 352 (the Opticians' Registry Act) to issue a registration certificate to persons who apply and pay fees to be on the Opticians' Registry. The purpose of the registry is to provide a means by which the public can identify providers of ophthalmic dispensing services and products that meet minimum standards of competence. The schedule of fees for registration under the Opticians' Registry Act and the schedule of fees under the Contact Lens Prescription Act, Occupations Code, Chapter 353, include a discounted fee for persons who hold multiple registrations. No change was made as a result of the comment.

Comment: Concerning §129.4(a)(3) and (4), one commenter opposed the fee increase and recommended that a law should be passed prohibiting ophthalmologists from selling glasses.

Response: The department disagrees. The department is not authorized to pass laws. Its role is to implement legislation, once passed, such as the Opticians' Registry Act. No change was made as a result of the comment.

Comment: Concerning §129.4(a)(3) and (4), several commenters opposed the increase in fees.

Response: The department disagrees. The fees set out in §129.4(a)(3) and (4) represent the first fee increase since 1991 and are necessary to cover the costs of administering the Opticians' Registry Act. No change was made as a result of the comments.

Comment: Concerning §129.4(a)(3) and (4), one commenter recommended the department consider a smaller increase in fees.

Response: The department disagrees. The fees set out in §129.4(a)(3) and (4) represent the first fee increase since 1991 and are necessary to cover the costs of administering the Opticians' Registry Act. No change was made as a result of the comment.

Comment: Concerning §129.4(a)(3) and (4), one commenter opposed the fee increase and is concerned that increasing the fees will result in fewer opticians maintaining registration and revenue will continue to decrease. The commenter believes it is time to either license opticians or abolish the opticians' registry.

Response: The increase represents the first fee increase since 1991 and is necessary to cover the costs of administering the Opticians' Registry Act. The other recommendations made by the commenter would require legislative amendment to the Opticians' Registry Act. No change was made as a result of the comment.

Comment: Concerning §129.4(a)(3) and (4), one commenter expressed support for the rules.

Response: The department agrees. No change was made as a result of this comment.

The commenters were individuals who were generally not in favor of the rules and expressed concern regarding the increase in fees.

The amendment is adopted under Texas Occupations Code, Chapter 352, which provides the Board of Health (board) with the authority to adopt rules; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement 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.

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CHAPTER 130. CODE ENFORCEMENT REGISTRY

25 TAC §130.12, §130.20

The Texas Department of Health (department) adopts an amendment to §130.12 and new §130.20 concerning the registration of code enforcement officers. Section 130.20 is adopted with changes to the proposed text as published in the November 9, 2001, issue of the *Texas Register* (26 TexReg 9016). Section 130.12 is adopted without changes, and therefore the section will not be republished.

Specifically, the amendment covers requirements for registration renewal related to continuing education. The new section prescribes the continuing education requirements, including the number of hours; establishes an approved curriculum; and provides that the curriculum be taught by suitable public agencies and private entities. The Board of Health (board) is authorized by the Act, to adopt rules concerning the registration of code enforcement officers. The sections are necessary to implement House Bill 2437 (2001), which amended the Code Enforcement Officers' Registration Act, Texas Revised Civil Statutes, Article 4447bb (the Act).

The following comments were received concerning the proposed sections. Following each comment is the department's response and any resulting change(s).

Comment: One commenter supported adoption of the rules as proposed.

Response: The department agrees with the exception of the changes listed below. No change was made as a result of this comment.

Comment: Concerning §130.12(c)(1), one commenter expressed concern that 30 days (between the date of the renewal notice and date the registration expires) did not allow enough time for completion of the required continuing education.

Response: The department disagrees. The existing rules require that a renewal notice be sent at least 30 days prior to expiration. The continuing education, however, may be taken at any time during the 12 months preceding renewal. No change was made a result of the comment.

Comment: Concerning §130.20(f), one commenter expressed concern that no provision was made for continuing education courses previously approved by another licensing authority in similar subject areas.

Response: The department agrees and has amended the subsection accordingly.

Comment: Concerning §130.20(k)(2), one commenter requested that the language be clarified.

Response: The department agrees and has added a reference to the relevant subsection.

One individual who identified himself as a member of the Code Enforcement Association of Texas provided the comment in favor of the rules. The other two comments were received from individuals who were neither for nor against the rules in their entirety; however, they raised questions and offered comments for clarification purposes.

The amendment and new section are adopted under the Texas Revised Civil Statutes, Article 4447bb, which provides the board with the authority to adopt rules concerning continuing education for registered code enforcement officers and code enforcement officers in training; and the Health and Safety Code, §12.001, which provides the Board of Health (board) with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§130.20. Continuing Education.

(a) Each registered code enforcement officer and code enforcement officer in training must meet the renewal requirements set out in this section.

(b) Code enforcement officers in training who apply to upgrade prior to the expiration of their registration are not required to submit continuing education hours in order to upgrade.

(c) Each registered code enforcement officer and code enforcement officer in training must obtain and show proof of not less than six continuing education hours as set forth in this section within the twelve months preceding renewal of their registration, at least one hour of which must be in legal/legislative issues as provided in subsection (j)(12) of this section.

(d) Only continuing education activities conducted in accordance with this section shall be considered approved by the department and may be represented to the public as acceptable for registration renewal for registered code enforcement officers in Texas.

(e) Department approved continuing education activities for license renewal include the following:

(1) conferences;

(2) home-study training modules (including professional journals requiring successful completion of a test document);

(3) lectures;

(4) panel discussions;

(5) seminars;

(6) accredited college or university courses;

(7) video or film presentations with live instruction;

(8) field demonstrations;

(9) teleconferences; or

(10) other activities approved by the department.

(f) Only the following continuing education activities shall serve as a basis for registration renewal:

(1) approved by the department or its designee in accordance with this section; or

(2) approved by another professional regulatory agency in the State of Texas as acceptable continuing education for license renewal; and

(3) covering one or more of the curriculum areas listed in subsection (j) of this section.

(g) Continuing education activities must meet the following criteria if they are to be acceptable for continuing education credit:

(1) the activity must cover one or more of the curriculum areas listed in subsection (j) of this section;

(2) the activity must be conducted by an organization which is:

(A) an accredited college or university;

(B) a governmental agency, including local, state or federal agencies;

(C) an association with a membership of 25 or more persons, or it's affiliate; or

(D) a commercial education business;

(3) the activity must have a record keeping procedure which includes a register of who took the course and the number of continuing education units earned;

(4) the organization must implement procedures for verifying participant's attendance;

(5) the activity must be at least 50 minutes in length of actual instruction time. Round table discussions and more than one speaker for the total of 50 minutes per activity is permissible. No credit will be given for time used for other non-relevant activities; and

(6) the activity must be conducted in compliance with all applicable federal and state laws, including the Americans with Disabilities Act (ADA) requirements for access to activities.

(h) Organizations shall send, e-mail, or fax notification of upcoming continuing education to the department at least 15 days prior to the event which includes the:

(1) date(s) of the continuing education activity;

(2) time of the continuing education activity ;

(3) location of the continuing education activity;

(4) title of the activity; and

(5) name of the instructor(s).

(i) Commercial education businesses, in addition to the items listed in subsection (h) of this section, shall submit a request for approval on department forms; and shall not represent any course as approved until such approval is granted by the department in writing.

(j) The curriculum of an approved activity must include one or more of the following subjects:

(1) zoning and zoning ordinance enforcements;

(2) sign regulations;

(3) home occupations;

(4) housing codes and ordinances;

(5) building abatement;

(6) nuisance violations;

(7) abandoned vehicles;

(8) junk vehicles;

(9) health ordinances;

(10) basic processes of law related to code enforcement;

(11) professional, supervisory or management training related to the profession of code enforcement; or

(12) legislative or legal updates related to the profession of code enforcement.

(k) Documentation of continuing education activity shall be maintained by the organization for three years, including:

(1) a roster which shall include the following:

(A) name, address, phone number, code enforcement officer or code enforcement officer in training registration number, social security number (used to coordinate continuing education activity information with the department's records), and signature of the registrant; and

(B) number of continuing education hours earned by each individual;

(2) copy of notification and description of method transmitted to the department as required by subsection (h) of this section; and

(3) copies of all program materials sufficient to demonstrate compliance with this section.

(l) At the conclusion of the activity the organization shall distribute to those registered code enforcement officer and code enforcement officer in training who have successfully completed the activity a certificate of completion which shall include the name of the registrant; the name of the organization providing the training, the title of the activity; the date and location of the activity, and the continuing education hours earned. The certificate shall state "Approved in accordance with 25 Texas Administrative Code, §130.20 for code enforcement officer/code enforcement officer in training registration renewal in Texas." It shall include a breakdown of the hours earned on each topic listed under subsection (j) of this section.

(m) Each registered code enforcement officer and code enforcement officer in training shall collect and keep certificates of completion of approved courses. These certificates of completion will be used to document the attendance of a registered code enforcement officer or code enforcement officer in training at approved courses. The department will conduct random audits for compliance with this requirement.

(n) Failure to comply with the annual continuing education hour requirements for the registered code enforcement officer or code enforcement officer in training registration issued by the department will:

(1) result in suspension of a code enforcement officer or code enforcement officer in training registration until the necessary credits for continuing education are successfully completed; and

(2) require the registered code enforcement officer or code enforcement officer in training to make new application for registration as a code enforcement officer or code enforcement officer in training, if the registered code enforcement officer or code enforcement officer in training does not renew within one year after the original registration expired.

(o) The department may fail to accept any or all courses for registration renewal if an organization fails to file a timely notice of upcoming continuing education, fails to retain documentation related to the activity as required by this section, or fails to comply with any other requirements that are a basis for approval or that are a part of this subchapter.

(p) A registered code enforcement officer or code enforcement officer in training registration may file a written request for an extension of time for compliance with any deadline in this subsection. Such request for extension, not to exceed 30 days, shall be granted by the department if the registered code enforcement officer or code enforcement officer in training files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause includes, but is not limited to, extended illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

(q) Transition.

(1) Any course taught between September 1, 2001, and the effective date of these rules will be accepted by the Code Enforcement Officer Registration Program for renewals between September 1, 2002, and August 31, 2003, provided that the course:

(A) covers one or more of the subjects listed in subsection (j) of this section;

(B) is taught in Texas by an organization listed in subsection (g)(2) of this section; and

(C) provides each attendee with a certificate listing the number of contact hours earned.

(2) A continuing education course approved for registration renewal under this section must be taken in the 12 months immediately preceding renewal to be considered acceptable.

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 134. PRIVATE PSYCHIATRIC HOSPITALS AND CRISIS STABILIZATION UNITS

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §134.3

The Texas Department of Health (department) adopts an amendment to §134.3 concerning the regulation of private psychiatric hospitals and crisis stabilization units without changes to the proposed text as published in the November 9, 2001, issue of the *Texas Register* (26 TexReg 9018), and therefore the section will not be republished.

The amendment increases the license fee for private psychiatric hospitals. The license fee for an initial license or a renewal license is revised from the current fee of $10 per bed based upon the design capacity of the hospital with a minimum license fee of $200, to $15 per bed with a minimum license fee of $1,000. Health and Safety Code, §577.006(f) requires the department to annually review the fee schedules to ensure that the fees charged are based on the estimated costs to and level of effort expended by the department. The result of the review indicated that license fees must be increased to the maximum permitted by statute to help defray the cost of administering the private psychiatric hospital licensing program and investigating complaints.

No comments were received on the proposal during the comment period.

The amendment is adopted under Health and Safety Code, §577.006, concerning fees, and Health and Safety Code, §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 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.

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CHAPTER 169. ZOONOSIS CONTROL

SUBCHAPTER D. RIDING STABLE REGISTRATION PROGRAM

25 TAC §§169.81 - 169.89

The Texas Department of Health (department) adopts the repeal of §§169.81-169.89 concerning the regulation of riding stables without changes to the proposed text as published in the December 14, 2001, issue of the *Texas Register* (26 TexReg 10210), and therefore the sections will not be republished.

The General Appropriations Act, Senate Bill 685, passed by the 77th Legislature (2001), Chapter 248 of the Sessions Laws, amends the Texas Occupations Code, Chapter 2053. The amendment transfers the authority of regulation of riding stables from the department, the Texas Board of Health (board), and the commissioner of public health (commissioner) to the Texas Animal Health Commission (commission). Rulemaking authority previously delegated to the board is transferred to the commission. The Texas Animal Health Commission has adopted rules to supercede the department's rules. These new rules were published as adopted in the December 7, 2001, issue of the *Texas Register* (26 TexReg 10045), 4 TAC, Agriculture, Part 2. Texas Animal Health Commission, Chapter 48, Riding Stable Registration Program, §§48.1-48.9, and the rules became effective December 11, 2001.

No comments were received on this proposal during the comment period.

The repeals are adopted under the Texas Occupations Code, Chapter 2053; and Health and Safety Code, §12.001 which provides the board with the authority to adopt rules for its procedures and the performance of each 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.

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SUBCHAPTER F. REPTILE-ASSOCIATED SALMONELLOSIS

25 TAC §169.121

The Texas Department of Health (department) adopts new §169.121 concerning warnings retail pet stores must provide relating to reptile-associated salmonellosis with changes to the proposed text as published in the December 14, 2001, issue of the *Texas Register* (26 TexReg 10211).

Specifically, the new section will require retail pet stores to post signs and distribute warnings relating to reptile-associated salmonellosis to purchasers of reptiles. The signs and warnings are to be in accordance with the form and content designated by the department. The proposed new rule is required by Chapter 1228 of the 77th Texas Legislature (2001) which enacted §§81.351 - 81.353 of the Health and Safety Code.

The following comment was received concerning the proposed rules. Following the comment is the department's response and any resulting change(s).

Comment: Concerning §169.121(b), one commenter recommended that the department amend its required language for posters and written notices to precisely match those posters jointly developed in 1997 by the Centers for Disease Control and Prevention (CDC) and the Pet Industry Joint Advisory Council.

Response: The CDC's recommendations have been modified since 1997. The department is using language reflecting the CDC's current recommendations. No change was made as a result of this comment.

The department is making the following changes due to department staff comments.

Change: Concerning §169.121(b)(3)(C), age of children was changed from <1 to <5 years of age.

Change: Concerning §169.121(b)(3)(D), language was added to state that pet reptiles should not be kept in childcare centers.

The comments on the proposed rule received by the department during the comment period were submitted by a member of the Pet Industry Joint Advisory Council. The commenter was generally in favor of the rule in its entirety; however, they offered comments for clarification purposes and suggested modifying language concerning specific provisions in the rule.

The new section is adopted under the Health and Safety Code, Chapter 81, "Animal-Borne Diseases," §81.352, which provides the Texas Board of Health (board) with the authority to adopt a rule governing the form and content of the sign and written warning relating to reptile-associated salmonellosis; 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.

§169.121. Reptile-Associated Salmonellosis.

(a) The Health and Safety Code, §81.352, requires retail stores that sell reptiles to post warning signs and distribute written warnings regarding reptile-associated salmonellosis to purchasers in accordance with the form and content designated by the Texas Department of Health.

(b) The warning signs must meet the following guidelines.

(1) The sign must be a minimum of 8.5 x 11 inches with fonts that are clearly visible and readily draw attention to the notice.

(2) The signs must be prominently displayed at each location where reptiles are displayed, housed, or held.

(3) At a minimum, the contents of the sign must include the following recommendations for preventing transmission of *Salmonella* from reptiles to humans.

(A) Persons should always wash their hands thoroughly with soap and water after handling reptiles or reptile cages.

(B) Persons at increased risk for infection or serious complications of salmonellosis (e.g., children aged <5 years and immunocompromised persons) should avoid contact with reptiles.

(C) Pet reptiles should be kept out of households where children aged <5 years or immunocompromised persons live. Families expecting a new child should remove the pet reptile from the home before the infant arrives.

(D) Pet reptiles should not be kept in childcare centers.

(E) Pet reptiles should not be allowed to roam freely throughout the home or living area.

(F) Pet reptiles should be kept out of kitchens and other food-preparation areas to prevent contamination. Kitchen sinks should not be used to bathe reptiles or to wash their dishes, cages, or aquariums.

(4) The sign must also contain a statement that reptiles carry *Salmonella* bacteria, which can make people sick.

(c) The written warnings, such as fliers or pamphlets, must contain the same information and statements as required for the signs. The written warnings must also contain a statement that purchasers of reptiles can contact their local health department for questions pertaining to *Salmonella*.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. CAGING REQUIREMENTS AND STANDARDS FOR DANGEROUS WILD ANIMALS

25 TAC §169.131

The Texas Department of Health (department) adopts new §169.131 concerning the establishment of the caging requirements and standards for the keeping and confinement of dangerous wild animals with changes to the proposed text as published in the December 14, 2001, issue of the *Texas Register* (26 TexReg 10212).

The new section will ensure that a dangerous wild animal is kept and confined in a manner that protects and enhances the public's health and safety; prevents escape by the animal; and provides a safe, healthy, and humane environment for the animal. The new rule is required by Chapter 54 of the 77th Texas Legislature (2001), which enacted §§822.101- 822.116 of the Health and Safety Code.

The following comments were received concerning the proposed rules. Following each comment is the department's response and any resulting change(s).

Comment: Concerning §169.131(d)(3)(D)(iii), one commenter stated that brown bears have been classified in the same category as polar bears and should not be. The commenter also stated that brown bears do not require a constant water source.

Response: The department disagrees and all references used in drafting the standards suggest that all bears should have pools that they can use for cooling themselves. All references used listed brown bears separately from polar bears but provided for the same cage dimensions. The only differences were in the sizes of the pools. The draft requirements recognized this difference by providing smaller pools for brown bears than for polar bears. No change was made as a result of the comment.

Comment: In regard to the rules in general, three commenters suggested adding a subsection to include a caution sign at the entrance to the property stating "Warning - Dangerous Wild Animals Kept Here."

Response: The department agrees that the posting of a sign on the primary enclosure or perimeter barrier could be considered part of the caging standard. Posting on a property entrance would not necessarily be associated with the cage and, in some cases, might be a long distance from the animal's confinement area. This would not appear to be within the authority of the department for establishing caging standards. No change was made as a result of the comment.

Comment: Concerning §169.131(d)(l)(D)(iv), three commenters suggested changing §169.131(d)(l)(D)(iv) to read "(iv) Gorillas. For one animal the primary enclosure shall have a floor area of 300 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 200 square feet." The suggestion was to delete §169.131(d)(l)(D)(iv)(II) because it was already stated in §169.131(d)(1)(B).

Response: The department agrees and the referenced section concerning gorillas has been changed by deleting §169.131(d)(1)(D)(iv)(II).

Comment: Concerning §169.131(d)(2)(E), one commenter stated that coverings for felines were unnecessary with appropriate construction techniques.

Response: The department agrees that the comment is correct. The draft rules provide minimum caging standards, but do not spell out all options. There are alternative methods, such as electric fencing, water-filled moats, or specially constructed dry moats, that may meet or exceed the draft standards. Section 822.104 of the Health and Safety Code provides that the "animal registration agency may approve a deviation from the caging standards...". That provision should adequately cover alternative methods of caging; therefore, no change to the proposed rule was made as a result of the comment.

The comments on the proposed rule received by the department during the comment period were submitted by a member of the Animal Protection Institute, a member of the Association of Sanctuaries, and members of the Texas Humane Legislation Network. The commenters were generally in favor of the rule in its entirety; however, they offered comments for clarification purposes and suggested clarifying language concerning specific provisions in the rule.

The new section is adopted under Texas Health and Safety Code, Chapter 822, "Dangerous Wild Animals," §822.111, which provides the Texas Board of Health (board) with the authority to establish the caging requirements and standards for the keeping and confinement of dangerous wild animals; 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.

§169.131. Caging Requirements and Standards for Dangerous Wild Animals.

(a) Definitions.

(1) Key components of facilities for confining dangerous wild animals and restricting public contact with the animals are the primary enclosure and the perimeter fence.

(A) Primary enclosure - Any structure used to immediately restrict an animal to a limited amount of space, including a cage, pen, run, room, compartment, or hutch.

(B) Perimeter fence - A barrier surrounding the area containing the primary enclosure(s) that restricts public access to the area.

(2) Where specified in this section, primary enclosures for dangerous wild animals shall be equipped to provide for the protection and welfare of the animals and the safety of handlers and the public. Such equipment includes, but is not limited to.

(A) Safety entrance - A protected, secure area that can be entered by a keeper that prevents animal escape and safeguards the keeper, or a device that can be activated by a keeper that prevents animal escape and safeguards entry.

(B) Shelter, nest box, or den - A structure that protects the animal from the elements (weather conditions). Such structures may vary in size depending on the security and biological needs of the species. The structures are particularly described as follows.

(i) Shelter - A structure that provides protection from the elements and from extremes in temperature that are detrimental to the health and welfare of the animal. When vegetation and landscaping is available to serve as protection from the elements, access to a shelter shall also be provided during inclement weather conditions. Such shelter shall be attached to or adjacent to the primary enclosure.

(ii) Nest box or den - An enclosed shelter that provides a retreat area within, attached to, or adjacent to a primary enclosure of specified size, which shall provide protection from the elements and from extremes in temperature that are detrimental to the health and welfare of the animal.

(C) Elevated platform or perching area - A surface or structure, either natural or manmade, positioned above the floor or above the grade level of the primary enclosure that will provide a resting area for the animal(s).

(D) Gnawing and chewing items - Natural or artificial materials that provide for the health of teeth, so as to keep teeth sharp, remove tartar, and promote general oral hygiene. Gnawing items include, but are not limited to, logs and trees. Chewing items include, but are not limited to, woody stems, knuckle bones, and rawhide objects. Suitability is dependent upon species of animal.

(b) General Requirements.

(1) Primary enclosures for housing dangerous wild animals shall be sufficiently strong to prevent escape and to protect the animal from injury and shall be equipped with structural safety barriers to prevent any public contact with the animal. Structural barriers may be constructed from materials such as fencing, landscaping, or close-mesh wire, provided that materials used are safe and effective in preventing public contact.

(2) All primary enclosures less than 1,000 square feet shall be covered at the top to prevent escape.

(3) A perimeter fence, sufficient to deter entry by the public, shall be a minimum of 8 feet in height and shall completely surround the premises where animals are housed or exercised outdoors. Perimeter fences constructed of materials, such as chain link or welded wire, that allow objects to be passed through them shall be at least 3 feet from the primary enclosure or exercise area.

(c) Structural Requirements for Primary Enclosures. In addition to the size and equipment requirements for primary enclosures, dangerous wild animals shall be caged in accordance with the following requirements.

(1) All primary enclosures shall be equipped with a safety entrance. Such entrances shall include a double-door mechanism, interconnecting cages, a lock-down area, or other comparable devices that will prevent escape and safeguard the keeper. Safety entrances shall be constructed of materials that are of equivalent strength as that prescribed for cage construction for that particular species. The area occupied by the safety entrance shall be in addition to the space requirements for the primary enclosure.

(2) All primary enclosures constructed of chain link or other approved materials shall be well braced and securely anchored at or below ground level to prevent escape by digging or erosion. Metal clamps, ties, or braces used in the construction of enclosures shall be of strength equivalent to the material required for primary enclosure construction for the particular species.

(3) Additional minimum requirements for specific species and hybrids of those species shall be as follows.

(A) Chimpanzees, gorillas, and orangutans.

(i) Outdoor facilities - Construction material shall consist of steel bars, 2-inch galvanized pipe, masonry block, or their strength equivalent.

(ii) Indoor facilities - Potential escape routes shall be equipped with steel bars, 2-inch galvanized pipe, or equivalent.

(B) Baboons, jaguars, tigers, lions, leopards, cougars, cheetahs, bears, and hyenas.

(i) Outdoor facilities - Construction material shall consist of not less than 9-gauge chain link or equivalent.

(ii) Indoor facilities - Potential escape routes shall be equipped with wire or grating of not less than 9-gauge or equivalent.

(C) Ocelots, servals, lynxes, bobcats, caracals, coyotes, and jackals.

(i) Outdoor facilities - Construction material shall consist of not less than 12-gauge chain link or equivalent.

(ii) Indoor facilities - Potential escape routes shall be equipped with wire or grating not less than 12-gauge or equivalent.

(d) Primary Enclosure Size and Equipment Requirements. No dangerous wild animal shall be confined in any primary enclosure that contains more individual animals than specified in this section, is smaller in dimension than specified in this section, or is not equipped as specified in this section. The area occupied by pools, ponds, or lakes shall be in addition to the space requirements for the primary enclosure.

(1) Primates.

(A) In addition to species-related requirements of this section, each primary enclosure shall have accessible devices to provide physical stimulation or manipulation compatible with the species. Each device shall be noninjurious and may include, but is not limited to, boxes, balls, mirrors, or foraging items.

(B) Each primary enclosure shall have perching area(s) and shelter(s) that will accommodate all animals in the enclosure simultaneously.

(C) Each primary enclosure shall have horizontal and vertical climbing structures appropriate for the species.

(D) Requirements for specific primate species are as follows:

(i) Baboons. For one animal the primary enclosure shall have a floor area of 100 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 100 square feet.

(ii) Chimpanzees. For one animal the primary enclosure shall have a floor area of 200 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 100 square feet.

(iii) Orangutans. For one animal the primary enclosure shall have a floor area of 200 square feet with a wall or fence 10 feet high. For each additional animal primary enclosure size shall be increased by 200 square feet.

(iv) Gorillas. For one animal the primary enclosure shall have a floor area of 300 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 200 square feet.

(2) Wild felines.

(A) In addition to requirements of this section, each primary enclosure shall be equipped with a shelter(s)/nest box(es) large enough to accommodate all the animals in the enclosure simultaneously.

(B) Each primary enclosure shall have an accessible device to provide physical stimulation or manipulation compatible with the species. Such device shall be noninjurious and may include, but is not limited to, boxes, balls, bones, barrels, drums, rawhide materials, or pools. The area occupied by a pool shall be in addition to the space requirements for the primary enclosure.

(C) Each primary enclosure shall have an elevated platform large enough to accommodate all animals in the enclosure simultaneously.

(D) Each primary enclosure shall have a claw log.

(E) Requirements for specific species of wild felines are as follows:

(i) Lions, tigers, and cheetahs.

(I) For one animal the primary enclosure shall have a floor area of 300 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 150 square feet.

(II) Outdoor primary enclosures over 1,000 square feet (uncovered) shall have vertical jump walls at least 10 feet high with a 45 degree inward angle overhang 2 feet wide or jump walls at least 12 feet high without an overhang. The inward angle fencing shall be made of the same material as the vertical fencing.

(ii) Jaguars, leopards, and cougars.

(I) For one animal the primary enclosure shall have a floor area of 200 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 100 square feet.

(II) Jaguars, leopards, and cougars shall not be kept in uncovered enclosures.

(iii) Bobcats, lynxes, ocelots, caracals, and servals. For one animal the primary enclosure shall have a floor area of 80 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 40 square feet.

(3) Bears.

(A) In addition to the requirements of this section, each primary enclosure shall be equipped with a shelter(s) that shall accommodate all animals in the enclosure simultaneously.

(B) Each primary enclosure shall have an accessible device to provide physical stimulation or manipulation compatible with the species. Such device shall be noninjurious and may include, but is not limited to, boxes, balls, bones, barrels, drums, climbing apparatus, or foraging items.

(C) Each primary enclosure shall have an elevated platform(s) for resting.

(D) Requirement for specific types of bears are as follows:

(i) Sun bears.

(I) For one animal the primary enclosure shall have a floor area of 200 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 100 square feet.

(II) Each primary enclosure shall have, as a minimum, a 3-foot by 4-foot pool of water, 2 feet deep. The area occupied by the pool shall be in addition to the space requirements for the primary enclosure.

(ii) Black bears and Asiatic bears.

(I) For one animal the primary enclosure shall have a floor area of 300 square feet with a wall or fence 8 feet high. For each additional animal primary enclosure size shall be increased by 150 square feet.

(II) Each primary enclosure shall have, as a minimum, a 4-foot by 6-foot pool of water, 3 feet deep. The area occupied by the pool shall be in addition to the space requirements for the primary enclosure.

(iii) Brown bears and polar bears.

(I) For one animal the primary enclosure shall have a floor area of 400 square feet with a wall or fence 10 feet high. For each additional animal primary enclosure size shall be increased by 200 square feet.

(II) Each primary enclosure for brown bears shall have, as a minimum, a 6-foot by 10-foot pool of water, 4 feet deep. The area occupied by the pool shall be in addition to the space requirements for the primary enclosure.

(III) Each primary enclosure for polar bears shall have, as a minimum, a 10-foot by 10-foot pool of water, 5 feet deep. The area occupied by the pool shall be in addition to the space requirements for the primary enclosure.

(4) Coyotes and jackals.

(A) In addition to the requirements of this section, each primary enclosure shall be equipped with a shelter(s)/den(s) that shall accommodate all the animals in the enclosure simultaneously.

(B) Each primary enclosure shall have an accessible device to provide physical stimulation or manipulation compatible with the species. Such device shall be noninjurious and may include, but is not limited to, boxes, balls, bones, barrels, drums, rawhide materials, or pools. The area occupied by a pool shall be in addition to the space requirements for the primary enclosure.

(C) For one animal the primary enclosure shall have a floor area of 150 square feet with a wall or fence 6 feet high. For

each additional animal primary enclosure size shall be increased by 100 square feet.

(D) Each primary enclosure shall have an elevated platform large enough to accommodate all animals in the enclosure simultaneously.

(E) Uncovered outdoor primary enclosures over 1,000 square feet shall have vertical jump walls at least 8 feet high with a 45 degree inward angle overhang 2 feet wide or jump walls 10 feet high without an overhang. The inward angle fencing shall be made of the same material as the vertical fencing.

(5) Hyenas.

(A) For one animal the primary enclosure shall have a floor area of 200 square feet with a wall or fence 6 feet high. For each additional animal primary enclosure size shall be increased by 100 square feet.

(B) Each primary enclosure shall have an elevated platform large enough to accommodate all animals in the enclosure simultaneously.

(C) Outdoor primary enclosures over 1,000 square feet (uncovered) shall have vertical jump walls at least 8 feet high with a 45 degree inward angle overhang 2 feet wide or jump walls 10 feet high without an overhang. The inward angle fencing shall be made of the same material as the vertical fencing.

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 221. MEAT SAFETY ASSURANCE SUBCHAPTER B. MEAT AND POULTRY INSPECTION

25 TAC §§221.11 - 221.15

The Texas Department of Health (department) adopts amendments to §§221.11 - 221.15 concerning meat and poultry inspection. Sections 221.11 - 221.14 are being adopted with changes to the proposed text as published in the October 5, 2001, issue of the *Texas Register* (26 TexReg 7764). Section 221.15 is adopted without changes, and therefore will not be republished.

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 221.11 - 221.15 have been reviewed and the department has determined that the reasons for adopting the sections continue to exist; however, revisions to the rules were necessary.

The department published a Notice of Intention to Review §§221.11 - 221.14 in the *Texas Register* (24 TexReg 11542) on December 17, 1999. The department received no comments on these sections. A Notice of Intention to Review §221.15 was published in the April 27, 2001 issue of the *Texas Register* (26 TexReg 3229). No comments were received as a result of the publication of this notice.

The department is making the following changes due to staff comments to improve the accuracy of the section:

Change: Concerning §221.11(a)(34), the department adopts Title 9, Code of Federal Regulations (CFR), Part 424, "Preparation and Processing Operations". Requirements prescribed in 9 CFR, Part 424 were previously located in 9 CFR, Part 318, which has been adopted by the department. The United States Department of Agriculture amended Title 9, CFR, by moving certain requirements regarding preparation and processing operations from 9 CFR, Part 318 into new 9 CFR, Part 424. The department is adopting 9 CFR, Part 424 in order to continue to enforce requirements previously adopted.

Change: Concerning §221.13(b)(2)(B), the department corrects the erroneous reference to subsection (a)(2), when it should have referenced paragraph (2)(C). The erroneous reference is corrected in the final rule.

Change: Concerning §221.14(a)(4)(D)(v), the reference to paragraph (6) was changed to paragraph (6)(C) to clarify the intent of the section.

The following comment was received regarding the proposed sections. The commenter was Heifer Project International.

Comment: Concerning §221.12(b)(21)(A) and §221.12(b)(27), the commenter recommended that the exemption limit of 10,000 poultry or rabbits be separately applied to rabbits and poultry.

Response: The department disagrees. When the department established the 10,000 poultry or rabbit limitation for qualification as a low-volume producer to be exempt from inspection requirements, the intent was to allow small family farms to produce a low volume of product for sale. Producers slaughtering and selling more than 10,000 units per year should no longer be considered low-volume producers. Although the department did not specify how the 10,000 head limit would be calculated, the intent was to limit a small producer to 10,000 head per year regardless of the number of species produced. The department feels that if a producer slaughters more than 10,000 poultry, rabbits, or combination of poultry and rabbits, it would be cost effective to assign an inspector to ensure the safety of the product produced. A change was made to §221.12(b)(21)(A) and §221.12(b)(27) to clarify the department's intent to limit a small producer to 10,000 poultry, rabbits, or a combination thereof in a calendar year.

The amendments are adopted under the Health and Safety Code, §433.008, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 433; 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.

§221.11. Federal Regulations on Meat and Poultry Inspection.

(a) The Texas Department of Health (TDH) adopts by reference the following federal requirements in the Code of Federal Regulations (CFR), as amended:

(1) 9 CFR, Part 301, "Definitions";

(2) 9 CFR, Part 303, except 303.1(a) and (b), "Exemptions";

(3) CFR, Part 304, "Application for inspection; grant of inspection";

(4) 9 CFR, Part 305, "Official numbers; inauguration of inspection; withdrawal of inspection; reports of violation";

(5) 9 CFR, Part 306, "Assignment and authorities of program employees";

(6) 9 CFR, Part 307, "Facilities for inspection";

(7) 9 CFR, Part 309, "Ante-mortem inspection";

(8) 9 CFR, Part 310, "Post-mortem inspection";

(9) 9 CFR, Part 311, "Disposal of diseased or otherwise adulterated carcasses and parts";

(10) 9 CFR, Part 312, "Official marks, devices, and certificates";

(11) 9 CFR, Part 313, "Humane slaughter of livestock";

(12) 9 CFR, Part 314, "Handling and disposal of condemned or other inedible products at official establishments";

(13) 9 CFR, Part 315, "Rendering or other disposal of carcasses and parts passed for cooking";

(14) 9 CFR, Part 316, "Marking products and their containers";

(15) 9 CFR, Part 317, "Labeling, marking devices, and containers";

(16) 9 CFR, Part 318, "Entry into official establishments; reinspection and preparation of products";

(17) 9 CFR, Part 319, "Definitions and standards of identity or composition", TDH adds the following requirements, which shall apply except in the case of restaurant menus and signs.

(A) The label of products prepared from bison meat must contain the words "bison meat," "North American bison meat" or "Native American bison meat".

(B) The label of products prepared from buffalo meat must contain the words "water buffalo meat," or "Asian buffalo meat".

(18) 9 CFR, Part 320, "Records, registration, and reports";

(19) 9 CFR, Part 321, "Cooperation with States and territories";

(20) 9 CFR, Part 322, "Exports";

(21) 9 CFR, Part 325, "Transportation";

(22) 9 CFR, Part 327, "Imported products";

(23) 9 CFR, Part 329, "Detention; seizure and condemnation; criminal offenses";

(24) 9 CFR, Part 331, "Special provisions for designated States and Territories; and for designation of establishments which endanger public health and for such designated establishments";

(25) 9 CFR, Part 335, "Rules of practice governing proceedings under the Federal Meat Inspection Act";

(26) 9 CFR, Part 350, "Special services relation to meat and other products";

(27) 9 CFR, Part 352, "Exotic animals; voluntary inspection";

(28) 9 CFR, Part 354, "Voluntary inspection of rabbits and edible products thereof";

(29) 9 CFR, Part 355, "Certified products for dogs, cats and other carnivora; inspection, certification, and identification as to class, quality, quantity, and condition";

(30) 9 CFR, Part 362, "Voluntary poultry inspection regulations";

(31) 9 CFR, Part 381, "Poultry products inspection regulation", except §381.10(a)(3) through §381.10(c);

(32) 9 CFR, Part 416, "Sanitation";

(33) 9 CFR, Part 417, "Hazard Analysis and Critical Control Point (HACCP) Systems"; and

(34) 9 CFR, Part 424, "Preparation and Processing Operations."

(b) Copies of these regulations are indexed and filed in the Meat Safety Assurance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for public inspection during regular working hours.

§221.12. Meat and Poultry Inspection.

(a) Introduction. The purpose of this section is to protect the public health by establishing uniform rules to assure that meat and poultry products are clean, wholesome and truthfully labeled.

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

(1) Act--The Texas Meat and Poultry Inspection Act, Texas Civil Statutes, Article 4476-7.

(2) Adulterated--A carcass, part of a carcass, or a meat food product where:

(A) any part of it is the product of an animal that has died in a manner other than by slaughter;

(B) any part of it consists of a filthy, putrid, or decomposed substance or is for another reason unsound, unhealthy, unwholesome, or otherwise unfit for human food; or

(C) it contains, because of administration of any substance to a live animal or otherwise, an added poison or harmful substance that makes the carcass, part of the carcass, or meat food unfit for human food.

(3) Alternate source food animals -- Animals slaughtered and processed for food that are amenable to inspection under the Texas Meat and Poultry Inspection Act but are not amenable to inspection under the federal meat and poultry inspection acts.

(4) Bison--An animal known by the scientific name Bovidae bison bison, commonly known as the North American prairie bison; or an animal known by the scientific name Bovidae bison athabascae, commonly known as the Canadian woods bison.

(5) Bison meat -- The meat or flesh of a bison.

(6) Buffalo -- An animal known by the scientific name Bovidae bubalus bubalus, commonly known as the Asian Indian buffalo, water buffalo, or caraboa; an animal known by the scientific name Bovidae syncerus caffer, commonly known as the African buffalo or the Cape buffalo; an animal known by the scientific name Bovidae anoa depressicornis, commonly known as the Celebes buffalo; or an animal known by the scientific name Bovidae anoa mindorenis, commonly known as the Philippine buffalo or Mindoro buffalo.

(7) Buffalo meat -- The meat or flesh of a buffalo.

(8) Change in ownership--

(A) A change in the business organization operating the business which changes the legal entity responsible for operation of the business; or

(B) any change in control of the business; or

(C) any change in ownership of the business which requires a reapplication to the Texas Department of Health for a grant of inspection and/or custom exemption to operate.

(9) Commissioner--Commissioner of Health. The term secretary when used in 9 CFR, for the purposes of this subchapter, shall mean commissioner.

(10) Custom operations -- The slaughtering of livestock or the processing of an uninspected carcass or parts thereof for the owner of that livestock animal, carcass, or parts, or the selling of livestock to be slaughtered and processed by the purchaser on premises owned or operated by the seller for the exclusive use of the purchaser.

(11) Custom processor--A person who prepares meat food products from uninspected livestock carcasses or parts thereof for the owner of those carcasses or parts.

(12) Custom slaughterer--A person who slaughters livestock for the owner of the livestock animal for the exclusive use of the owner of the livestock or sells livestock to be slaughtered by the purchaser on premises owned or operated by the seller, for the exclusive use of the purchaser of the livestock.

(13) Department--Texas Department of Health.

(14) Director-- Meat Safety Assurance Division Director. The term Administrator, when used in 9 CFR, Parts 301-417, for the purpose of this section, shall mean director.

(15) Exotic animal--A member of a species of game not indigenous to this state, including an axis deer, nilgai antelope, or other cloven hoofed ruminant animal.

(16) Federal regulations--The regulations adopted by reference by the department in §221.11 of this title (relating to Federal Regulations on Meat and Poultry Inspection).

(17) Feral swine--Nondomestic descendants of domestic swine that have either escaped or were released and subsequently developed survival skills necessary to thrive in the wild. Some are out-crossed with "Russian boar."

(18) Game animals--Wild animals that are hunted for food or recreational purposes and for which the hunter must obtain a hunting license from the Texas Parks and Wildlife Department prior to hunting such animals.

(19) Grant of custom exemption--An authorization from the department to engage in a business of custom slaughtering and/or processing livestock for the owner of the livestock for the owner's personal use.

(20) Grant of inspection--An authorization from the department to engage in a business subject to inspection under the Act.

(21) Grant of poultry/rabbit exemption -- An authorization from the department for a person to engage in a very low volume business of slaughtering and processing poultry or rabbits of his/her own raising on his/her own property and personally distributing the carcasses and/or parts, to retail consumers, restaurants, or other retail establishments, provided that the following conditions are met:

(A) the person slaughters less than 10,000 poultry, rabbits, or a combination thereof, in a calendar year;

(B) the person does not buy and sell other poultry or rabbit products (except live chicks, baby rabbits, and/or breeding stock);

(C) only sound, healthy poultry or rabbits are slaughtered and all processes and handling are conducted under sanitary standards and procedures resulting in poultry and rabbit products that are not adulterated;

(D) the product bears the processor's name and address and the statement "Exempted P.L. 90-492"; (unless immediately sold to the household consumer); and

(E) the poultry is not a ratite.

(22) Heat-treated--Meat or poultry products that are ready-to-eat or have the appearance of being ready-to-eat because they received heat processing.

(23) Livestock--Cattle, sheep, swine, goats, horses, mules, other equines, poultry, domestic rabbits, exotic animals, or domesticated game birds.

(24) Person--Any individual, partnership, association, corporation, or unincorporated business organization.

(25) Poultry--A live or dead domesticated bird.

(26) Ratite -- Poultry such as ostrich, emus, or rhea.

(27) Very low volume poultry/rabbit processing establishments -- Producers that slaughter less than 10,000 poultry, rabbits, or a combination thereof, of their own raising each year.

(c) Grant of inspection, custom exemption, and/or poultry/rabbit exemption.

(1) Basic requirements.

(A) A person shall not engage in a business subject to the Act unless that person has met the standards established by the Act, the federal regulations as adopted by the department, and these sections, and has obtained the appropriate grant of inspection, custom exemption, and/or poultry/rabbit exemption issued by the department.

(B) A person shall not engage in custom operations unless that person has met the standards established by the Act, the federal regulations, and these sections, and has obtained a grant of custom exemption issued by the department.

(C) A person shall not engage in exempted poultry or rabbit slaughter and processing operations unless that person has met the standards established by the Act, the federal regulations, and these sections, and has obtained a grant of poultry/rabbit exemption issued by the department.

(2) Application. To apply for a grant of inspection, custom exemption, and/or poultry/rabbit exemption, a person shall complete department application forms which can be obtained from the Meat Safety Assurance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(3) Duration. The applicant who has complied with the standards in the Act, the federal regulations, and these sections will receive a grant of inspection, custom exemption, and/or poultry/rabbit exemption for an indefinite period subject to the denial, suspension, and revocation provisions in paragraph (6) of this subsection.

(4) Nontransferability. A grant of inspection, custom exemption, and/or poultry/rabbit exemption is not transferable to another person.

(5) Change of ownership. Any person operating a business under a grant of inspection, custom exemption, and/or poultry/rabbit exemption from the department shall notify the department of any change in ownership of that business and, in such event, shall relinquish the current grant to the department. The new owner shall make application for a new grant on forms provided by the department. This notification and application shall be made prior to the ownership change.

(6) Denial, suspension and revocation.

(A) The department may deny a grant of inspection, custom exemption, and/or poultry/rabbit exemption to any applicant who does not comply with the standards of the Act, the federal regulations, and these sections.

(B) The department may suspend or revoke a grant of inspection, custom exemption, and/or poultry/rabbit exemption of any person who violates the standards of the Act, the federal regulations, and these sections.

(C) A person whose grant has been denied, suspended, or revoked is entitled to an opportunity for a formal hearing in accordance with §§1.21-1.34 of this title (relating to Formal Hearing Procedures).

(d) Special fees for inspection services.

(1) Scope and purpose. Fees shall be charged by the department for inspection services provided on a holiday or on an overtime basis, and/or for products which do not require inspection by state or federal law.

(2) Overtime and holiday rate. The overtime and holiday rate for inspection services provided pursuant to Health and Safety Code, Chapter 433, §433.009, shall be $23 per hour, per program employee.

(3) Rate for inspections not required by state or federal meat and poultry inspection laws. The rate for inspections not required by state or federal meat and poultry inspection laws provided pursuant to Health and Safety Code, Chapter 433, §433.009, shall be $23 per hour, per program employee.

§221.13. Enforcement and Penalties.

(a) Administrative Penalties. The purpose of this section is to establish the criteria and procedures by which the commissioner of health will assess administrative penalties for violations relating to the provisions of the Act, these rules, and licenses and orders issued pursuant to the Act or the rules.

(1) Determining the amount of the penalty. In determining the amount of the penalty, the commissioner of health shall consider the criteria described in paragraphs (2) - (6) of this subsection.

(2) The seriousness of the violation.

(A) Violations shall be categorized by one of the following severity levels.

(i) Severity Level I covers violations that are most significant and have a direct negative impact on, or represent a threat to, the public health and safety and including, but not limited to, adulteration, misbranding, false representation, or false advertising that results in fraud.

(ii) Severity Level II covers violations that are very significant and have impact on the public health and safety including, but not limited to, adulteration, misbranding, false representation, or false advertising, that results in fraud.

(iii) Severity Level III covers violations that are significant and which, if not corrected, could threaten the public and have an adverse impact on the public health and safety, including, but not limited to, adulteration, misbranding, false representation, or false advertising that results in fraud.

(iv) Severity Level IV covers violations that are of more than minor significance, and if left uncorrected, would lead to more serious circumstances.

(v) Severity Level V covers violations that are of minor safety or fraudulent significance.

(B) The severity of a violation shall be increased if the violation involves deception or other indications of willfulness. In determining the severity of a violation, there shall be taken into account the economic benefit gained by a person through noncompliance.

(3) History of previous violations. The department may consider previous violations. The base penalty may be reduced or increased for past performance. Past performance involves the consideration of the following factors:

(A) how similar the previous violation was;

(B) how recent the previous violation was; and

(C) the number of previous violation(s) in regard to correction of the problem.

(4) Demonstrated good faith. The department may consider demonstrated good faith. The base penalty may be reduced if good faith efforts to correct a violation have been made, or are being made. Good faith effort shall be determined on a case by case basis and be fully documented.

(5) Hazard to the health and safety of the public. The department may consider the hazard to the health and safety of the public. The base penalty shall be increased when a direct hazard to the health and/or to the safety of the public is involved. It shall be taken into account, but need not be limited to, the following factors:

(A) whether any disease or injuries have occurred from the violation;

(B) whether any existing conditions contributed to a situation that could expose humans to a health hazard; or

(C) whether the consequences would be of an immediate or long range hazard.

(6) Other matters. The commissioner may consider other matters as justice may require.

(7) Levels of penalties.

(A) The Department will impose different levels of penalties for different severity level violations as follows:
Figure: 25 TAC §221.13(a)(7)(A)

(B) Each day a violation continues may be considered a separate violation.

(8) Assessment, payment, and refund procedures.

(A) The commissioner may assess an administrative penalty only after a person charged with a violation is given an opportunity for an administrative hearing. The hearing shall be in accordance with the Health and Safety Code, §433.095; the Government Code, Chapter 2001; and the department's formal hearing procedures in Chapter 1 of this title (relating to Texas Board of Health).

(B) Payment of an administrative penalty shall be in accordance with the provision of the Health and Safety Code, §433.096.

(C) Refund of an administrative penalty shall be in accordance with the provisions of the Health and Safety Code, §433.097.

(b) Criminal Penalties.

(1) Interference with inspection.

(A) A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with a livestock inspector while the inspector is performing a duty under the Act.

(B) An offense under this section is a Class B misdemeanor.

(C) It is a defense to prosecution under this section that the interruption, disruption, impediment, or interference alleged consisted of speech only.

(2) General.

(A) A person commits an offense if the person violates a provision of the Act or these rules for which these rules do not provide another criminal penalty.

(B) Except as provided by paragraph (2)(C) of this subsection, an offense under this section is punishable by a fine of not more than $1,000, imprisonment for not more than one year, or both.

(C) If an offense under this section involves intent to defraud or a distribution or attempted distribution of an adulterated article, except adulteration described by Health and Safety Code (HSC), §433.004(11), (12), or (13), the offense is punishable by a fine of not more than $10,000, imprisonment for not more than three years, or both.

(D) A person does not commit an offense under this section by receiving for transportation an article in violation of the Act if the receipt is in good faith and if the person furnishes, on request of a representative of the commissioner:

(i) the name and address of the person from whom the article is received; and

(ii) any document pertaining to the delivery of the article.

(E) This section does not require the commissioner to report for prosecution, or for institution of complaint or injunction proceedings, a minor violation of this chapter if the commissioner believes that the public interest will be adequately served by a suitable written warning notice.

(3) Injunction.

(A) If it appears that a person has violated or is violating the Act or a rule adopted under the Act, the commissioner may request the attorney general or the district attorney or county attorney in the jurisdiction where the violation is alleged to have occurred, is occurring, or may occur to institute a civil suit for:

(i) an order injoining the violation; or

(ii) a permanent or temporary injunction, a temporary restraining order, or other appropriate remedy, if the commissioner shows that the person has engaged in or is engaging in a violation.

(B) Venue for a suit brought under this section is in the county in which the violation occurred or in Travis County.

(C) The commissioner or the attorney general may recover reasonable expenses incurred in obtaining injunctive relief under this section, including investigation and court costs, reasonable attorney's fees, witness fees, and other expenses. The expenses recovered by the commissioner under this section may be used for the administration and enforcement of HSC, Chapter 433. The expenses recovered by the attorney general may be used by the attorney general for any purpose.

(4) Emergency Withdrawal of Mark or Suspension of Inspection Services.

(A) The commissioner or the commissioner's designee may immediately withhold the mark of inspection or suspend or withdraw inspection services if:

(i) the commissioner or the commissioner's designee determines that a violation of the Act or these rules presents an imminent threat to public health and safety; or

(ii) a person affiliated with the processing establishment impedes an inspection under this chapter, including, but not limited to, assaulting, threatening to assault, intimidating, or interfering with a department employee.

(B) An affected person is entitled to a review of an action of the commissioner or the commissioner's designee under subsection (a) in the same manner that a refusal or withdrawal of inspection services may be reviewed under HSC, §433.028.

(C) For purposes of this section only, the definition of imminent threat to public health and safety includes, but is not limited to:

(i) the establishment produced and shipped adulterated or misbranded product as defined under HSC, §433.004 and §433.005;

(ii) the establishment does not have a HACCP plan as specified in 9 CFR, §417.2;

(iii) the establishment does not have Sanitation Standard Operating Procedures as specified in 9 CFR, §416.11 and §416.12;

(iv) sanitary conditions are such that products in the establishment are or would be rendered adulterated under HSC, §433.004; or

(v) the establishment violated the terms of a regulatory control action as specified in HSC, §433.030, 9 CFR, §310.4, or 9 CFR, §416.6.

(D) This section in no way restricts or prohibits the department from taking action under HSC, Chapter 431, HSC, §433.008, the Federal Meat Inspection Act (21 USC 12), and the Poultry Products Inspection Act (21 USC 10) and the regulations adopted thereunder in §221.11 of this title (relating to Federal Regulations on Meat and Poultry Inspection).

§221.14. Custom Slaughter and Processing; Very Low Volume Poultry/Rabbit Slaughter Operations.

(a) Custom slaughter requirements. The requirements of this section shall apply to the custom slaughter by any person of livestock, as defined in §221.12(b) of this title (relating to Meat and Poultry Inspection), delivered by or for the owner thereof for such slaughter, not for sale to the public and exclusively for use, in the household of such owner, by him and members of his household and nonpaying guests. The requirements of this section do not apply to hunter killed game animals, hunter killed exotic animals, and hunter killed feral swine, as defined in §221.12(b) of this title.

(1) Animals for slaughter. No adulterated animals as defined in §221.12(b)(2) of this title shall be accepted for custom slaughter. Only healthy animals, exhibiting no abnormalities, may be accepted for custom slaughter at custom slaughter establishments. Unhealthy or unsound animals are those that exhibit any condition that is not normally expected to be exhibited in a healthy and sound member of that species.

(A) Examples of abnormal or unsound animals include, but are not limited to, animals that are not able to get up, or animals that have a missing or abnormal eye, swellings, rectal or vaginal prolapse, ocular or nasal discharge, a cough, or a limp.

(B) Animals that have an obviously recent break of the lower leg (below the stifle or elbow) and are able to walk and stand are not considered to be unsound or unhealthy if no other abnormal conditions are noted.

(2) Record keeping.

(A) Operators of facilities conducting custom slaughter shall keep records for a period of two years, beginning on January 1 of the previous year plus the current year to date.

(B) The records shall be available to Texas Department of Health (department) representatives on request.

(C) Custom slaughter records shall contain the name, address, and telephone number of the owner of each animal presented, the date the animal was slaughtered, the species and brief description of the livestock.

(D) Additional records that must be kept include records such as bills of sale, invoices, bills of lading, and receiving and shipping papers for transactions in which any livestock or carcass, meat or meat food product is purchased, sold, shipped, received, transported or otherwise handled by the custom slaughterer.

(E) If the custom slaughter establishment also maintains a retail meat outlet, separate records as listed in subparagraph (D) of this paragraph, shall be maintained for each type of business conducted at the establishment.

(3) Sanitary methods. Custom slaughter establishments shall be maintained in sanitary condition. Each custom slaughter establishment shall comply with all of the requirements of 9 CFR, Part 416, adopted under §221.11 of this title (relating to Federal Regulations on Meat and Poultry Inspection).

(4) Humane treatment of animals.

(A) Livestock pens, driveways, and ramps shall be maintained in good repair and free from sharp or protruding objects which may cause injury or pain to the animals. Floors of livestock pens, ramps, and driveways shall be constructed and maintained so as to provide good footing for livestock.

(B) A pen sufficient to protect livestock from the adverse climatic conditions of the locale shall be required at those establishments that hold animals overnight or through the day.

(C) Animals shall have access to water in all holding pens and, if held longer than 24 hours, access to feed. There shall be sufficient room in the holding pen for animals held overnight to lie down.

(D) Livestock is to be humanely slaughtered. The slaughtering of livestock by using captive bolt stunners, electrical stunners, and shooting with firearms, are designated as humane methods of slaughtering.

(i) The captive bolt stunners, electrical stunners, or deliver of a bullet or projectile shall be applied to the livestock in a manner so as to produce immediate unconsciousness in the animals before they are shackled, hoisted, thrown, cast, or cut. The animals shall be stunned in such a manner that they will be rendered unconscious with a minimum of excitement and discomfort.

(ii) The driving of animals to the stunning area shall be done with a minimum of excitement and discomfort to the animals. Delivery of calm animals to the stunning area is essential since accurate placement of stunning equipment is difficult on nervous or injured animals. Electrical equipment shall be minimally used with the lowest effective voltage to drive animal to the stunning area. Pipes, sharp or pointed objects, and other items which would cause injury or unnecessary pain to the animal shall be used to drive livestock.

(iii) Immediately after the stunning blow is delivered, the animals shall be in a state of complete unconsciousness and remain in this condition throughout shackling, sticking, and bleeding.

(iv) Stunning instruments must be maintained in good repair and available for inspection by a department representative.

(v) Inhumane treatment of animals shall be prohibited and any observed inhumane treatment of animals shall be subject to the tagging provisions of paragraph (6)(C) of this subsection.

(5) Containers used for product; paper in contact with product.

(A) To avoid contamination of product, containers shall be lined with suitable material of good quality before packing.

(B) Containers and trucks, or other means of conveyance in which any carcass or part is transported to the owner shall be kept in a clean and sanitary condition.

(C) Paper used for covering or lining containers and the cargo space of trucks, or other means of conveyance shall be of a kind which does not tear during use but remains intact and does not disintegrate when moistened by the product.

(6) Tagging insanitary equipment, utensils, rooms, and carcasses.

(A) A department representative may attach a "Texas Rejected" tag to any equipment, utensil, room, or compartment at a custom slaughter establishment that a department representative determines is insanitary and is a health hazard. No equipment, utensil, room, or compartment so tagged shall again be used until untagged or released by a department representative. Such tag so attached shall not be removed by anyone other than a department representative.

(B) A department representative that determines a carcass is adulterated, unfit for human food, is from an unhealthy or unsound animal, or could result in a health hazard, may attach a "Texas Retained" tag to the carcass and document the reason for attaching the tag on a form specified by the department and deliver the form to the operator of the establishment. The owner of the carcass shall be notified by the plant operator and advised of the potential health risk. The custom slaughterer shall ensure that the owner of the carcass either authorizes the voluntary destruction and denaturing of the carcass and all parts or agrees to remove the carcass from the custom slaughter establishment.

(C) Inhumane treatment of animals that is observed by a department representative shall result in the attaching of a "Texas Rejected" tag to the deficient equipment, facility structure, or the stunning area causing the inhumane treatment. No equipment, area, or facility

so tagged shall be used until untagged or released by the department representative.

(7) Marking and labeling of custom prepared products. Carcasses and parts therefrom that are prepared on a custom basis shall be marked at the time of preparation with the term "Not for Sale" in letters at least three-eighths inch in height, and shall also be identified with the owner's name or a code that allows identification of the carcass or carcass part to its owner. Ink used for marking such products must be labeled for such purpose. Ink containing FD&C Violet No. 1 shall not be used.

(8) Requirements concerning procedures.

(A) Heads from animals slaughtered by gunshot to the head shall not be used for food purposes. Such heads shall be denatured in accordance with paragraph (10) of this subsection and placed into containers marked "INEDIBLE." Heads with gunshot wounds may be returned to the owner only after they have been freely slashed and adequately denatured to preclude their use for human food.

(B) Cattle paunches and hog stomachs intended for use in the preparation of meat food products shall be emptied of their contents immediately upon removal from the carcass and thoroughly cleaned on all surfaces and parts.

(C) Carcasses shall not be adulterated, as defined in §221.12(b)(2) of this title, when placed in coolers.

(9) Requirements concerning ingredients. All ingredients and other articles used in the preparation of any carcass shall be clean, sound, healthful, wholesome, and will not result in the adulteration of the carcass. A letter of guaranty from the manufacturer stating that the ingredient or article is safe when used in contact with food shall be obtained by the custom slaughterer and made available upon request to the department representative.

(10) Denaturing procedures. Carcasses, parts thereof, meat and meat food products that are adulterated and/or not returned to the owner shall be adequately denatured or decharacterized to preclude their use as human food. Before the denaturing agents are applied, carcasses and carcass parts shall be freely slashed or sectioned. The denaturing agent must be mixed with all of the carcasses or carcass parts to be denatured, and must be applied in such quantity and manner that it cannot easily and readily be removed by washing or soaking. A sufficient amount of the appropriate agent shall be used to give the material a distinctive color, odor, or taste so that such material cannot be confused with an article of human food.

(b) Custom processing requirements. The requirements of this section shall apply to the custom processing by any person of uninspected livestock carcasses or parts, delivered by or for the owner thereof for such processing, not for sale to the public and exclusively for use, in the household of such owner, by him and members of his household and nonpaying guests. The requirements of this section shall not apply to processing hunter killed game animals, hunter killed exotic animals, and hunter killed feral swine as defined in §221.12(b) of this title.

(1) Carcasses and parts for processing. No adulterated carcasses or parts as defined in §221.12(b)(2) of this title shall be accepted for custom processing.

(2) Record keeping.

(A) Operators of facilities conducting custom processing shall keep records for a period of two years, beginning on January 1 of the previous year plus the current year to date.

(B) The records shall be available to the department representative on request.

(C) Custom processing records shall contain the name, address, and telephone number of the owner of each carcass or parts presented, the date the carcass or parts were delivered, the species and amount.

(D) Additional records such as bills of sale, invoices, bills of lading, and receiving and shipping papers for transactions in which any carcass, meat or meat food product is purchased, sold, shipped, received, transported or otherwise handled by the custom processor shall also be kept by the custom processor.

(E) If the custom processing establishment also maintains a retail meat outlet, separate records, as listed in subparagraph (D) of this paragraph, shall be maintained for each type of business conducted at the establishment.

(F) Temperature monitoring records shall be maintained by the custom processor, for heat treated or ready-to-eat products. These records shall include the temperature attained and time held during heating and the time and temperatures during the cool down process.

(3) Sanitary methods. Custom processing establishments shall be maintained in sanitary condition. Each custom processing establishment shall comply with the requirements of 9 CFR, Part 416, adopted under §221.11 of this title.

(4) Containers used for product; paper in contact with product.

(A) To avoid contamination of product, containers shall be lined with suitable material of good quality before packing.

(B) Containers and trucks, or other means of conveyance in which any product is transported to the owner shall be kept in a clean and sanitary condition.

(C) Boxes and any containers used as tote boxes shall be clean and stored off the floor in a manner that does not interfere with good sanitation.

(5) Tagging insanitary equipment, utensils, rooms, and carcasses.

(A) A department representative may attach a "Texas Rejected" tag to any equipment, utensil, room, or compartment at a custom processing establishment that a department representative determines is insanitary and is a health hazard. No equipment, utensil, room, or compartment so tagged shall again be used until untagged or released by a department representative. Such tag so attached shall not be removed by anyone other than a department representative.

(B) A department representative that determines a carcass is adulterated, unfit for human food, is from an unhealthy or unsound animal, or may be a health hazard, may attach a "Texas Retained" tag to the carcass and document the reason for attaching the tag on a form specified by the department and deliver the form to the operator of the establishment. The owner of the carcass shall be notified by the plant operator and advised of the potential health risk. The custom processor shall ensure that the owner of the carcass or parts either authorizes the voluntary destruction and denaturing of the carcass and all parts or agrees to remove the carcass from the custom processing establishment. Under no circumstances may the carcass be further processed at the establishment.

(6) Marking and labeling of custom prepared products.

(A) Products that are custom prepared must be packaged immediately after preparation and must be labeled with the term "Not For Sale" in lettering not less than three-eighths inch in height. Such custom prepared products or their containers shall also bear the owner's name and any additional labeling such as product cut or description.

(B) Safe handling instructions shall accompany every customer's raw or not fully cooked products. The information shall be in lettering no smaller than one-sixteenth of an inch in size and may be placed on each product package, each tote box or bag containing packaged product, or given as a flyer to the customer with the product. The safe handling instructions shall include the following or similar statements.

(i) "Some meat and meat products may contain bacteria that could cause illness if the product is mishandled or cooked improperly. For your protection, follow these safe handling instructions" shall be placed immediately after the heading and before the safe handling statements.

(ii) "Meat and poultry must be kept refrigerated or frozen. Thaw in refrigerator or microwave." However, any portion of this statement that is in conflict with the product's specific handling instructions may be omitted, e.g., instructions to cook without thawing. A graphic illustration of a refrigerator may be displayed next to this statement.

(iii) "Raw meat and poultry must be kept separate from other foods. Wash working surfaces including cutting boards, utensils, and hands after touching raw meat or poultry." A graphic illustration of soapy hands under a faucet may be displayed next to this statement.

(iv) "Meat and poultry must be cooked thoroughly. Ground meat products should be cooked to an internal temperature of 160 degrees Fahrenheit or until the juices run clear. Other meat products should be cooked so that the external temperature reaches 160 degrees Fahrenheit." A graphic illustration of a skillet may be displayed next to this statement.

(v) "Hot foods must be kept hot. Refrigerate leftovers immediately or discard." A graphic illustration of a thermometer may be displayed next to the statement.

(7) Requirements concerning procedures.

(A) Uninspected heads from custom slaughtered animals may not be sold or used in the preparation of meat food products unless prepared specifically for the owner of the animal for his personal use.

(B) Heads for use in the preparation of meat food products shall be split and the bodies of the teeth, the turbinates and ethmoid bones, ear tubes, and horn butts removed, and the heads then thoroughly cleaned.

(C) Bones and parts of bones shall be removed from product which is intended for chopping or grinding.

(D) Kidneys for use in the preparation of meat food products shall first be freely sectioned and then thoroughly soaked and washed.

(E) Clotted blood shall be removed from livestock hearts before they are used in the preparation of meat food products.

(F) Product shall not be adulterated as defined in §221.12(b)(2) of this title when placed in coolers or freezers.

(G) Frozen product may be defrosted in water or pickle in a manner that is not conducive to promoting bacterial growth or resulting in adulteration of the product.

(8) Requirements concerning ingredients.

(A) All ingredients and other articles used in the preparation of any product shall be clean, sound, healthful, wholesome, and otherwise such as to not result in adulteration of product. A letter of guaranty from the manufacturer stating that the ingredient or article is safe when used as an ingredient or in contact with food shall be obtained by the custom processor and made available upon request to the department representative.

(B) Ingredients for use in any product may not contain any pesticide chemical or other residues in excess of levels permitted under the Federal Food, Drug, and Cosmetic Act.

(9) Approval of substances for use.

(A) No substance may be used in the preparation of any product unless it is an FDA approved food additive.

(B) No product shall contain any substance which would render it adulterated.

(C) Nitrates shall not be used in curing bacon.

(i) Nitrites in the form of sodium nitrite may be used at 120 parts per million (ppm) ingoing (or in the form of potassium nitrite at 148 ppm ingoing) maximum for injected, massaged, or immersion cured bacon; and 550 ppm of sodium ascorbate or sodium erythorbate (isoascorbate) for injected, massaged, or immersion cured bacon shall be used.

(ii) Sodium or potassium nitrite may be used at 2 pounds to 100 gallons pickle at 10% pump level; 1 ounce to 100 pounds meat (dry cure).

(iii) Sodium ascorbate or sodium erythorbate (isoascorbate) may be used at 87.5 ounces to 100 gallons pickle at 10% pump level; 7/8 ounces to 100 pounds meat; or 10% solution to surfaces of cut meat.

(iv) Sodium nitrite shall not exceed 200 ppm ingoing or an equivalent amount of potassium nitrite (246 ppm ingoing) in dry cured bacon based on the actual or estimated skin-free green weight of the bacon belly.

(D) When curing products other than bacon, nitrites, nitrates, or combination shall not result in more than 200 ppm of nitrite in the finished product.

(i) Sodium or potassium nitrite may be used at 2 pounds to 100 gallons pickle at 10% pump level; 1 ounce to 100 pounds meat (dry cure); or 1/4 ounce to 100 pounds chopped meat and/or meat byproduct.

(ii) Sodium or potassium nitrate may be used at 7 pounds to 100 gallons pickle; 3 1/2 ounce to 100 pounds meat (dry cure); or 2 3/4 ounce to 100 pounds chopped meat. (Nitrates may not be used in bacon).

(10) Prescribed treatment of heat-treated meat and poultry products.

(A) All forms of fresh meat and poultry, including fresh unsmoked sausage and pork such as bacon and jowls are classified as products that are customarily well cooked in the home before being consumed. Therefore the treatment of such products for the destruction of pathogens is not required.

(B) Meat and poultry products, that are not customarily cooked or may not be cooked before consumption because they have the appearance of being fully cooked, must not contain pathogens.

(i) Heat-treated products and dry, semi-dry, and fermented sausages, that are less than three inches in diameter, are required to be heated to an internal temperature according to the following chart:
Figure: 25 TAC §221.14(b)(10)(B)(i)

(ii) Heat treated products and dry, semi-dry, and fermented sausages, that are more than three inches in diameter, are required to be heated to an internal temperature according to the following chart:
Figure: 25 TAC §221.14(b)(10)(B)(ii)

(iii) Heat treated products that must be stored under refrigerated temperatures must be cooled quickly to prevent bacterial growth. During cooling, the product's maximum internal temperature should not remain between 130 degrees Fahrenheit and 80 degrees Fahrenheit for more than 1 1/2 hours nor between 80 degrees Fahrenheit and 40 degrees Fahrenheit for more than 5 hours. Custom processors may slowly cool cured products in accordance with Food Safety and Inspection Services (FSIS) Directive 7110.3, Time/Temperature Guidelines for Cooling Heated Products.

(I) The FSIS Directive 7110.3 may be reviewed at the department's central headquarters, Meat Safety Assurance Division, 1100 West 49th Street, Austin, Texas 78756, or any department Regional Meat Safety Assurance Division Office or upon request from the department Meat Safety Assurance inspector.

(II) Copies of the FSIS Directive 7110.3 may be purchased from the Scientific Services, Meat and Poultry Inspection, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, D.C. 20250.

(iv) Custom processors not utilizing a heating step as described in clauses (i), (ii), and (iii) of this subparagraph must submit an alternate procedure, describing the method utilized in determining safety, to a department representative.

(v) Custom processors may produce heat-treated or ready-to-eat custom products, including chorizo, at temperatures other than those listed in clauses (i), (ii), and (iii) of this subparagraph when requested to do so by the owner of the product. The custom processor must obtain a signed statement from the owner of the product stating that the risks associated with eating under-cooked meat products are understood.

(C) When necessary to comply with the requirements of this section, the smokehouses, drying rooms, and other compartments used in the treatment of meat and poultry products to destroy pathogens shall be suitably equipped, by the operator of the custom processing establishment with accurate automatic recording thermometers.

(11) Denaturing procedures. Carcasses, parts thereof, meat and meat food products that are adulterated and/or not returned to the owner shall be adequately denatured or decharacterized to preclude their use as human food. Before the denaturing agents are applied, carcasses and carcass parts shall be freely slashed or sectioned. The denaturing agent must be mixed with all of the carcasses or carcass parts to be denatured, and must be applied in such quantity and manner that it cannot easily and readily be removed by washing or soaking. A sufficient amount of the appropriate agent shall be used to give the material a distinctive color, odor, or taste so that such material cannot be confused with an article of human food.

(c) Very low volume poultry/rabbit slaughter operations requirements. The requirements of this section shall apply to any person who slaughters and sells poultry, rabbits, or both, and qualifies as a very low volume slaughter operation, as defined in §221.12(b)(27) of this title.

(1) Animals for slaughter. No adulterated poultry or rabbits as defined in §221.12(b)(2) of this title shall be slaughtered for the purpose of selling its carcass or parts for food. Only healthy poultry and rabbits, exhibiting no abnormalities, may be slaughtered for sale as food. Unhealthy or unsound poultry and rabbits are those that exhibit any condition that is not normally expected to be exhibited in a healthy and sound member of that species. Examples of abnormal or unsound animals include, but are not limited to, animals that are not able to get up, or animals that have any swellings, rectal or vaginal prolapse, ocular or nasal discharge, a cough, or a limp.

(2) Record keeping.

(A) Operators of facilities conducting slaughter under the poultry/rabbit exemption shall keep records such as bills of sale, invoices, bills of lading, and receiving and shipping papers for transactions in which any livestock or carcass, meat or meat food product is purchased, sold, shipped, received, transported or otherwise handled for a period of two years, beginning on January 1 of the previous year plus the current year to date.

(B) The records shall be available to Texas Department of Health (department) representatives on request.

(3) Sanitary methods. Very low volume poultry/rabbit slaughter operations shall be maintained in sanitary condition. Each operator shall comply with all of the requirements of 9 CFR, §§416.11 - 416.16, adopted under §221.11 of this title.

(4) Tagging insanitary equipment, utensils, rooms, and carcasses.

(A) A department representative may attach a "Texas Rejected" tag to any equipment, utensil, room, or compartment at a very low volume poultry/rabbit slaughter establishment that a department representative determines is insanitary and is a health hazard. No equipment, utensil, room, or compartment so tagged shall again be used until untagged or released by a department representative. Such tag so attached shall not be removed by anyone other than a department representative.

(B) A department representative that determines a carcass is adulterated, unfit for human food, is from an unhealthy or unsound animal, or could result in a health hazard, may attach a "Texas Retained" tag to the carcass and document the reason for attaching the tag on a form specified by the department and deliver the form to the operator of the establishment. The unfit carcass may not be used as human food and must either be voluntarily destroyed and denatured or otherwise precluded from use as human food.

(5) Marking and labeling of products. Carcasses and parts therefrom that are prepared under a grant of limited inspection for low volume poultry and rabbit producers to be sold through an off premise retail outlet, shall be packaged and the container marked with the slaughterer's name and address and the term "Exempted P.L. 90-492" in letters at least one-quarter inch in height.

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 February 22, 2002.

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Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: October 5, 2001
For further information, please call: (512) 458-7236

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TITLE 28. INSURANCE

PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 126. GENERAL PROVISIONS APPLICABLE TO ALL BENEFITS

The Texas Workers' Compensation Commission (the commission) adopts amendments to §126.8 (relating to Commission Approved Doctor List) and repeal of §126.10 (relating to Commission Approved List of Designated Doctors) with changes to the proposed text published in the August 31, 2001 issue of the *Texas Register* (26 TexReg 6554).

As required by the Government Code §2001.033(1), the commission's reasoned justification for this rule is set out in this order which includes the preamble. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the reasons why the commission disagrees with some of the comments and proposals.

The only change made to the rules as proposed was to change the "sunset date" in §126.8(c) from August 1, 2003 to September 1, 2003. This change was made to coincide with the beginning of the new biennium. No changes were made to the proposed rule based upon public comments as none suggesting changes to the repeal or amendment were received in writing or at a public hearing held on October 1, 2001. The commission received one comment supporting the proposals and one comment asking a question regarding a statement in the proposal preamble.

House Bill 2600 (HB-2600), passed by the 77th Texas Legislature in its 2001 session, made numerous amendments to the Texas Labor Code. Many of these changes related to regulating medical benefit delivery by: changing the commission's ADL and application process (including mandated training); changing the grounds under which the commission can issue sanctions (as well as expanding the sanctions); adding a medical advisor to the commission staff and Medical Quality Review Panel (MQRP); and providing for expanded financial disclosure and prohibiting inappropriate referral fees, kickbacks, or other financial incentives.

To implement these changes, the commission examined its existing rules and found that most of the provisions relating to general regulation of doctors and health care are spread out among several chapters (126, 133, and 134 in particular). Given the scope of changes to be made and to simplify usage, the commission has moved these provisions to Chapter 180. The commission's medical advisor provided recommendations regarding these rules.

The amendments and additions proposed for Chapter 180 are based upon legislative changes provided in Articles 1 and 6 of HB-2600. Chief among the changes is that admission to the ADL now requires a doctor to apply and meet specified criteria. Prior to this change admission to the ADL was automatic upon receiving a license. Now doctors will be required to take training and register to be on the list. In addition, the Commission has been given the authority to deny or restrict admission based upon factors such as practice restrictions. Approved doctors will be issued certificates of registration that expire if re-training requirements are not met.

Another major change is that HB-2600 now mandates that doctors serving any role in the Texas workers' compensation system be on the ADL. In the past only treating doctors were required to be on the ADL. Doctors who are not on the ADL will be prohibited from performing services or receiving reimbursement in the Texas workers' compensation system (unless the commission grants an exception on a case by case basis or in an emergency or for immediate post-injury medical care).

HB-2600 also mandates that the commission set up modified training and registration requirements for certain types of doctors such as those who infrequently provide care in the Texas workers' compensation system or those who only perform peer reviews and utilization review (UR). Doctors from other states are permitted to be on the ADL. However, out of state doctors who review health care services (such as though utilization review or peer reviews) are required to be supervised by a doctor licensed in Texas.

HB-2600 requires that the commission collect information about treating doctors regarding return to work outcomes, patient satisfaction, and cost and utilization of health care in order to promote quality of care and best practices. The commission previously collected information on cost and utilization of care but this was based upon the person providing the care and who was not necessarily the treating doctor for the claim. This information will be important over time because HB-2600 makes major changes to the way the commission regulates doctors on the ADL.

As a simplification, HB-2600 mandates that the executive director of the commission remove doctors from the list who fail to meet registration requirements (including training), who are deceased, whose license to practice has been revoked, suspended, or not renewed by the appropriate licensing authority, or who requests to be removed. Previously, removal under these circumstances required commissioner approval.

The commission's authority to address activities not in full compliance with the law or not representative of quality care has been greatly expanded. Both the grounds for taking action and the actions the commission is authorized to take are broader than under the previous statute.

To help evaluate behavior by doctors and carriers (as relates to medical benefit delivery), HB-2600 created an official medical advisor position which is imbued with specific authority and responsibilities. Also created was the MQRP which functions to support the medical advisor in reviewing the conduct of doctors and carriers relating to medical benefit delivery.

Amendment to §126.8 -- Commission Approved Doctor List

Previous §126.8 was the rule that covered all issues associated with the ADL. The commission has moved all of the requirements for the ADL from previous §126.8 to new §180.20 (relating to

Commission Approved Doctor List) which sets out the requirements for being admitted to the ADL. In the amendment to §126.8 as proposed, subsections (a) and (b) were unchanged. However, in responding to the public comments, the commission realized that splitting the ADL requirements between two different rules made the rules harder to use. Therefore, in the adoption of §180.20, the commission incorporated the remaining features from §126.8 into §180.20 so that all the ADL provisions would be in one rule.

Section 126.8 will continue to be effective until September 1, 2003 (which is the date that doctors must fully comply with the new requirements of §180.20 if they wish to be added to or remain on the ADL). A new subsection (c) will "sunset" these provisions on September 1, 2003 unless the commission repeals the rule as redundant to §180.20 before that time. Should there appear to be any conflict between §126.8 and §180.20, the commission intends §180.20 to take precedence as it is more fully integrated with the new HB-2600 changes.

Subsections (d) through (h) which addressed deleting a doctor from the ADL, the doctor's opportunity for appeal, the doctor's ability to request reinstatement, and the way such a request will be handled have been deleted because these processes have been replaced by §180.26 (relating to Doctor and Insurance Carrier Sanctions) and §180.27 (relating to Sanctions Process/Appeals/Restoration/Reinstatement). Although the new ADL requirements will not be mandatory until September 1, 2003, the legislative provisions relating to sanctions were effective immediately. *Repeal of §126.10 -- Commission Approved List of Designated Doctors*

The commission adopts the repeal of §126.10 because the provisions of new §180.21 (relating to Commission Designated Doctor List), §180.26, and §180.27 replace it.

Comments supporting the proposed amendment to §126.8 and repeal of §126.10 were received from the following group: Insurance Council of Texas. In addition the commission received one comment from an individual asking a question regarding a statement in the proposal preamble.

Summaries of the comments and commission responses are as follows:

Comment: Commenter supported the adoption of proposed amendments to §126.8 and supported the adoption of the repeal of §126.10.

Response: Commission agrees.

Comment: In response to language in the preamble which stated that increased compliance should reduce overpayments caused by late reports from doctors one commenter asked whether late reports cause unnecessary treatment and asked for clarification.

Response: Late reports probably do not cause much unnecessary treatment to be provided however, late reports such as TWCC-69s and TWCC-73s can cause carriers to overpay TIBs when the carrier does not timely receive the report containing information showing that the employee is no longer entitled to income benefits.

28 TAC §126.8

The amended rule is adopted under the following statutes: the Texas Labor Code §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024 which provides the commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042 which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the commission; the Texas Labor Code §402.061 which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010 which authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §408.021 which states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.022 which address choice of treating doctor; the Texas Labor Code §408.023 which requires the commission to develop a list of approved doctors and lay out the requirements for being on the list; the Texas Labor Code §408.0231 which provides the commission with the responsibility for maintenance of the list, with the authority for imposing sanctions, and requires the commission to adopt rules; the Texas Labor Code §408.025 which requires the commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §413.002 which requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code §413.012 which requires the commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.013 which requires the commission by rule to establish a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services, and a program to increase the intensity of review; the Texas Labor Code §413.014 which requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request precertification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained or ordered by the commission; the Texas Labor Code §413.017 which establishes medical services to be presumed reasonable when provided subject to prospective, concurrent review and are authorized by the carrier; the Texas Labor Code §413.031 which establishes the right to access medical dispute resolution; the Texas Labor Code §413.041 which requires financial disclosure of financial interests by health care providers and their employers, which requires the commission to adopt federal standards prohibiting payment of acceptance of payment in exchange for health care referrals, and which prohibits payment to a provider during a period of noncompliance with disclosure requirements; the Texas Labor Code §413.0511 which creates the position of

medical advisor and imbues the position with certain responsibilities and authority; the Texas Labor Code §413.0512 which creates the Medical Quality Review Panel (MQRP) and grants it certain responsibilities and authority; certain responsibilities and authority; the Texas Labor Code §413.0513 which lays out confidentiality provisions relating to the MQRP. §414.007 which allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; and the Texas Labor Code §415.0035 which establishes administrative violations for repeated administrative violations.

The amended rule is adopted under the following statutes: the Texas Labor Code, §401.011, §401.024, §402.042, §402.061, §406.010,§408.021, §408.022, §408.023, §408.0231, §408.025, §413.002, §413.012, §413.013, §413.014, §413.017, §413.031, §413.041, §413.0511, §413.0512, §413.0513, §414.007, and §415.0035.

§126.8. Commission Approved Doctor List.

(a) On or after January 1, 1993, except in emergency situations, injured employees must receive medical treatment from a doctor on the commission approved doctor list (the list). This list initially includes all doctors licensed in Texas on or after January 1, 1993, and doctors licensed in other jurisdictions who have been added to the list by the commission.

(b) Doctors licensed in other jurisdictions may ask to be added to the list by submitting a written request containing information prescribed by the commission. Unless the doctor has been deleted from the list by the commission, a carrier shall not withhold reimbursement to doctors licensed in other jurisdictions when the only reason for nonpayment is that the doctor is not presently on the list.

(c) This section is no longer effective on or after September 1, 2003.

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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28 TAC §126.10

The repeal is adopted under the following statutes: the Texas Labor Code §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024 which provides the commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042 which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the commission; the Texas Labor Code §402.061 which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010 which authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §408.021 which states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.022 which address choice of treating doctor; the Texas Labor Code §408.023 which requires the commission to develop a list of approved doctors and lay out the requirements for being on the list; the Texas Labor Code §408.0231 which provides the commission with the responsibility for maintenance of the list, with the authority for imposing sanctions, and requires the commission to adopt rules; the Texas Labor Code §408.025 which requires the commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §413.002 which requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code §413.012 which requires the commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.013 which requires the commission by rule to establish a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services, and a program to increase the intensity of review; the Texas Labor Code §413.014 which requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request precertification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained or ordered by the commission; the Texas Labor Code §413.017 which establishes medical services to be presumed reasonable when provided subject to prospective, concurrent review and are authorized by the carrier; the Texas Labor Code §413.031 which establishes the right to access medical dispute resolution; the Texas Labor Code §413.041 which requires financial disclosure of financial interests by health care providers and their employers, which requires the commission to adopt federal standards prohibiting payment of acceptance of payment in exchange for health care referrals, and which prohibits payment to a provider during a period of noncompliance with disclosure requirements; the Texas Labor Code §413.0511 which creates the position of medical advisor and imbues the position with certain responsibilities and authority; the Texas Labor Code §413.0512 which creates the Medical Quality Review Panel (MQRP) and grants it certain responsibilities and authority; certain responsibilities and authority; the Texas Labor Code §413.0513 which lays out confidentiality provisions relating to the MQRP; the Texas Labor Code §414.007 which allows the review of referrals from the Medical

Review Division by the Division of Compliance and Practices; and the Texas Labor Code §415.0035 which establishes administrative violations for repeated administrative violations.

The repeal is adopted under the following statutes: the Texas Labor Code, §§401.011, §401.024, §402.042, §402.061, §406.010,§408.021, §408.022, §408.023, §408.0231, §408.025, §413.002, §413.012, §413.013, §413.014, §413.017, §413.031, §413.041, §413.0511, §413.0512, §413.0513, §414.007, and §415.0035.

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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Susan Cory
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Texas Workers' Compensation Commission
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CHAPTER 133. GENERAL MEDICAL PROVISIONS

SUBCHAPTER A. GENERAL RULE FOR REQUIRED REPORTS

28 TAC §133.3, §133.4

The Texas Workers' Compensation Commission (the commission) adopts repeal of §133.3 (relating to Responsibilities of Treating Doctor) and of §133.4 (relating to Consulting and Referral Doctors). The proposed repeal was published in the August 31, 2001 issue of the *Texas Register* (26 TexReg 6577).

As required by the Government Code §2001.033(1), the commission's reasoned justification for repeal of these rules is set out in this order which includes the preamble. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the reasons why the commission disagrees with some of the comments and proposals.

House Bill 2600 (HB-2600), passed by the 77th Texas Legislature in its 2001 session, made numerous amendments to the Texas Labor Code. Many of these changes related to regulating medical benefit delivery by: changing the commission's approved doctor list (ADL) and application process (including mandated training); changing the grounds under which the commission can issue sanctions (as well as expanding the sanctions); adding a Medical Advisor to the commission staff and Medical Quality Review Panel (MQRP); and providing for expanded financial disclosure and prohibiting inappropriate referral fees, kickbacks, or other financial incentives.

To implement these changes, the commission examined its existing rules and found that most of the provisions relating to general regulation of doctors and health care are spread out among several chapters (126, 133, and 134 in particular). Given the scope of changes to be made and to simplify usage, the commission has moved these provisions to Chapter 180. The commission's Medical Advisor provided recommendations regarding these rules.

The amendments and additions proposed for Chapter 180 are based upon legislative changes provided in Articles 1 and 6 of HB-2600. Chief among the changes is that admission to the ADL now requires a doctor to apply and meet specified criteria. Prior to this change, admission to the ADL was automatic upon receiving a license. Now doctors will be required to take training and register to be on the list. In addition, the Commission has been given the authority to deny or restrict admission based upon factors such as practice restrictions. Approved doctors will be issued certificates of registration that expire if re-training requirements are not met.

Another major change is that HB-2600 now mandates that doctors serving any role in the Texas workers' compensation system be on the ADL. In the past, only treating doctors were required to be on the ADL. Doctors who are not on the ADL will be prohibited from performing services or receiving reimbursement in the Texas workers' compensation system (unless the commission grants an exception on a case by case basis or in an emergency or for immediate post-injury medical care).

HB-2600 also mandates that the commission set up modified training and registration requirements for certain types of doctors such as those who infrequently provide care in the Texas workers' compensation system or those who only perform peer reviews and utilization review (UR). Doctors from other states are permitted to be on the ADL. However, out of state doctors who review health care services (such as though utilization review or peer reviews) are required to be supervised by a doctor licensed in Texas.

HB-2600 requires that the commission collect information about treating doctors regarding return to work outcomes, patient satisfaction, and cost and utilization of health care in order to promote quality of care and best practices. The commission previously collected information on cost and utilization of care but this was based upon the person providing the care and who was not necessarily the treating doctor for the claim. This information will be important over time because HB-2600 makes major changes to the way the commission regulates doctors on the ADL.

As a simplification, HB-2600 now mandates that the Executive Director of the commission remove doctors from the list who fail to meet registration requirements (including training), who are deceased, whose license to practice has been revoked, suspended, or not renewed by the appropriate licensing authority, or who requests to be removed. Previously, removal under these circumstances required commissioner approval.

The commission's authority to address activities not in full compliance with the law or not representative of quality care has been greatly expanded. Both the grounds for taking action and the actions the commission is authorized to take are broader than under the previous statute.

To help evaluate behavior by doctors and carriers (as relates to medical benefit delivery), HB-2600 created an official Medical Advisor position that is imbued with specific authority and responsibilities. Also created was the MQRP which functions to support the Medical Advisor in reviewing the conduct of doctors and carriers relating to medical benefit delivery.

Previous §133.3 set out the general responsibilities of treating doctors and previous §133.4 set out the general responsibilities of consulting and referral doctors. As part of the commission's effort to consolidate information on the various roles that a doctor can play in the system and the responsibilities associated with these roles, the commission has repealed §§133.3 and 133.4. The provisions of previous §§133.3 and 133.4 are replaced by §180.22 (relating to Health Care Provider Roles and Responsibilities).

Comments supporting the proposed repeal of §133.3 and §133.4 were received from the following group: the Insurance Council of Texas. In addition the commission received several comments from an individual on language in the proposal preamble but not the rule repeals themselves.

Summaries of the comments and commission responses are as follows:

Comment: Commenter supported repeal of §133.3 and §133.4.

Response: Commission agrees.

Comment: In response to language in the preamble which stated that some doctors offer improper inducements to employees, one commenter asked why the commission hasn't taken enforcement action against these providers in the past.

Response: Prior to the adoption of this rule, there was no prohibition against providing many inducements. Therefore the commission did not have the authority to take enforcement action in response to many of the types of inducements that the rule now defines as improper.

Comment: The preamble noted that the increased ability of the commission to hold carriers responsible for their actions and inactions should result in improved compliance and, as a result, payments of medical bills may be more timely and accurate while disputes may be reduced. In response to this language, one commenter asked whether the commission will be more responsive to the medical community "before they all leave the work comp arena?"

Response: The commission endeavors to be responsive to all system participants. The commission works with a group of stakeholders who were involved in the development of HB-2600 which included health care provider representation. In addition, the Medical Quality Review Panel will help ensure that the commission has access to medical expertise that can help it make decisions about medical issues.

Comment: The preamble noted that to the extent that the commission is able to change utilization and return to work patterns (e.g. by changing behavior or by removing doctors who won't change behavior), costs shall be reduced. One commenter suggested that it "should scare the medical community to see that the commission would write something like this. There are a few bad apples and the TWCC is driving out the good ones."

Response: The commission agrees that efforts to control system participants who operate outside of acceptable standards (all system participants, not just providers) may hamper those who wish to operate within acceptable standards. However, these rules should assist the commission in setting processes to more easily identify outliers in system participant behavior and attempt to correct their behavior without hampering other providers.

Comment: Commenter commenting on the fiscal impact statement from the proposal preamble noted that providers are small business owners that pay for workers' compensation insurance.

Response: The commission agrees that many providers are small businesses. The costs in the workers' compensation system that drive up workers' compensation premiums are of concern to small businesses as well as larger businesses. The changes in these rules will benefit all employers who participate in the workers' compensation system.

The repeals are adopted under: the Texas Labor Code §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024 which provides the commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042 which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the commission; the Texas Labor Code: §402.061 which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010 which authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §408.021 which states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.022 which address choice of treating doctor; the Texas Labor Code §408.023 which requires the commission to develop a list of approved doctors and lay out the requirements for being on the list; the Texas Labor Code §408.0231 which provides the commission with the responsibility for maintenance of the list, with the authority for imposing sanctions, and requires the commission to adopt rules; the Texas Labor Code, §408.025 which requires the commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §413.002 which requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code §413.012 which requires the commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.013 which requires the commission by rule to establish a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services, and a program to increase the intensity of review; the Texas Labor Code §413.014 which requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request precertification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health

care provider and either obtained or ordered by the commission; the Texas Labor Code §413.017 which establishes medical services to be presumed reasonable when provided subject to prospective, concurrent review and are authorized by the carrier; the Texas Labor Code §413.031 which establishes the right to access medical dispute resolution; the Texas Labor Code §413.041 which requires financial disclosure of financial interests by health care providers and their employers, which requires the commission to adopt federal standards prohibiting payment of acceptance of payment in exchange for health care referrals, and which prohibits payment to a provider during a period of noncompliance with disclosure requirements; the Texas Labor Code §413.0511 which creates the position of Medical Advisor and imbues the position with certain responsibilities and authority; the Texas Labor Code §413.0512 which creates the Medical Quality Review Panel (MQRP) and grants it certain responsibilities and authority; certain responsibilities and authority; the Texas Labor Code §413.0513 which lays out confidentiality provisions relating to the MQRP; the Texas Labor Code §414.007, which allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; and the Texas Labor Code §415.0035 which establishes administrative violations for repeated administrative violations.

The repeals are adopted under the following statutes: the Texas Labor Code, §§401.011, §401.024, §402.042, §402.061, §406.010,§408.021, §408.022, §408.023, §408.0231, §408.025, §413.002, §413.012, §413.013, §413.014, §413.017, §413.031, §413.041, §413.0511, §413.0512, §413.0513, §414.007, and §415.0035.

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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Susan Cory
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Texas Workers' Compensation Commission
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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES AND PAYMENTS

SUBCHAPTER B. DISCLOSURE BY HEALTH CARE PROVIDER OF FINANCIAL INTEREST IN REFERRED PROVIDER

28 TAC §134.100, §134.101

The Texas Workers' Compensation Commission (the commission) adopts repeal of §134.100 (relating to Provider Disclosure of Financial Interest, Submission to the commission) and §134.101 (relating to Provider Disclosure of Financial Interest, Submission to the Carrier). The proposed repeal was published in the August 31, 2002 issue of the *Texas Register* (26 TexReg 6580).

As required by the Government Code §2001.033(1), the commission's reasoned justification for repeal of these rules is set out in this order which includes the preamble. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the reasons why the commission disagrees with some of the comments and proposals.

House Bill 2600 (HB-2600), passed by the 77th Texas Legislature in its 2001 session, made numerous amendments to the Texas Labor Code. Many of these changes related to regulating medical benefit delivery by: changing the commission's approved doctor list (ADL) and application process (including mandated training); changing the grounds under which the commission can issue sanctions (as well as expanding the sanctions); adding a Medical Advisor to the commission staff and Medical Quality Review Panel (MQRP); and providing for expanded financial disclosure and prohibiting inappropriate referral fees, kickbacks, or other financial incentives.

To implement these changes, the commission examined its existing rules and found that most of the provisions relating to general regulation of doctors and health care are spread out among several chapters (126, 133, and 134 in particular). Given the scope of changes to be made and to simplify usage, the commission has moved these provisions to Chapter 180. The commission's Medical Advisor provided recommendations regarding these rules.

The amendments and additions adopted in Chapter 180 are based upon legislative changes provided in Articles 1 and 6 of HB-2600. Chief among the changes is that admission to the ADL now requires a doctor to apply and meet specified criteria. Prior to this change, admission to the ADL was automatic upon receiving a license. Now doctors will be required to take training and register to be on the list. In addition, the commission has been given the authority to deny or restrict admission based upon factors such as practice restrictions. Approved doctors will be issued certificates of registration that expire if re-training requirements are not met.

Another major change is that HB-2600 now mandates that doctors serving any role in the Texas workers' compensation system be on the ADL. In the past, only treating doctors were required to be on the ADL. Doctors who are not on the ADL will be prohibited from performing services or receiving reimbursement in the Texas workers' compensation system (unless the commission grants an exception on a case by case basis or in an emergency or for immediate post-injury medical care).

HB-2600 also mandates that the commission set up modified training and registration requirements for certain types of doctors such as those who infrequently provide care in the Texas workers' compensation system or those who only perform peer reviews and utilization review (UR). Doctors from other states are permitted to be on the ADL. However, out of state doctors who review health care services (such as though utilization review or peer reviews) are required to be supervised by a doctor licensed in Texas.

HB-2600 requires that the commission collect information about treating doctors regarding return to work outcomes, patient satisfaction, and cost and utilization of health care in order to promote quality of care and best practices. The commission previously collected information on cost and utilization of care but this was

based upon the person providing the care who was not necessarily the treating doctor for the claim. This information will be important over time because HB-2600 makes major changes to the way the commission regulates doctors on the ADL.

As a simplification, HB-2600 mandates that the Executive Director of the commission remove doctors from the list who fail to meet registration requirements (including training), who are deceased, whose license to practice has been revoked, suspended, or not renewed by the appropriate licensing authority, or who requests to be removed. Previously, removal under these circumstances required commissioner approval.

The commission's authority to address activities not in full compliance with the law or not representative of quality care has been greatly expanded. Both the grounds for taking action and the actions the commission is authorized to take are broader than under the previous statute.

To help evaluate behavior by doctors and carriers (as relates to medical benefit delivery), HB-2600 created an official Medical Advisor position that is imbued with specific authority and responsibilities. Also created was the MQRP which functions to support the Medical Advisor in reviewing the conduct of doctors and carriers relating to medical benefit delivery.

The change made by HB-2600 that motivates the repeal of §134.100 and §133.101 involves the provision for the commission to adopt requirements for financial disclosure that are similar to the federal standards.

Previous §134.100 sets out the general requirements for notification of financial interest to the commission. Previous §134.101 set out the general requirements for notification of financial interest to the carrier. As part of the commission's effort to consolidate key rules relating to health care provider regulation, §§134.100 and 134.101 have been repealed. New §180.24 (relating to Financial Disclosure) and §180.25 (relating to Improper Inducements Influence and Threats) will replace the requirements previously contained in §134.100-134.101.

No comments either supporting or opposing the proposed repeals of §134.100 or §134.101 were received. However, the commission did receive several comments from an individual on language in the proposal preamble though not the rule repeals themselves.

Summaries of the comments and commission responses are as follows:

Comment: The proposal preamble noted that among the benefits that health care providers would receive from adopting these rules was dealing with carrier doctors who "will be better trained" which "should reduce unnecessary disputes (both prospective and retrospective)." Commenter interpreted this as a bias of the commission towards carriers.

Response: Under the new rules in Chapter 180, carrier-selected doctors are now required to be trained in workers' compensation issues and therefore will be better trained than they were previously. The preamble was not stating that carrier-selected doctors are better trained in general than other doctors (such as those who provide treatment).

Comment: Commenter suggested that the reductions in costs would not result in any benefit to employers since "there is no way to force the carriers to pass the savings on to the consumers as noted in MFG preamble!"

Response: The commission disagrees. Workers' compensation premiums are set in accordance with regulations by the Texas Department of Insurance (TDI) and they include consideration of claim costs. If claims costs are reduced sufficiently, premium rates should be reduced.

The repeals are adopted under the following statutes: the Texas Labor Code, §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024 which provides the commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042 which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the commission; the Texas Labor Code §402.061 which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010 which authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §408.021 which states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.022 which address choice of treating doctor; the Texas Labor Code §408.023 which requires the commission to develop a list of approved doctors and lay out the requirements for being on the list; the Texas Labor Code §408.0231 which provides the commission with the responsibility for maintenance of the list, with the authority for imposing sanctions, and requires the commission to adopt rules; the Texas Labor Code §408.025 which requires the commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §413.002 which requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code §413.012 which requires the commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.013 which requires the commission by rule to establish a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services, and a program to increase the intensity of review; the Texas Labor Code §413.014 which requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request precertification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained or ordered by the commission; the Texas Labor Code §413.017 which establishes medical services to be presumed reasonable

when provided subject to prospective, concurrent review and are authorized by the carrier; the Texas Labor Code §413.031 which establishes the right to access medical dispute resolution; the Texas Labor Code §413.041 which requires financial disclosure of financial interests by health care providers and their employers, which requires the commission to adopt federal standards prohibiting payment of acceptance of payment in exchange for health care referrals, and which prohibits payment to a provider during a period of noncompliance with disclosure requirements; the Texas Labor Code §413.0511 which creates the position of Medical Advisor and imbues the position with certain responsibilities and authority; the Texas Labor Code §413.0512 which creates the Medical Quality Review Panel (MQRP) and grants it certain responsibilities and authority; certain responsibilities and authority; the Texas Labor Code §413.0513 which lays out confidentiality provisions relating to the MQRP; the Texas Labor Code §414.007 which allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; and the Texas Labor Code §415.0035 which establishes administrative violations for repeated administrative violations.

The repeals are adopted under the following statutes: the Texas Labor Code, §401.011, §401.024, §402.042, §402.061, §406.010, §408.021, §408.022, §408.023, §408.0231, §408.025, §413.002, §413.012, §413.013, §413.014, §413.017, §413.031, §413.041, §413.0511, §413.0512, §413.0513, §414.007, and §415.0035.

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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Susan Cory
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CHAPTER 180. COMPLIANCE AND PRACTICES

The Texas Workers' Compensation Commission (the commission) adopts amendments to §180.1 and §180.7 and new §180.2 and §§180.20 - 180.27 with changes to the proposed text published in the August 31, 2001 issue of the *Texas Register* (26 TexReg 6589).

The adoption includes changing the title of chapter 180 to "Monitoring & Enforcement" to reflect the broader nature of the subject matter and because monitoring and enforcement activities are shared among different parts of the agency and are not only concentrated in the Compliance and Practices Division.

As required by the Government Code §2001.033(1), the commission's reasoned justification for this rule is set out in this order which includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the reasons why the commission disagrees with some of the comments and proposals.

The *Texas Register* published text shows the adopted language and should be read to determine all revisions. Changes made to the proposed rules are in response to public comment received in writing and at a public hearing held on October 1, 2001, and are described herein, including those based upon further review by staff, including the Medical Advisor, and in the summary of comments and responses section of this preamble. Other changes were made to better line up the effective date of some of provisions with the next legislative session, to clarify intent, to better match statutory provisions, to improve consistency and to correct typographical or grammatical errors. Changes in the proposed text are found in every rule and are described in the overview of the rules and the responses to the public comments.

House Bill 2600 (HB-2600), passed by the 77th Texas Legislature in its 2001 session, made numerous amendments to the Texas Labor Code. Many of these changes related to regulating medical benefit delivery by: changing the commission's approved doctor list (ADL) and application process (including mandated training); changing the grounds under which the commission can issue sanctions (as well as expanding the sanctions); adding a Medical Advisor to the commission staff and a Medical Quality Review Panel (MQRP), and providing for expanded financial disclosure and prohibiting inappropriate referral fees, kickbacks, or other financial incentives.

To implement these changes, the commission examined its existing rules and found that most of the provisions relating to general regulation of doctors and health care are spread out among several chapters (126, 133, and 134 in particular). Given the scope of changes to be made and to simplify usage, the commission has moved these provisions to chapter 180.

In doing this, though many of the rules in chapter 180 are technically "new rules," most of them relocate provisions that the commission had in place in other chapters. This preamble identifies the previous rules that have been replaced and discusses the way the adopted rules differ from them.

The amendments and additions to chapter 180 are based upon legislative changes made in Articles 1 and 6 of HB-2600 and the commission's Medical Advisor provided recommendations on them. Chief among the changes is that admission to the ADL now requires a doctor to apply and meet specified criteria. Prior to this change, admission to the ADL was automatic upon receiving a license. Now doctors will be required to take training and register to be on the list. In addition, the commission has been given the authority to deny or restrict admission based upon factors such as practice restrictions. Approved doctors will be issued certificates of registration that expire if re-training requirements are not met.

HB-2600 mandates that doctors serving any role in the Texas workers' compensation system be on the ADL. In the past, only treating doctors were required to be on the ADL. Doctors who are not on the ADL will be prohibited from performing services or receiving reimbursement in the Texas workers' compensation system (unless the commission grants an exception on a per claim basis, or in an emergency or for immediate post-injury medical care).

HB-2600 also mandates that the commission set up modified training and registration requirements for certain types of doctors such as those who infrequently provide care in the Texas workers' compensation system or those who only perform peer reviews and utilization review (UR). Doctors from other states are permitted to be on the ADL. However, out of state doctors who review health care services (such as through utilization review or peer reviews) are required to be supervised by a doctor licensed in Texas.

HB-2600 requires that the commission collect information about treating doctors regarding return to work outcomes, patient satisfaction, and cost and utilization of health care in order to promote quality of care and best practices. The commission previously collected information on cost and utilization of care but this was based upon the person providing the care and who was not necessarily the treating doctor for the claim. This information will be important over time because HB-2600 made major changes to the way the commission regulates doctors on the ADL.

As a simplification, HB-2600 mandates that the Executive Director remove doctors from the list who fail to meet registration requirements (including training), who are deceased, whose license to practice has been revoked, suspended, or not renewed by the appropriate licensing authority, or who request removal. Previously, removal under these circumstances required commissioner approval.

The commission's authority to address activities not in full compliance with the law or not representative of quality care has been greatly expanded. Both the grounds for taking action and the actions the commission is authorized to take are broader than under the previous statute.

To help evaluate behavior by doctors and carriers (as relates to medical benefit delivery), HB-2600 created an official Medical Advisor position that is imbued with specific authority and responsibilities. Also created was the MQRP which functions to assist the Medical Advisor in reviewing the conduct of doctors and carriers relating to medical benefit delivery. This preamble and these rules sometimes reference the MQRP. These references are not always to the entire membership of the MQRP. The role of the MQRP is to assist and make recommendations to the Medical Advisor as directed by the Medical Advisor. This may mean that the Medical Advisor may choose to use only some members of the MQRP on a given issue.

As another measure to control costs, HB-2600 requires the commission to adopt a definition of financial interest consistent with analogous federal regulations and to adopt the federal standards that prohibit the payment or acceptance of payment in exchange for referrals.

HB-2600 clarifies the commission's enforcement authority with regard to violations of the statute and commission rules that don't carry a specific violation class. For example, Texas Labor Code §408.027 requires carriers to pay or dispute medical bills within 45 days but doesn't specify what class administrative violation it is if a carrier fails to meet this requirement. The language in Article 6 of HB-2600 clarifies that actions such as this constitute administrative violations and that they are subject to enforcement action by the commission.

It is these mandates that are the primary motivation for the changes adopted in chapter 180. The commission has placed the existing rules in chapter 180 under the general subchapter heading "General Rules For Enforcement." The changes to this newly labeled subchapter include: amendments to §180.1 (relating to Definitions); addition of §180.2 (relating to Referrals); and amendments to §180.7 (relating to Date Administrative Violation Deemed to Have Occurred; Establishing Willful Violations).

Subchapter B entitled "Medical Benefits Regulation" has been added. Within this subchapter the commission has relocated concepts previously contained in rules in chapters 126, 133, and 134 relating to the ADL, the Designated Doctor List (DDL), financial disclosure, and the responsibilities of treating, referral, and consulting doctors. Specifically, the commission has adopted eight new rules in this subchapter: §180.20 relating to Commission Approved Doctor List; §180.21 relating to Commission Designated Doctor List; §180.22 relating to Health Care Provider Roles and Responsibilities; §180.23 relating to Commission Required Training for Doctors/Certification Levels; §180.24 relating to Financial Disclosure; §180.25 relating to Improper Inducements, Influence and Threats; §180.26 relating to Doctor and Insurance Carrier Sanctions; and §180.27 relating to Sanctions Process/Appeals/Restoration/Reinstatement.

These rules replace all or parts of previous §126.8 (relating to Commission Approved Doctor List), §126.10 (relating to Commission Approved List of Designated Doctors), §133.3 (relating to Responsibilities of Treating Doctor), §133.4 (relating to Consulting and Referral Doctors), §134.100 (relating to Provider Disclosure of Financial Interest, Submission to the Commission), and §134.101 (relating to Provider Disclosure of Financial Interest, Submission to the Carrier). Amendment and repeal of those rules are included in separate preambles.

Taken together these amendments and newly adopted rules provide a number of benefits. One of the key intents of HB-2600, and thus, these rules, is to ensure that employees have access to doctors who will provide timely quality care that is designed to cure or relieve the effects naturally resulting from the compensable injury, promote recovery, and/or enhance the ability of the employee to return to or retain employment. The commission expects that employees will see improvements in these areas as a result of the new rules. The exceptions provided for some out-of-state and low-volume doctors should help ensure employee access to quality health care.

The training relating to MMI and impairment should provide a number of benefits to the system as a whole. Employees should receive more accurate impairment ratings and this will ensure that they get the benefits they are entitled to. More accurate impairment ratings should also reduce disputes and this should reduce the number of employee exams required and reduce delays in employees receiving their benefits. Disputes relating to MMI date should also be reduced because doctors will be better educated on how to certify MMI. Reducing disputes and extra examinations will reduce costs to the system.

Studies have shown that employees who remain off of work longer are less likely to ever return to work at wages approaching those they were earning while injured. The emphasis on timely return to work in the training that doctors will receive should result in fewer employees remaining off of work longer than medically appropriate. As a result, the long-term impact of injuries on employees should be lessened.

Currently carriers utilizing the medical opinions of doctors who are not fully trained in Texas workers' compensation law often interrupt employees' medical care. By educating peer review and utilization review doctors, disputes that affect benefit delivery

may be avoided. Reductions in disputes should improve medical benefit delivery, lower frustration, and speed recovery. Education and training of doctors should result in faster resolution of disputes.

Doctors will similarly benefit from these rules in a number of ways. As noted, carrier-selected doctors will be better trained in the requirements of the Texas workers' compensation system than they were in the past. This should reduce unnecessary disputes (both prospective and retrospective). With costs currently very high and rising, action by some carriers designed to address noncompliant doctors may be affecting some doctors who are compliant. To the extent that the commission is able to reduce the number of noncompliant doctors (e.g. by getting them to change their behavior or by removing the doctors who won't change), the remaining doctors should experience increased efficiencies in the handling of their claims. In addition, these doctors are likely to see an increase in their workers' compensation business.

Currently some doctors offer improper inducements to employees in order to get the employees to change doctors. Often the doctors who are doing this are the doctors who keep employees off work longer than medically necessary and otherwise add to system costs by overutilizing care. The prohibition of improper inducements and the efforts to remove noncompliant doctors should also increase workers' compensation business for those who comply with system rules and regulations.

Another benefit to providers is that the commission's ability to sanction carriers for quality of care issues is expanded by these rules. The increased ability to hold carriers responsible for their actions and inactions should result in improved compliance and, as a result, payments of medical bills may be more timely and accurate while disputes may be reduced.

One of the other key intents of HB-2600 was to control costs and these rules will help further that end. Insurance carriers and employers will benefit from the lower costs that will come as the system transitions from using an open list of approved doctors to using a controlled list of doctors specially trained in Texas workers' compensation. Prior to HB-2600, the commission's ability to exclude or otherwise limit doctors from participation in the system was limited. The system has seen workers' compensation costs (both indemnity and medical costs) rise significantly, especially when compared to costs in other states. To the extent that the commission is able to change utilization and return to work patterns (e.g. by changing behavior or by removing doctors who won't change behavior), costs shall be reduced and this may enable carriers to reduce premiums. This will both benefit employers already in the system and may attract more employers to the system, thus increasing customers for the carriers.

Costs may be controlled in a number of other ways. With full financial disclosure, carriers will be able to give extra scrutiny to medical services provided through a self-referral by the doctor. Though these services may be reasonable and necessary, doctors who self-refer have an additional incentive to make the referral and thus additional scrutiny may be appropriate. Similarly, prohibitions against improper inducements should ensure that only those benefits that the employee is truly entitled to are delivered.

In addition, the commission's expanded ability to remove doctors from the system should help increase compliance with the statute and rules. This should reduce claim costs by reducing overpayments of income benefits sometimes caused by late reports by doctors.

The new rules should promote earlier returns to work which provide benefits to carriers and employers through reducing indemnity benefit costs. However employers should also benefit from earlier returns to work because they should reduce the loss of productivity that an injury can cause.

Amendment to §180.1 - Definitions

Amendments to §180.1 add new definitions and amend previous definitions.

A broad definition of "conviction" or "convicted" is adopted to ensure that a relevant conviction (including those resulting from procedures such as plea agreements) can be used as grounds for sanction of a doctor. The intent is that the conduct for which a person is convicted serves as the grounds for the sanction not the fact that there was a conviction. Regardless of whether or not there is a conviction by jury or judge, if it is determined that the conduct occurred and is relevant, it can be used by the commission to issue sanctions.

This definition was clarified to show that any type of conviction is still a conviction until and unless overturned on appeal. Again, it is the relevant conduct that the commission intends to make the basis of action not the conviction itself. The conviction is merely evidence of the conduct. If the conviction is overturned, then that means that it can not be relied upon to prove that the conduct occurred. But until and unless it is overturned, it can be used.

"Emergency" is defined by reference to the definition in §133.1 of this title (relating to Definitions for chapter 133) to maintain consistency with other commission rules.

The terms "willful," "intentional," and "knowingly" are defined in the rule rather than referencing the Texas Penal Code as in the previous rule. There is no definition of "willful" in the penal code. Therefore, one has been added to make that term effective. "Willfully" is defined as "knowingly or intentionally". An act is willful even if it was originally accidental, if it continues after the person was made aware of the noncompliance. The definitions of intentional and knowingly remain consistent to their definitions in the penal code but are set out in this rule for easier reference (though the definition of "intentionally" needed a slight change because it referred to a "subsection" which was accidentally copied over from the Texas Penal Code but not applicable here). In addition, the commission added a note to the rule that explains that different spellings of the terms "willful" and "willfully" have the same meaning. The proposed definition did not specify who provides the notice under "willfully." Therefore the definition was modified to say that it comes from the commission or other regulatory authority. The commission intends to be able to use the term to characterize conduct outside of the workers' compensation system as well as within it.

The definition of "Significant Violation" differentiates between violations that require recommending deletion from the ADL and violations that the commission can address through other sanctions.

The definition of "Uncorrected Pattern of Practice" has been added as one of the ways a violation can be deemed to be a "Significant Violation." The definition was modified slightly based upon a comment to state that the notice from the commission has to be in writing.

The definition of "Continued noncompliance" helps differentiate between a violation where the act was tied to a specific period and a violation that is continuing (thus requiring some action or change in behavior to bring conduct out of continued noncompliance or into compliance). The definition was simplified slightly based upon comment.

Based on comments, definitions were added for "Frivolous" (used in §180.26), and "Immediate post-injury medical care" (used in a number of the rules).

Other definitions include: "Abusive Practice," "Administrative Law Judge" (which was clarified to explain that for the purpose of these rules the term includes commission hearing officers and appeals panel judges), "Agent," "Charged Person," "Compliance," "Controlled Substances," "Noncompliance or Noncompliant Act," "Pattern of Practice," "Rules," "Remuneration," "SOAH," "System Participant," "Violation," and "Violator."

New §180.2 - Referrals

New §180.2 provides that any person may make a referral to the commission for fraudulent acts or omissions, for issues relating to quality of care by health care providers and insurance carriers, and for other violations of the Texas Workers' Compensation Act or commission rules. The rule was clarified slightly to better differentiate between carrier and provider referrals relating to quality of care. For insurance carriers the provisions now apply to carriers paying for or approving health care that is not reasonable and necessary and also apply to carriers failing to approve and pay for reasonable and necessary health care. The language used is "all and only reasonable and necessary health care" as it is meant to ensure that ONLY reasonable and necessary care is paid for or approved (meaning that which is not reasonable and necessary is denied) and that ALL reasonable and necessary care is approved and paid for.

Amendment to §180.7 - Date Violation Deemed to Have Occurred; Establishing Willful Violations

HB-2600 clarifies that the commission can enforce statutory requirements where no specific administrative violation class is listed, therefore, amended §180.7 changes "administrative violation" to "violation."

Language has been added to §180.7 that helps the commission establish the existence of a willful violation. This language is consistent with the definition in §180.1.

Based upon public comment, the rule was modified to clarify that commission notification of noncompliance may establish willfulness in two ways. As proposed, if a violator remains in noncompliance 7 or more days after being notified by the commission of the noncompliance the continued noncompliance may be deemed willful. However the rule now also allows repeated conduct after being previously notified of noncompliance to be deemed willful. The proposed definition of willful covered this situation but neither the definition nor §180.7 were clear enough on this point. This situation is important because the prior notification establishes that the violator knows that behaving in a given way is a violation and therefore the commission has an expectation that the violator will take steps to prevent such violations from occurring in the future. If subsequent violations are committed the commission can assume that the violator failed to take steps to ensure that the violations were not repeated and therefore acted with willful negligence.

New §180.20 - Application for Registration/Commission Approved Doctor List

HB-2600 mandates that the commission develop a list of doctors who are licensed in this state and approved to provide health care under the Statute. HB-2600 also provides that the commission establish by rule requirements regarding application and registration, training, and impairment rating testing. The requirements apply to doctors who provide health care services as treating doctors, referral doctors, consulting doctors, required medical exam doctors, peer review doctors, utilization review doctors, designated doctors, and doctors on the MQRP.

Previously, the only requirement to be included on the ADL was that the doctor be licensed in this state or licensed in another jurisdiction and request inclusion. ADL inclusion was automatic. Now, as a result of HB-2600, ADL inclusion is clearly a privilege and the commission has discretion regarding approving doctors for inclusion and has the option of placing restrictions on a doctor as a condition of inclusion on the ADL.

HB-2600 requires the commission to set a date (not to exceed 18 months from the date of adoption) after which doctors must have complied with the new registration and training requirements imposed by the rules. This date has been set as September 1, 2003. The rule originally proposed making this date August 1, 2003 but this date was changed for two reasons. First, the adoption date of the rules was delayed by one month and second, because September 1, 2003 is the beginning of a state biennium and the commission realized that the Legislature might make additional changes that could affect the ADL. Lining these rules up with September 1, 2003 will make it easier to coordinate implementation should the statute be revised.

When originally proposed, the commission planned to use the rule to spell out the new requirements that go into effect approximately eighteen months after the rule was adopted. Prior to the effective date, the commission intended to use the remaining provisions of §126.8 to govern the ADL. However, based upon review of comments the commission realized that this was less user-friendly - requiring review of two different rules that are many chapters apart to understand the ADL. Therefore, the commission modified the proposed rule to copy provisions from §126.8 into it. Therefore, §180.20 now addresses ADL membership both before and after September 1, 2003. The commission does not believe there are conflicts between §126.8 and the provisions from §126.8 that were copied into §180.20. However, should such a conflict appear to exist, the commission intends §180.20 to be the ruling rule as it is better integrated with the rest of the rules implementing HB-2600.

Subsection (a) provides that a doctor providing medical treatment to an employee be on the ADL except in the case of an emergency or for immediate post-injury medical care. This is effective immediately. A more significant change is that on or after September 1, 2003 all doctors (not just treating doctors) are required to be on the ADL if they want to participate in the system (other than with an exception granted by the commission).

As provided in the definition, immediate post-injury care is care that is provided on the date the employee first seeks medical attention for the workers' compensation injury or illness. The intent is not that this care be tied to a specific time-frame because the employee might not realize they need medical attention immediately following the injury or might not realize they have a work-related illness. However, once the employee has initially sought medical attention, the employee must receive all future care from a doctor on the ADL. The definition is different than the language initially proposed because, as proposed, the rule would have allowed a patient to get all their care from a doctor

not on the list as long as it was the same doctor who the employee first saw for the injury and this was not the intent.

Subsection (b) explains the transition from the Pre-September 1, 2003 ADL to the Post-September 1, 2003 ADL. For the sake of simplicity some people have come to refer to the Pre-September 1, 2003 ADL as the "old ADL" and the Post-September 1, 2003 ADL as the "new ADL". This is not true. There is but one ADL. September 1, 2003 is merely the date on which the requirements for inclusion to the ADL change. It also explains that doctors licensed in other jurisdictions may apply to be included on the ADL in the same manner that doctors licensed in Texas are required to.

Subsection (c) specifies the information required in an application for inclusion on the ADL. Much of this is information was previously required in an ADL application, but was not addressed by rule. With the additional discretion that HB-2600 provides the commission, additional information is needed for evaluation and tracking on and after September 1, 2003. These additional items include: the certificate of training indicating the level of training completed (necessary to establish the doctor's certification level under §180.23), impairment rating test score (if applicable), verification of licensure, disciplinary actions or practice restrictions (which can serve as grounds for denial of a request to be put on the ADL or for a restricted approval), and a signed affidavit of sponsorship by a doctor on the ADL agreeing to supervise a doctor licensed in another jurisdiction, performing peer review or utilization review of medical services for Texas workers' compensation (HB-2600 requires doctors licensed out of state and who wish to perform work for a utilization review agent (URA) to do so under the supervision of a doctor licensed in this state).

The commission needs the ability to quickly contact doctors on the ADL to provide important information on a timely basis. Therefore, subsection (c) provides that doctors are required to provide the commission with an email address through which the commission can contact them. As part of the commission's 2000 Customer Satisfaction Survey (published May 26, 2000), the commission asked respondents to indicate whether they had internet access. 68.3% of the health care providers responded that they did have such access. Given that the date that doctors would be required to meet the new ADL requirements is September 1, 2003 (more than 3 years after the original survey was conducted) and that Internet access is becoming more and more common throughout business and society, it is reasonable to assume that an even greater proportion of doctors participating in the system on a regular basis will already have Internet access. Further 18 months should be sufficient time for those providers who are not already using email to set up internet access.

The commission modified the subsection to ensure that it is clear that the application described under the subsection is the one required to remain on the ADL on or after September 1, 2003. A doctor can be added to the ADL using the old process prior to September 1, 2003 but must file the application required by this subsection prior to September 1, 2003 or the doctor will be deleted from the ADL. This change was made for clarification when provisions from §126.8 were included in §180.20.

The commission also modified the subsection to specify that the application to the ADL shall require the doctor to agree to comply with the statute and rules, including but not limited to, cooperating with commission monitoring and review efforts such as audits by the commission and paying audit bills when required by statute or rule. Willful failure to comply with an agreement is grounds for recommendation for deletion under §180.26.

One of the goals of HB-2600 is to ensure that doctors on the ADL comply with the statute and rules and provide quality care at reasonable cost. To meet these goals, HB-2600 gave the commission additional authority to review the compliance and performance of doctors (particularly using the Medical Advisor and members of the MQRP). Therefore, it is reasonable that doctors be required to agree to cooperate with monitoring and review efforts such as audits. HB-2600 clearly intends the commission to review the practices of doctors who may be operating outside of acceptable standards. To allow doctors to be on the ADL who refuse to cooperate with monitoring efforts (thus making it difficult or impossible for the commission to verify that the doctor is or is not providing quality care and generally acting in compliance with the statute and rules) would defeat the purpose of the law.

Regarding paying for audit bills, Texas Labor Code §413.020 requires the commission to establish procedures to enable the commission to charge a health care provider who exceeds a fee or utilization guideline adopted by the commission. Rule 134.900 (relating to Medical Benefit Review and Audit) requires the commission to charge for an audit or review of a health care provider. Thus, doctors are expected to pay audit fees in some situations and it is not unreasonable to require them to agree to do so as a condition of being on the ADL.

Subsection (d) states that the commission may utilize the MQRP set-up by HB-2600 for evaluating ADL applications and making recommendations to the Medical Advisor regarding approval, approval with restrictions, or denial of admission to the ADL. The language regarding recommendations to approve with restrictions is a clarification to the proposal. The original reference to recommendations "to approve" was intended to cover approval with restrictions but was modified to be more explicit.

Subsection (e) gives the reasons a doctor shall be denied admission to the ADL or admitted with conditions or restrictions, as provided by HB-2600. The proposed rule specified that the commission "may" take such action. However, this language was intended to say that the commission was authorized to take such action. It was not meant to be discretionary in as much as many of the reasons for taking the action were automatic disqualifiers for inclusion on the list. Therefore the commission clarified the subsection by changing it from "may" to "shall."

The reasons that a doctor shall be denied admission or shall be admitted with restrictions include failing to submit a complete application or complete the required training, having relevant practice restrictions or other activities which warrant denial or restriction such as grounds that would require a recommendation of deletion or sanction of the doctor under §180.26. The clear intent of much of the language in Article 1 of HB-2600 is for the commission to better regulate the ADL and prevent it from being populated with doctors whose patterns of practice are outside of professionally recognized standards of care. Therefore, the proposed rule was changed from "may" to "shall." In addition, the language in the rule was modified to mirror §180.26 more closely. Section 180.26 requires the Medical Advisor to recommend deletion or sanction under some conditions. The language in subsection (e) was changed to match this.

Subsection (f) states that the commission shall notify a doctor of approval or denial of the doctor's application to the ADL and reasons for denial or admission with restrictions. The notification of a denial and admissions with restrictions shall be by verifiable

means. The subsection gives the doctor 14 days after receiving a denial from the commission to respond to the reasons for denial/restricted admission. As in other rules, the term "verifiable means" is used to allow the commission the flexibility to use new and less expensive means of sending notices in such a way the can confirm delivery other than using certified mail.

When proposed, the rule only provided for a response to a denial and not an admission with restrictions. The commission modified this to ensure that the doctor has the opportunity to respond to the reasons that the commission had for the action in case the commission was mistaken or did not have complete information. It might be that, after initially deciding that a doctor should be admitted with restrictions, the commission decides that it is appropriate to allow an unrestricted or less restricted admission.

In addition, the commission provided additional detail regarding the process for reviewing and responding to ADL denials or restrictions. The proposed rule did not clearly indicate that the commission would review the doctor's response and might change its mind. The subsection is now much clearer in this regard and also specifies that if the final decision is still not an unrestricted approval, the commission shall explain its reason(s) to the doctor so that the doctor will know why his rebuttal did not convince the commission that it was appropriate to allow an unrestricted admission (or possibly even a restricted admission) to the ADL.

Another change from the proposal was the addition of language that made it clear that if the commission inadvertently admits a doctor to the ADL that should have been denied admission or should have only been approved with restrictions, the commission can review or further review the doctor and take action at a later date. Admission to the ADL does not forgive past transgressions. Given that the commission may be reviewing tens of thousands of ADL applications in a short period of time (since the statute did not provide for a means to space the applications equally over a period of time), it is likely that doctors may be inappropriately added to the ADL.

As noted, the requirements relating to the new ADL are effective September 1, 2003. Therefore, subsection (g) provides for the deletion from the ADL of all doctors previously on the ADL upon the earlier of either the date the doctor applies for and is denied approval or September 1, 2003 (if the doctor failed to register and be approved prior to that date).

Subsection (h) was changed from the proposal. As proposed, subsection (h) was intended to ensure that doctors who are not regular participants in the system (whether in-state doctors or out-of-state doctors) do not lose their right to reimbursement without having the opportunity to be admitted to the ADL (since these doctors may not be aware of the ADL requirements). However, based upon comments, the commission realized that there was a potential for abuse if carriers are not allowed to withhold payment on bills of doctors who are not on the ADL and the subsection has been rewritten.

Subsection (h) now requires carriers to withhold reimbursement to doctors not on the ADL except when the health care provided was emergency or immediate post-injury medical care or the doctor receives exception from the commission. If the doctor has not been deleted or suspended from the ADL and has not had his application for admission to the ADL rejected, the carrier will be required to process the medical bills in accordance with chapter 133 and determine whether or not the medical bills will be paid once the doctor is added to the ADL. The carrier's explanation of benefits (EOB) will include an explanation that the payment will be made if the commission grants the doctor an ADL exception for that claim. This will allow the carrier the full 45 days to review the medical bill for reasonableness and medical necessity and at the same time, not require a doctor to have to go through the 45-day delay twice. Carriers will have 14 days from receiving documentation of the approved exception to pay all bills previously processed on the approved claim but not paid due to the ADL status question.

In some cases, doctors will be able to get payment for services that were provided prior to being admitted to the ADL. However, because the delay in payment will be caused by the doctor's failure to register for the ADL and not any fault of the carrier, the carrier will not be required to pay interest on the payment unless the carrier took more than the allowable time to initially review the bills or failed to timely pay the benefits when finally notified that the doctor was eligible for payment due to timely ADL approval or ADL exception.

After September 1, 2003, these exceptions are not likely to be granted to a doctor more than once as the intent of them is to allow a doctor who was not aware of the ADL requirements to receive reimbursement when they provide health care in good faith. The commission intends to track these exceptions and deny them when it appears that a doctor was already granted an exception and had a reasonable opportunity to be added to the ADL.

Doctors who were not entitled to payment because they were deleted or suspended from the list or had their application to be on the ADL rejected by the commission will not be eligible for retroactive payment. They will only be eligible for payment for services provided on or after the date the doctor was reinstated/added to the ADL.

Doctors who are on the ADL at the time they provide health care shall not be required to provide such documentation to the carrier in order to secure payment. Carriers shall have access to the ADL online and will be expected to use that information. Requiring doctors to submit documentation of ADL status with each medical bill or even an initial bill is unnecessary paperwork that runs contrary to the intent of HB2511 passed by the 76th Texas Legislature.

The commission has traditionally made information relating to actions it has taken regarding the ADL available to the public. Previous §126.8(c) required the commission to provide the names of doctors deleted, reinstated or added to the ADL from other jurisdictions. Subsection (i) requires the commission to provide similar information via its website. This will help ensure ready access to the ADL and to information of the commission's activities regarding the list. The subsection was modified from the proposed language slightly for clarification and to also require the commission to provide information on doctors whose applications to the ADL were denied and doctors who were suspended from the ADL. This information is necessary for carriers to have to ensure they know how to process medical bills under subsection (h) when the doctor was not on the ADL at the time care was provided.

Subsection (j) requires a doctor on the ADL to provide the commission with any change in information provided in the doctor's application, within 30 days of the change in information. This is necessary for the maintenance of an accurate ADL database.

The commission previously had great difficulty contacting doctors on the ADL because there was no requirement for doctors to provide the commission with accurate contact information. This often resulted in mail being returned to the commission and necessitated that staff manually attempt to verify information. Further, the commission envisions eventually providing a system whereby injured employees looking for a doctor in their area will be able to get a list of doctors within a given radius of their home or work and who are on the ADL. Such a system will require accurate information to be effective.

New §180.21 - Commission Designated Doctor List

Section 180.21 sets out requirements for a doctor applying to become a designated doctor for the commission and replaces §126.10. These requirements are general to all designated doctors regardless of the purpose of the examination. Requirements for specific designated doctor examinations will be addressed in individual rules addressing the specific purpose of the exam.

Subsection (a) maintains the requirement that in order to serve as a designated doctor the doctor must be on the Designated Doctor List (DDL).

Subsection (b) includes the requirements for being admitted to the DDL prior to September 1, 2003. These requirements are essentially the same as those previously in §126.10 with the clarification by definition that an "active practice" is at least 20 hours per week of treating patients. This definition was not previously in §126.10 but was taken from the Texas Insurance Code and is the standard that the commission has used previously.

Subsection (c) addresses the same requirements in subsection (b) for being approved to be on and remain on the DDL after September 1, 2003, but changes the three years of active practice to one year, and adds that the doctor must have an ADL Level 2 Certification under §180.23. The reason for the change from 3 years of active practice to 1 year is based upon the fact that 1 year of active practice is generally enough to allow for board certification. In addition, based upon public comment, the subsection provides for an alternative to having an active practice that lets the doctor take supplemental training instead of maintaining an active practice. The other main change from the proposal language was to incorporate the concept of "full authorization" to evaluate maximum medical improvement (MMI) and permanent whole body impairment) from §180.23. The concept of "full authorization" was added to §180.23 based upon public comment and basically makes MMI/impairment evaluation optional (since it requires training and testing). Doctors can opt not to take the training/testing but then they are not fully authorized. Since designated doctors are used to evaluate MMI and impairment more often than they are used for anything else, designated doctors will be required to have full authorization. The concept is explained more fully in the section of this preamble focusing on §180.23 and in the responses to comments.

Subsection (d) explains that a doctor who is on the current DDL and fails to apply in accordance with this section, or applies but is not approved under subsections (f) through (h) of this section, shall be deleted from the DDL on the earlier of the date of the denial, or September 1, 2003. This is largely the same as the requirement in §180.20(i).

Subsection (e) lists the information required in an application to the DDL, which is general contact information, training certificate, Impairment Rating Skills Examination score, license verification, information on the doctor's training and experience in various types of health care and injury areas, and any disciplinary actions or practice restrictions. The requirements under this subsection are similar to those in §180.20(c). The requirement to provide information on the doctor's training and experience was added to the rule based upon development of the commission's method for selecting designated doctors. HB-2600 made significant changes to the way a designated doctor is selected when one is needed to evaluate MMI and/or permanent impairment. These changes were implemented in rule §130.5. The change in this subsection supports the implementation of that rule.

Subsection (f) states that the commission may utilize the Medical Quality Review Panel to evaluate the DDL applications and make recommendations to the Medical Advisor regarding approval or denial of an application. This basically matches the provisions in §180.20(d).

Subsection (g) lists the reasons a doctor shall be denied admission to the DDL. These reasons are nearly identical to those in §180.20 with a few exceptions. For example, a doctor could be denied for not being on the ADL or for having ADL restrictions. Another example is that a doctor could be denied for having failed to pass the required examination. As was the case in the corresponding section of §180.20, the proposed rule specified that the commission "may" take such action. However, this language was intended to say that the commission was authorized to take such action. It was not meant to be discretionary in as much as many of the reasons for taking the action were automatic disqualifiers for inclusion on the list. Therefore, subsection was clarified by changing it from "may" to "shall" as it did in §180.20. In addition, the language in the rule was modified to mirror §180.26 more closely. Section 180.26 requires the Medical Advisor to recommend deletion or sanction under some conditions. The language in subsection (g) was changed to match this.

Subsection (h) requires the commission to notify a doctor of the approval or denial of the application to the DDL and reasons for denial and that the commission will notify the doctor by verifiable means of a denial and gives the doctor 14 days to respond to the reasons for denial. This offers the doctor the opportunity to respond to the commission's reasons for not approving the doctor. The response will be reviewed and, if it appears that the commission's initial recommendation to deny the application was in error, the commission will notify the doctor of the approval. Otherwise, the commission will provide a response to the doctor's rebuttal and explain why the denial is being upheld. The commission changed the subsection to provide additional detail regarding this process. The proposed rule did not clearly indicate that the commission would review the doctor's response and might change its mind. The subsection is now much clearer in this regard and also specifies that if the final decision is still a denial not an unrestricted approval, the commission shall explain its reason(s) to the doctor so that the doctor will know why his rebuttal did not convince the commission that it was appropriate admit the doctor to the DDL.

Like §180.21(g), §180.21(h) has a corresponding subsection in §180.20 (subsection (f) in this case); and as it did in §180.20(f), the commission has modified the language in §180.21(h) to make it clear that if the commission inadvertently admits a doctor to the DDL that should have been denied admission, the commission can later review or further review the doctor and take action at a later date. Admission to the DDL does not forgive past transgressions.

Subsection (i) allows the commission to waive any of the requirements stated in this section for an out-of-state doctor to serve as a designated doctor in order to facilitate the timely resolution of

a dispute. This concept is taken from previous §126.10 and is supported by HB-2600, which allows the commission to waive requirements to ensure access to care and evaluations (particularly for out-of-state cases).

Subsection (j) requires a doctor on the DDL to provide the commission with any change in information provided in the doctor's application, within 30 days of the change in information. This is necessary for the maintenance of an accurate DDL database and for many of the same reasons that it is required of doctors on the ADL. The statute requires the commission to schedule designated doctor examinations in a very tight time frame. In addition, the commission schedules designated doctor appointments, in part, based upon geographic location. Therefore it is critical that the commission have updated information on the doctor's examination locations and the means of contacting the doctor.

Subsection (k) lays out grounds that will result in the commission suspending or deleting a doctor from the DDL. Previously these requirements were contained in §126.10(l). Section 180.26 lays out the grounds for deletion from the ADL or imposing other sanctions on a doctor. Rather than repeating those grounds in this rule, the grounds in §180.26 are referenced here in this rule and added to the list of DDL-specific grounds. The additional grounds are largely similar to the grounds previously listed in §126.10(l).

The proposed rule specified that the commission "may" take such action. Based upon public comment the commission changed this from "may" to "shall". When proposed the list of items included several more minor offences. This was why the commission proposed the rule using the "may" standard. The intent was that the commission would evaluate the behavior and determine whether it warranted suspension or deletion. In changing the standard from "may" to "shall" the subsection was also tightened up to focus only on the more serious conduct so that if the commission was going to be required to delete or suspend the doctor it would only be for conduct that the commission believes would always be serious enough to warrant such action. For example, the commission has modified the subsection to focus more on significant violations such as those that are either willful or parts of patterns of practice.

Subsection (l) explains that notification and appeal of a sanction is governed by §180.27 of this title (relating to Sanctions Process/Appeals/Restoration/Reinstatement). This represents a change from the previous process which did not provide for an appeal to the State Office of Administrative Hearings (SOAH). The reason for the change is that HB-2600 lists deletion from the DDL as a sanction that the commission can impose after the opportunity for a hearing is given. This is a statutory change and thus an opportunity to appeal to SOAH is now provided to designated doctors being suspended or removed from the list.

Subsection (l) also provides that suspension, deletion, or other sanction relating to the DDL shall be in effect during the pendency of any appeal. Given the critical nature of the designated doctor's role and the fact that the doctor's opinion generally has presumptive weight on the matter that the doctor was requested to review, the commission believes that it is not appropriate for a doctor to serve as a designated doctor while questions exist regarding the doctor's eligibility to be on the list.

Subsection (m) states that the commission shall make available on its website information regarding the names of doctors on the DDL, and the names of doctors deleted, suspended, or readmitted, and added from other jurisdictions. This will help ensure ready access to the DDL and to information of the commission's activities regarding the list.

Subsection (n) was added to the rule because the proposed rule did not specify where a newly added or restored doctor is placed on the DDL for selection purposes. This subsection provides that when a doctor is added to the DDL for the first time or readmitted to the DDL after a suspension or deletion, the doctor shall be placed at the bottom of the list for rotation purposes.

Subsection (o) was added to the rule because the proposed rule did not include definitions for three key terms used in the rule. These definitions were contained in rule §126.10 which §180.21 replaces but when §180.21 was proposed, the definitions were inadvertently omitted. These definitions were for "disqualifying association," "party," and "self-refer." The definitions added are nearly identical to those previously contained in §126.10. The main change was to clarify the definition of "disqualifying association" to include situations where the doctor has a financial arrangement that would require disclosure under §180.24. In addition, the commission added a definition for "active practice" to simplify the structure of the rule, however, this definition matches the description of active practice in the proposed rule.

New §180.22 - Health Care Provider Roles and Responsibilities

HB-2600 requires that all doctors participating in the Texas workers' compensation system be on the ADL, with but a few exceptions. Section 180.22 describes different roles of doctors participating in the system and the responsibilities of those roles. Previously the commission has the responsibilities of several doctor roles explicitly described by rule (treating doctors in §133.3 and consulting and referral doctors in §133.4). Other doctors, however, are described more via process rules that describe how they are utilized. Although these other rules are important, the commission believes that having one rule which lays out all the roles and responsibilities will help ensure understanding of them. In addition, HB-2600 formally recognizes peer review and utilization review doctors and Medical Quality Review Panel doctors. The rule also applies to ancillary health care providers not licensed as doctors.

Subsection (a) of this section states the primary responsibility of all health care providers (HCPs) in the system is to provide reasonable and necessary health care that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery and/or enhances the employee's ability to return to work. These responsibilities match many of the original goals of the Texas Workers' Compensation Act and subsequent legislation. The proposed language specified that health care was to meet any of the three items, however it was changed from "or" to "and/or" to emphasize the care should meet more than one of the three items to the extent possible.

Subsection (b) expresses that HCPs must comply with all applicable statutes and rules, including the reporting of information, disclosure of financial interests, evaluating impartially, and billing correctly. Though several responsibilities are listed, the list is far from inclusive. The statutes and rules contain other individual requirements and prohibitions relating to HCPs with which they are expected to comply.

Subsection (c) explains that the treating doctor is the doctor primarily responsible for the management of the employee's health care related to the compensable injury. These responsibilities were previously found in §133.3, with the additions of communicating with the employee, employer, and carrier about the employee's ability to return to work with or without restrictions, and

reporting work release data, cost and utilization data, and patient satisfaction data required by HB-2600 to be captured by the commission. Not included in this subsection is the requirement of the treating doctor to certify maximum medical improvement (MMI) and assign an impairment rating. This requirement is addressed in chapter 130 (relating to Benefits-Impairment and Supplemental Income Benefits), which regulates the impairment rating process. The subsection is largely as it was proposed with minor clarifications and the addition of the requirement that doctors discuss ability to return to work and work restrictions with the employee and the carrier.

Subsection (d) incorporates the description of the consulting doctor responsibilities from §133.4 (relating to Consulting and Referral Doctors) and clarifies them. Although peer review, utilization review, and required medical examination (RME) doctors provide evaluations that are similar to consulting doctors, their responsibilities are listed separately because their roles are slightly different. The subsection was changed from the proposal to reference the narrative report required by §133.104 (relating to Consultant Medical Reports) and specify who to file it with; to require that if the consulting doctor makes a referral with the treating doctor's approval, the doctor to whom the referral is made must be aware of the treating doctor's name and contact information to ensure that the treating doctor is able to continue to coordinate care on the claim as required by statute; and to clarify the subsection.

Subsection (e) incorporates the description of the referral doctor's responsibilities from §133.4. The subsection was changed from the proposal to require that if the referral doctor makes a referral with the treating doctor's approval, the doctor to whom this referral must be made is aware of the treating doctor's name and contact information to ensure that the treating doctor is able to continue to coordinate care on the claim as required by statute.

Subsection (f) addresses the responsibilities of the RME doctor. Previously, these were not addressed by rule, but were generally recognized by the commission and other system participants. The responsibilities for the RME doctor are the same as the responsibilities for the consulting doctor addressed in subsection (e) of this section but RME doctors perform examinations at the request of the carrier or the commission. In addition, employees are required to attend RMEs whether by order of the commission or agreement with the carrier made in accordance with commission rule.

The subsection has two changes from the proposal. The first is the same as the change made to subsections (d) and (e) relating to referrals and communicating the treating doctor's name and contact information. The other was a simple clarification to show that RME doctors are supposed to provide unbiased evaluations of MMI and permanent impairment.

Subsection (g) addresses doctors serving in a peer or utilization review capacity for carriers. The proposed rule provided for separate subsections for each role but based upon comment, the two were combined into subsection (g) and proposed subsection (h) was deleted. The role of the peer review doctor is to evaluate health care services and patient care, including the qualifications of professional health care practitioners providing those services and care. The utilization review doctor reviews medical care either prospectively, concurrently, or retrospectively for medical necessity. Providing these descriptions by rule is consistent with the provisions in HB-2600. Peer and utilization reviews are generally conducted without benefit of an examination of the employee but rather are reviews of medical reports, other chart information and other medical documentation submitted with a medical bill or with a request for preauthorization, concurrent review, or voluntary certification of health care.

Subsection (h) (proposed as subsection (i)) describes the role and responsibilities of the designated doctor. The section incorporates the basic responsibilities in previous §126.10 and applies to a designated doctor regardless of the purpose of the examination being performed. In addition to these general responsibilities, a designated doctor may have additional responsibilities associated with the specific examination being performed. These responsibilities are addressed in the specific rules associated with the various types of examinations. The subsection as originally proposed included the qualifications to serve as a designated doctor but this language was replaced with a reference to §180.21 and other rules relating to designated doctors as §180.22 was not the appropriate place to present them and they were duplicative of these other rules.

Subsection (i) (proposed as subsection (j)) provides an overview regarding members of the MQRP, which is a new role provided by HB-2600. As was the case when proposed, the subsection explains that eligibilities, terms, responsibilities, prohibitions, and terms relating to MQRP membership are prescribed by commission contract. The adopted subsection is broader than the proposed section in that it opens membership up to all types of providers rather than just doctors. This change was made based upon public comment that pointed out that the statute provides that the MQRP can include all kinds of providers. The subsection still states that the MQRP members are chosen by the commission's Medical Advisor and must meet the performance standards specified by contract to be eligible for selection. The rule no longer specifies the certification level required for membership but does require that a member who is a doctor must be on the ADL.

New §180.23 - Commission Required Training for Doctors/Certification Levels

HB-2600 mandates that the commission establish training requirements for doctors and health care providers providing services under this title. With HB-2600, the commission's authority is expanded and, through §180.23, training is being mandated for all doctors.

However, the commission recognizes, and HB-2600 requires, that not all doctors need to have the same level of training. For example, there are doctors who are involved in a few cases per year and for whom the requirement to complete the normal workers' compensation doctor training (designed to educate doctors who participate in the system on a regular basis) would be burdensome when compared to their actual involvement. HB-2600 required the commission to modify its training and registration requirements for doctors who infrequently provide care to injured employees, doctors who wish to primarily serve in a peer or utilization review capacity for carriers, and doctors participating in a regional network established under Texas Labor Code §408.0221.

Subsection (a) is basically an overview for the rule. It was simplified from the proposed language because the various certification levels were greatly simplified in subsection (c) and the proposed language from subsection (a) was no longer needed.

Subsection (b) allows the commission to grant exceptions to let a doctor either avoid some training and registration requirements or to perform functions not normally permitted by the doctor's certification level. The reason for this is language in HB-2600

that authorizes such exceptions in order to ensure access to health care and evaluations of the employee's health care and income benefits eligibility. The proposed rule did not make it clear that the commission could grant exceptions to training and registration requirements though the statute did. Therefore this was clarified in the rule. In addition, the rule now provides that if the commission approves such an exception, the commission shall provide a copy of the approval to the carrier.

Subsection (c) was rewritten. The proposed subsection set up three main levels of certification (Levels 1 to 3) and one auxiliary certification level (Level X - for eXception). Based upon public comments the commission revisited the proposed structure and replaced it with one that was more simple and streamlined including only 2 certification levels.

Level 1 Certification allows a doctor to: infrequently provide health care to injured employees (providing care, other than emergency or immediate post-injury medical care, to 18 Texas workers' compensation claimants or fewer per calendar year); perform utilization review or peer review functions for a carrier; and/or participate in a regional network established under Texas Labor Code §408.0221.

Level 2 Certification allows a doctor to serve in any role authorized in the Texas workers' compensation system with the exception of serving as a designated doctor unless the doctor is also on the designated doctor list which is governed by §180.21 of this title (relating to the Commission Designated Doctor List).

Full authorization to evaluate MMI/impairment is now separate from the doctor's certification level and optional. Doctors who do not choose to seek full authorization will not be permitted to certify MMI or assign an impairment rating in the case where the employee has permanent impairment as a result of the compensability. When faced with such a situation, an unauthorized doctor will either have to receive permission by exception from the commission (which will be reserved primarily for cases where the employee is living well out of state) or refer the employee to a doctor who is fully authorized to perform such evaluations in the workers' compensation system. These provisions are consistent with recent amendments to rules in chapter 130 (relating to Benefits - Impairment and Supplemental Income Benefits).

Given the importance that impairment ratings play in the system and the fact that they generally do not occur throughout the claim, the rule requires doctors seeking full authorization to evaluate MMI/impairment to successfully complete commission-prescribed training and testing. This training/testing is the same that designated doctors are required to complete. Training all doctors who evaluate MMI/impairment to the same level of competence is expected to result in more accurate certifications and ratings which should reduce disputes and costs.

Among the advantages these changes offer are a simplified structure and more flexibility for doctors regarding the training they need to obtain. The proposed rule required doctors who wished to be treating doctors to take impairment rating training even though they might not have wanted to be responsible for assigning impairment ratings. Under the adopted rule, these doctors can concentrate their practices on the employee's clinical recovery and return to work and make referrals to another doctor for assignment of an impairment rating should the injury result in permanent impairment.

Some of the training requirements for designated doctors (other than the MMI/IR training) were moved §180.20 (where they were proposed) to §180.21 which regulates the DDL. This places designated doctor training requirements with requirements for supplemental training for doctors who do not have active practices. However, §180.21 refers back to the §180.23(i) which describes how doctors obtain full authorization to evaluate MMI and impairment as a part of the training requirements to be a designated doctor on or after September 1, 2003.

Subsection (d) requires that doctors must receive training from the commission or a commission-approved sponsor (vendor). The proposed rule did not provide for such training to be obtainable from the commission (except for the now defunct Level X Certification). Now standard ADL training will be obtainable from the commission through various self-study methods, while training for full authorization relating to MMI/impairment evaluation will have to be obtained from a commission-approved trainer.

Subsection (e) requires a person or organization that seeks to be approved to provide training under this rule to apply for commission approval in the form and manner prescribed by the commission.

Subsection (f) explains that the commission-approved trainer shall file or provide registration and training information for each doctor trained by the vendor in the form and manner prescribed by the commission. The commission's original intent was that a doctor would attend the training and provide the commission-approved trainer with their application for registration and financial disclosure information. This information would then be recorded in an electronic file that is transmitted to the commission for processing along with the paper copies for commission records. The arrangement was expected to be a time-saving measure in processing thousands of ADL applications by September 1, 2003. However, the commission has modified its implementation plans as a result of the changes in the training to allow basic training to be provided in a self-study format.

Now the commission is planning to develop an interactive web-form as part of the tier one implementation of the Business Process Improvement project. Doctors will be able to provide information directly to the commission through this system and be able to revisit it over time to provide updates. The current timeline has implementation of this system planned for January of 2003. Doctors will be able to provide the commission with basic information and obtain their training as early as summer 2002 even though the new online ADL application system will not be ready yet. The commission will then track the training and notify doctors by email when the new online system is available and doctors will then complete the registration process. By obtaining the information directly from the doctors, the commission will be able to concentrate its efforts on reviewing the applications rather than data-entering them.

Subsection (g)(1) prohibits a doctor not licensed in this state from performing utilization review and/or peer review for an carrier or its agent, unless directed by a doctor who: is licensed in this state, is on the ADL, has a Level 2 Certification, and agrees to direct the doctor's reviews. This requirement comes from HB-2600. The proposed rule required the supervising doctor to have Level 3 Certification (which was the highest level possible). However commenters pointed out this level was not appropriate because it would have required the supervising doctor to receive training in evaluating MMI and impairment which was not really relevant to peer review and utilization review functions. Therefore the commission modified the requirement. The reason that the commission required Level 2 Certification is that supervising doctors will be responsible for the actions of multiple doctors and

thus should be more thoroughly trained than the doctors they are supervising (who have to have Level 1 Certification).

Subsection (g)(2) states that the commission may restrict or reduce a doctor's privileges or authorizations as provided by the statute or commission rules. Section 180.26 sets out the various types of sanctions the commission may impose on a doctor. This subsection is designed to ensure that the two rules are not read in such a way as to limit the commission's ability to impose sanctions that reduce a doctor's certification level or authorization.

Subsection (h) was added to the rule when subsection (c) was replaced. This subsection outlines the type of training that each level of certification requires and how often it must be repeated. The subsection provides that doctors seeking Level 2 Certification are to complete the "Doctor Training Module" prior to being added to the ADL and then once every four years thereafter. Doctors seeking Level 1 Certification are required to complete the "Limited Participation Doctor Training Module" prior to being added to the ADL and then once every two years thereafter.

Training will cover basic requirements of the Texas workers' compensation system and focus on return to work, efficient utilization of care, entitlement to benefits, maximum medical improvement (MMI), and the determination of the existence of permanent impairment. The key difference between the "Doctor Training Module" and the "Limited Participation Doctor Training Module" is the intensity and depth of material, not the content itself.

Level 1 Certification is intended to be for doctors who do not fully participate in the system on a regular basis. These doctors are likely to need refresher courses in Texas workers' compensation issues on a more frequent basis than doctors with Level 2 Certification. Refresher courses for both levels of certification will be designed to focus on key issues and changes that have occurred in the system since the doctor previously completed the training.

Subsection (i) relates to authorization to evaluate MMI and permanent impairment. As previously discussed, doctors will not be required to seek full authorization under this section. However, unless they obtain such authorization (through training/testing or by exception granted by the commission) they will not be permitted to certify MMI or assign an impairment rating in those cases where the employee has permanent impairment. As noted, on or after September 1, 2003, full authorization under this subsection is one of the minimal requirements to be on the DDL.

New §180.24 - Financial Disclosure

This new rule is adopted to comply with statutory mandates in the Texas Labor Code. Prior to the 77th Texas Legislative Session, 2001, §413.041 of the Texas Labor Code required the commission to adopt rules mandating an annual disclosure requirement by a health care provider who refers an employee to another health care provider in which the referring provider has more than a five percent financial interest. Disclosure to the commission and insurance carriers was required. Previously, this financial disclosure was governed by §134.100 and §134.101 of this title (relating to Provider Disclosure of Financial Interest, Submission to the Commission and Provider Disclosure of Financial Interest, Submission to the Carrier, respectively).

HB-2600 amended §413.041. The revised statute requires each health care practitioner to disclose to the commission the identity of any health care provider in which the health care practitioner, or the health care provider that employs the doctor, has a financial interest. It further requires the health care practitioner to make the disclosure in the manner provided by commission rule. The revised statute also provides that the commission, by rule, require that a doctor disclose financial interests in other health care providers as a condition of registration for the approved doctor list established under §408.023, and to define "financial interest" for purposes of the subsection as provided by analogous federal regulations. The section also provides an administrative penalty for failure to disclose the interest and includes forfeiture of the right to reimbursement for services rendered during the period of noncompliance.

Section 180.24 replaces §§134.100 and §134.101 with a single rule.

Subsection (a) sets forth the definitions relevant to the section. The subsection defines "financial interest" to include both "ownership interest" and "compensation arrangement" and is consistent with the definition of "financial relationship" found in Title 42, United States Code §1395nn. The interest may be either a direct or indirect ownership or direct or indirect compensation arrangement of the health care practitioner, the health care provider who employs the health care practitioner, or an interest of an immediate family member. The term "immediate family member" is based on the definition found in 42 CFR 411.351 (relating to physician referrals for Medicare services).

This subsection was changed from the proposal in that the proposed rule included a number of exceptions to the financial disclosure requirements. However, in reviewing comments and the rule, the commission realized that the proposal would have resulted in the commission not being aware of many relevant financial interests that practitioners might have. In addition, it would have created many questions as to whether a given arrangement required disclosure. As a result, the commission modified the rule so that it requires disclosure of all financial interests as defined by rule. This will eliminate questions that could otherwise necessitate obtaining professional advice from an attorney familiar with federal standards. This will also allow the commission to better monitor referral patterns. The federal exceptions may exist because federal regulators had not established that such financial arrangements did not lead to abuse in the Medicare system but that may not be the case in the workers' compensation system. Therefore, not allowing exceptions to reporting requirements will ensure that the commission can better monitor referrals to look for patterns of abuse.

Subsection (b) sets out requirements for financial disclosure reporting to the commission.

Subsection (b)(1) requires that a health care practitioner report any financial interest to the commission when the health care practitioner makes a referral to another health care provider in which the practitioner has a financial interest unless the practitioner has previously made the disclosure. The disclosure is required within 30 days of making the referral. The proposed rule required annual disclosure but was changed as being redundant. If the practitioner has already made the disclosure, then there is no need for redisclosure.

Subsection (b)(2) requires that a doctor, as a condition for a certificate of registration for the ADL, report all financial interest to the commission at the time of application for a certificate of registration for the approved doctor list in the form and the manner prescribed by the commission. Taken with the requirements of §180.20, to be in compliance with the subsection, the doctor must disclose newly acquired interests not later than 30 days from the date the interest is acquired. This is different from other

practitioners. Practitioners other than doctors merely have to report when they make a referral for the first time. However, the statute requires doctors to disclose as a condition of registration and as such the reporting requirement is broader.

Subsection (b)(3) explains what must be contained in the disclosure. At a minimum, the disclosure must contain: the disclosing health care practitioner's name, business address, federal tax identification number, professional license number and any other unique identification number, the name(s), business address(es), federal tax identification number(s), professional license number(s), and any other unique identification number of the health care provider(s) in which the disclosing health care practitioner has a financial interest; the nature of the financial interest, including, but not limited to: percentage of ownership, type of ownership (e.g., direct or indirect, equity, mortgage), type of compensation arrangement (e.g, salary, contractual arrangement, stock as part of a salary payment) and the entity with the ownership (disclosing health care practitioner, the health care provider who employs the health care practitioner, or an immediate family member of the health care practitioner). The only change to this subsection from the proposed language was to correct a reference to another portion of the rule.

Proposed subsection (c) would have required practitioners to make financial disclosure directly to carriers when they made referrals. Based upon comment, this requirement was deleted as unnecessary since the commission shall make financial disclosure information reported under this rule available for review or download on its website. Therefore the requirement was not included in the adopted rule.

Section 180.24(c) (proposed as (d)) addresses the consequences of a failure to disclose. Failure to disclose a financial interest has a number of consequences. First, as with any failure to comply with the statute and commission rules, subsection (c) provides that the commission may take enforcement action as otherwise authorized. In addition, a health care practitioner, including a doctor, who fails to comply with any provisions of the section may be subject to a forfeiture of payments for all services, treatments or health care provided on a specific claim that is provided during a period of noncompliance even if the services themselves did not implicate any disclosure requirements.

Specific enforcement citations and violation language are not contained in the rule because they would be redundant to the statute. Failure to include enforcement language does not limit the commission's authority to take enforcement action for violations of this or any other rule. The commission's authority to enforce the statute and rules is granted in multiple provisions of the statute and duplicate language in rules is redundant and unnecessary.

Subsection (c)(1) (proposed as (d)(1)) prohibits a health care practitioner who rendered services on a claim during a period in which the practitioner did not comply with the disclosure requirements of the section, regardless of whether the circumstances of the services themselves were subject to disclosure, and regardless of whether the services were medically necessary, from presenting or causing to be presented a claim or bill to any individual, third party payer, or other entity for those services. Services include any treatments or health care provided.

Subsection (c)(2) (proposed as (d)(2)) makes clear that a health care practitioner who collects any amounts that were billed for services on a claim during a period in which the practitioner did not comply with the disclosure requirements under the section, regardless of whether the circumstances of the services themselves were subject to disclosure, and regardless of whether the services were medically necessary shall be liable to the individual or entity for, is responsible for timely refunding any amounts collected, regardless of whether the services were medically necessary. Services include any treatments or health care provided. Refunds shall be deemed to have been timely paid if they are paid within 45 days of the date the request for refund is received by the practitioner (as provided in §133.304 relating to Medical Payments and Denials).

Subsection (c)(3) (proposed as (d)(3)) provides that a referral for services to a health care provider by a health care practitioner under circumstances that required a disclosure under the section, but was not disclosed as required, creates a rebuttable presumption that the services were not medically necessary. Services include any treatments or health care provided. The presumption is justified by both the absence of disclosure and a number of studies that consistently found that physicians who had ownership or investment interests in entities to which they referred ordered more services than physicians without those financial relationships (some of these studies involved compensation as well). Increased utilization occurred whether the physician owned shares in a separate company that provided ancillary services or owned the equipment and provided the services as part of his or her medical practice. This correlation between financial ties and increased utilization was the impetus for Congressional action resulting in section 1877 of the Social Security Act. See 66 Federal Register 856, 859 (January 4, 2001).

The proposed rule provided that failure to disclose an interest as required created a rebuttable presumption that the care provided as a result of the referral was not reasonable and necessary. The adopted rule still provides for this but on a more limited basis. As noted, the federal regulations that this rule is analogous to contain exceptions where the federal regulators had not established that a significant risk of abuse exists. Therefore the adopted rule incorporates this concept and limits the rebuttable presumption to those cases where federal exceptions do not apply.

New §180.25 - Improper Inducements, Influence, and Threats

HB-2600 requires the commission to adopt federal standards relating to fraud, abuse, and antikickbacks that prohibit the payment or acceptance of payment in exchange for health care referrals. An employee is entitled to reasonable and necessary medical care. Providing fees for referrals creates an incentive to over-prescribe care and unnecessarily add costs to the workers' compensation system. In addition, the commission has noted that there are other attempts to improperly induce system participants (sometimes including threats) as relates to medical benefits. Section 180.25 addresses these improper inducements.

Subsection (a) provides an overview of the intent of the rule and makes it clear that the rule applies to all system participants and their agents. The subsection generally prohibits offering, paying, soliciting, or receiving an improper inducement relating to medical benefit delivery and any improper attempts to influence medical benefit delivery, including through the making of improper threats.

Subsection (b) sets out the specific conduct that will be deemed to be an improper inducement, influence or threat. Conduct that violates subsection (a) is prohibited regardless of whether it is specifically listed in subsection (b).

Subsections (b)(1) and (b)(2) relate to the federal standards. They cover soliciting, receiving, offering, or paying any remuneration for referrals and generally adopt the federal provisions in Title 42, United States Code §1320a-7b (Antikickback Statute). Section 180.25(c) provides that the exceptions found in the federal statute apply to these two subsections. The language is constructed in such a way that a third party is not permitted to engage in these activities either. The subsections were changed from proposal to clarify that the rule is focusing on medical benefits.

Subsections (b)(3) and (b)(4) prohibit attempts to influence where an employee seeks medical care by offering financial or other incentives such as favorable medical opinions that could impact the employee's benefits or offering to keep the employee off of work. The subsection also prohibits providing such incentives to attempt to influence the employee to comply with the provider's treatment plans. Based upon public comment, Subsection (b)(3) was broadened to apply to actions both favorable to the employee or the carrier. It is just as improper to attempt to be selected as an RME doctor by promising reports that are favorable to the carrier. In addition the subsection was broadened to prohibit threatening adverse actions as well. For example, doctors can not threaten the employee with a low impairment rating if the employee refuses to comply with treatment.

Although the offering of the inducement under subsection (b)(4) requires a level of knowledge, the knowledge requirement does not extend to knowing that the inducement may cause a particular provider to be selected, if a reasonable person could conclude that such would be the result. The inducement is improper whether it is offered directly or indirectly, overtly or covertly, in cash or in kind. For example, this provision would prohibit the offering of a store gift certificate to provide supplemental food and clothing support while an injured employee participated in a single or multidisciplinary program, such as work conditioning or work hardening.

Offering an employee the income benefit enhancements provided by §408.0222 in exchange for treating within a regional network established under that subsection is an exception under the prohibition. Another exception is for providing conveniences such as transportation, translation services, and claim filing information, etc., that make it easier to obtain reasonable and necessary medical care if the conveniences are generally available to all patients, including non-workers' compensation patients. The conveniences that are permitted under subsection (b)(4) were clarified based upon public comment.

Subsection (b)(5) prohibits attempting to influence the opinion of a provider or carrier by threatening to file a complaint or embroil them in other legal action. Medical benefit delivery is to be based solely upon reasonableness and medical necessity. This subsection prevents a chilling effect on the professional opinion of system participants performing duties arising under the Statute or Rules that may result from the threat of harassment through frivolous allegations. Frivolous assertions may result from a lack of facts to support the claim, a lack of legal basis for the claim, or a lack of legal authority of the body with whom the assertion is filed to act on the claim by sanctions, disciplinary action and the like. Like the other inducements described in subsection (b), attempting to influence benefit delivery with threats is improper and prohibited.

Based upon public comment, subsection (b)(6) was added which prohibits attempting to influence the opinion of a provider or carrier by making or causing to be made a threat to life, safety, or property. As before, medical benefit delivery is to be based solely upon reasonableness and medical necessity. This subsection prevents a chilling effect on the professional opinion of system participants performing duties arising under the Statute or Rules that may result from the threat.

Subsection (c) provides exceptions to subsections (b)(1) and (b)(2). The exceptions are those that apply to analogous provisions in Title 42, United States Code §1320a-7b(3). HB-2600 mandates that the commission by rule shall adopt the federal standards that prohibit the payment or acceptance of payment in exchange for health care referrals.

The commission added a new subsection (d) to the rule that provides that employers and carriers can offer incentives to employees to treat within a carrier network established under §408.0023. Although the commission intended the rule to allow employers and carriers to provide employees with incentives to seek health care from providers within a network (as evidenced by the exception under §180.25(b)(3)), the proposed language unintentionally limited the exception to voluntary networks that may be created after a feasibility study conducted under the direction of the Healthcare Network Advisory Committee (HNAC). The statute provided that carrier-established networks will have to comply with the standards recommended by the HNAC.

The language of the rule focuses on insurance carrier networks because the statute formally recognizes and regulates them while so-called "employer" networks are not. If an employer wants to provide an incentive to an employee to seek care from such a network, the employer can ask the carrier to include the employer's network as part of the carrier network. This would allow employers or carriers to provide incentives to the employee under this section while ensuring that the networks are governed by the same standards that regional networks will be held to.

Subsection (d) allows employers and carriers to offer employees incentives to seek health care from within an insurance carrier network. However, the rule prohibits employers or carriers from limiting the employee's right to request an alternate treating doctor under Texas Labor Code §408.023 as insurance carrier networks do not have that power under §408.0023. The rule also provides certain limits on the incentives to ensure that they are not constructed in such a way that they could be a barrier to the employee exercising his right to request authority to select an alternate treating doctor. The incentives must be conditioned in such a way that even if the employee leaves the network, the employee retains entitlement to the incentive the employee was entitled to while participating in the network. For example, if the employee was paid $20.00 per week to remain in the network and after twelve weeks leaves the network, the employee retains entitlement to the $240.00 of incentive owed for those twelve weeks.

New §180.26 - Doctor and Insurance Carrier Sanctions

This rule replaces requirements previously in §126.8(d) and expands them based upon the provisions of HB-2600. The rule sets out the grounds (conduct, actions, inactions, and events) that will require the Executive Director to delete a doctor from the Approved Doctor's List (ADL); the grounds that allow the commission to either delete a doctor or issue a sanction against a

carrier or doctor; the evidence the commission may consider as conclusively establishing the grounds to issue a sanction; and the types of sanction the commission may issue.

Subsection (a) clarifies that sanctions provided and imposed under this rule are in addition to sanctions provided by statute or other commission rules and otherwise serves as an overview for the rule. The only changes made from the proposed language were minor clarifications.

Subsection (b) outlines the grounds that will require the Executive Director to delete a doctor from the Approved Doctor's List. This subsection is based upon new Texas Labor Code §408.0231 which states that the Executive Director "shall delete from the list of approved doctors" if any of four conditions apply. This subsection of the rule is virtually identical to the language in §408.0231 except that it adds clarification to one of the conditions. Section 408.0231(a)(3) provides for deletion by the Executive Director if the doctor's license to practice in this state "is revoked, suspended, or not renewed by the appropriate licensing authority". Subsection (b) makes it clear that the subsection covers voluntary relinquishment of a license by a doctor or deferred suspension or revocation by the licensing authority.

There were two changes from the proposed language. The first was a minor clarification. The second was also a clarification but a more significant one. As proposed, subsection (e) of the rule provided that if a doctor's training expired, the doctor was automatically suspended from the ADL until the training was renewed. However, this did not follow the requirements of HB-2600 in that the training is part of the registration process and the statute provides that the Executive Director shall delete a doctor that fails to meet registration and certification requirements. Therefore proposed subsection (e) was deleted and subsection (b) was clarified to indicate that the Executive Director shall delete a doctor who fails to meet required training.

Subsections (c) and (d) outline the grounds under which Medical Advisor shall recommend a doctor (any type of doctor) for removal from the ADL or may recommend removal or other sanctions against a doctor or a carrier. Subsection (c) covers grounds that require recommendation for deletion and subsection (d) provides grounds for recommendation of sanction (which can include deletion). The two subsections are very similar with some grounds appearing to be identical. However, subsection (c) covers mandatory recommendation for deletion because the grounds listed in the subsection are more serious (like "significant violations") than those in subsection (d).

As noted, amendments to §180.1 provide a definition of "significant violation" to help clarify §180.26. A significant violation is basically one which was willfully committed, which was part of an uncorrected pattern of practice, which resulted or could have resulted in significant harm to an employee or another system participant, or which, based upon the facts of the violation, raise reasonable concern about a violator's ability to conform its future conduct to applicable laws and rules. It is worth noting that the term "significant violation" is not applied only to violations of the statute and commission rules. It can also be a significant violation of regulations enforced by another regulatory body.

Subsection (c) lists the grounds for deletion and provides a non-inclusive list of examples where it was believed that such a list would provide clarification. Texas Labor Code §408.0231(c) amends the list of factors that the commission can consider for deleting a doctor or imposing other sanctions on a carrier or doctor. The commission may use "anything it considers relevant" and the list of examples that was already in the statute was made broader. In general, the changes to this subsection from the proposal language were minor and made for clarification purposes. There were a number of comments that indicated that the commenters did not understand that the subsection applied to carrier doctors (such as those who perform peer reviews) as well as doctors who provide treatment. Therefore §180.26(c) was modified in places to ensure that it was clear that doctors who act inappropriately but in a manner that helps carriers shall also be recommended for deletion.

Subsection (c)(1) states that the Medical Advisor shall recommend deletion of a doctor who commits a significant violation of the statute, commission rules, agreement, or a commission decision or order ("agreement" was added because one of the goals of the commission is to reduce disputes at the lowest possible level through the use of agreements; to be successful in this, agreements need to be complied with). Listed examples include willful or intentional violations as well as violations that are part of an uncorrected pattern. If a doctor commits a willful or intentional violation, or if the doctor continues a pattern of conduct that violates the statute, commission rules, or commission decisions or orders or agreements even after the doctor was notified of the noncompliance of the conduct, the doctor has demonstrated an unwillingness to abide by the requirements of the statute and commission rules and should not be allowed to participate in the Texas workers' compensation system.

Subsection (c)(2) is similar to subsection (c)(1) in that it involves significant violations but in this case, it is significant violations of statutes or regulations not administered by the commission. For example, behavior that causes sanctions by the Medicare or Medicaid programs is considered to be a significant violation. Because of clarifications made to the definition of "conviction" in §180.1, this subsection was simplified. In addition other clarifications were made to ensure that the license or practice restrictions included any "other limitation(s)" and to ensure that an adverse license action, whether "stayed, deferred, or probated," requires a recommendation of deletion.

Subsection (c)(3) provides for deletion for "professional failure to practice medicine or provide health care, including chiropractic care, in an acceptable manner consistent with the public health safety and welfare". Included as examples of this are things such as negligent practices that result in or substantially increase the probability of death or significant injury to a patient ("significant" was added because it clarifies intent). Some other examples include excessive or deficient care (changed from "excessive surgical care), excessive complications, having an uncorrected pattern of failing to timely and appropriately release an employee to return to work. The commission anticipates using benchmarks, guidelines, and recommendations from the Medical Advisor and the MQRP regarding the grounds in this subsection. Subsection (c)(3) references benchmarks rather than specific thresholds because over time, benchmarks fluctuate as standards of care change due to new techniques and technology. Setting specific thresholds in the rule would limit the commission's ability to ensure that the quality of care in the workers' compensation system keeps pace with advances in quality in other health care systems. In addition, in response to comments, the commission clarified that three ore more adverse malpractice judgments against the doctor during his career are grounds that require recommendation for deletion. The proposed language regarding over-prescribing medications was modified to focus on doing so

willfully or as a pattern of practice to ensure that the subsection focused on the more serious conduct.

Subsection (c)(4) provides for deletion if a doctor has a significant (uncorrected or willful) pattern of conduct relating to the delivery of health care that the commission finds is not fair and reasonable or that the commission determines does not meet professionally recognized standards of health care. Some examples of this include unjustifiable differences between the doctor's diagnoses or treatments and acceptable standards of care (which covers both over- and under-treating); administering improper, unreasonable, or medically unnecessary treatment or services and/or seeking approval for the same; making unnecessary referrals; and having a practice of submitting medical bills with a pattern of inappropriate coding or which is abusive or violates rules and guidelines including but not limited to, practices such as upcoding and unbundling as defined in §133.1 (relating to Definitions for chapter 133) and which, if relied upon by the carrier, have the potential of unlawfully increasing the doctor's fee. The subsection was modified to clarify the proposed language relating to differences between the doctors charges or fees and the commission's fee guidelines because commenters pointed out that providers are instructed to bill their usual and customary charges not the maximum allowable reimbursements listed in the guidelines. In addition, subsection (c)(4)(F) was clarified to cover utilization review opinions as well as peer review opinions even though the terms are largely synonymous.

Subsection (c)(5) provides for deletion for dishonest conduct. Though this may appear redundant to subsection (c)(2), it is placed in a separate subsection to emphasize it and because the commission has the option of pursuing these matters administratively to establish that the conduct occurred. Subsection (c)(5)(C) was broadened to cover dishonest actions by a doctor or carrier that could cause reasonable and necessary care to be denied.

Subsection (c)(6) provides for deletion in a case where a doctor refuses to refund monies improperly paid to the doctor. Doctors are entitled to specific fees for reasonable and necessary medical care assuming the care was provided and billed in accordance with the statute and commission rules. If the commission finds that the doctor was paid monies he or she was not entitled to or was otherwise overpaid, the doctor is expected to comply with the refund order. Failure to do so (after opportunity for appeal of the order) constitutes a willful violation of the order and represents conduct that warrants recommendation for deletion. The adopted language regarding the order clarifies that it is a commission order.

Subsection (c)(7) is a "catch-all" category that allows the commission to recommend deletion for conduct not specifically stated in the rule but which otherwise rises to the level that makes it appropriate to recommend deletion. This subsection is functionally identical to language contained in previous §126.8.

Subsection (d) lists grounds that require the Medical Advisor to recommend some kind of sanction (including deletion or suspension of a doctor). Because the grounds under this section are similar to the grounds under subsection (c), no examples were provided under subsection (d). Lesser versions of the examples under subsection (c) can apply to subsection (d). For example, both subsections (c) and (d) reference "conduct relating to the delivery of health care that the commission finds is not fair and reasonable or that the commission determines does not meet professionally recognized standards of health care." However subsection (c), addresses a "significant (uncorrected or willful) pattern of practice" and subsection (d) does not require a significant pattern of practice.

Subsection (d) also provides that the Medical Advisor recommend imposition of a sanction for violation of the statute, commission rules, or commission decision or order or agreement; or violation of other statutes or regulations not administered by the commission but relevant to the provision of and payments for health care as well as "other activities which warrant sanction."

Sanction for refusal to "pay monies owed to a health care provider" was included in subsection (d) (instead of subsection (c) as in the analogous provision for doctors refusing to pay refunds) because the commission is not authorized to "delete" a carrier under HB-2600. Therefore, this provision was put under the subsection providing for grounds for sanctions. It is worth noting, however that this subsection is not limited to orders. Carriers are expected to reimburse providers under the statute and rules for reasonable and necessary health care related to the compensable injury. Failure to do so is an action that warrants sanction.

In reviewing public comments on the rule, the commission became concerned that the full intent of these rules was not being understood with regard to disciplinary actions. The commission intended to reserve for itself the right to enter into agreements on sanctions with the charged person (the sanctionee). To ensure this was clear, the commission had added a new subsection (e) that specifies that notwithstanding subsections (c) and (d), the commission may enter into a progressive disciplinary agreement. However, such agreements can only be entered into if the commission believes that such an agreement will achieve the goals of improving medical quality and cost containment in the system. If the commission does not believe that these goals will be achieved no agreement will be signed and the commission will recommend deletion or other sanction (depending on whether the grounds for sanction were under subsection (c) or (d)). The subsection specifies what such an agreement has to include, such as a description of the grounds that caused the sanction, the type of sanction agreed upon, the duration of the agreement, etc.

Subsection (f) identifies different types of evidence that the commission can use to establish the grounds for issuing a sanction against a carrier or doctor (including deleting or suspending a doctor from the ADL or DDL). The intent of this section is to allow the commission to use facts already established through adjudication, agreement, no contest plea or other finding by a regulatory entity, hearing, court, or administrative review process. This will save the commission the expense of reestablishing facts already established should the recommendation for sanction or deletion be appealed. The subsection also notes that information obtained from any source (including expert opinions such as from MQRP members) can be used as well. The subsection was revised slightly from the proposed language for clarification.

Subsection (g) states which of the types of evidence listed in subsection (f) are conclusive evidence. The subsection was modified for clarification purposes because of a number of comments that indicated confusion on how this subsection and subsection (f) operated together.

Subsection (h) lists the sanctions that the commission is authorized to impose or recommend against a doctor or carrier. The list is identical to Texas Labor Code §408.0231(f) but it contains some parenthetical examples to try to explain what form the sanctions might take.

Subsection (i) states that a doctor deleted or suspended from the ADL may not provide health care or receive remuneration after being deleted or while suspended. The definition of remuneration in §180.1 is "any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind including, but not limited to forgiveness of debt." Therefore, by prohibiting remuneration to a doctor who has been deleted or suspended from the ADL, the health care providers in which the doctor has a financial interest will not be permitted to receive remuneration either (because this remuneration would take the form of an indirect payment to the doctor who was deleted or suspended). Language from proposed subsection (e) (that was not adopted) relating to the duty of a doctors who were removed from the ADL to inform their patients was moved into subsection (i). In addition, the exception that allows a doctor not on the ADL to provide care in an emergency was expanded to also cover immediate post-injury medical care.

New §180.27 - Sanctions Process/Appeals/Restoration/Reinstatement

This rule replaces requirements previously in §126.8(e) through (h) and modifies them based upon the provisions of HB-2600. The rule sets out the process for issuing sanctions authorized by §180.26, the process for appeals, and the processes for requesting and reviewing requests for reinstatement to the list or restoration of privileges (restricted by sanction). In addition, the analogous processes previously in §126.10 (relating to Commission Approved List of Designated Doctors) are replaced with those in this rule.

Some of the requirements of §180.27 are the same as they were under §126.8 and §126.10 while others are not. One difference is that this rule also applies to sanctions involving carriers while the previous rules did not. Where processes are different, they are noted.

Subsection (a) requires the commission to send notice of its intent to recommend or impose a sanction to the person by verifiable means other than if there is an agreement. Previous §126.8 and §126.10 went into more detail about how such notice was to be sent (certified mail with return receipt requested). However, certified mail is but one way to verify delivery and so the commission recommends language that will allow more flexibility to use other means of delivery. With the addition of the formal "progressive disciplinary agreement" concept in §180.26, the commission modified this section to not require notification to the sanctionee and to not provide for an appeal. Such notice and appeal would be redundant since the sanction would have been agreed to.

Subsection (a) also provides that the person has 20 days to request a hearing or the sanction recommendation will go to commissioners for their approval. This is not unlike previous §126.8 (for ADL deletions) but it is very different than previous §126.10 (for DDL suspensions or deletions). Previous §126.10 provided for an administrative review by the commission and the doctor had only 14 days to file it. However, HB-2600, by listing "deletion or suspension from the approved doctor and designated doctor lists," seems to require actions relating to designated doctors to be handled as they are for other sanctions. This means that the doctor is entitled to request a hearing.

Subsection (a) also provides that if a hearing is not timely requested then the commissioners shall act on the recommendation at a public meeting. If a hearing was requested, the commission generally will have the burden of proof unless the recommendation is based upon facts already established/adjudicated.

Subsection (b) provides that if the commission modifies, amends, or changes a recommended finding of fact or conclusion of law or order of the administrative law judge (ALJ), the commission's final order shall state the legal basis and specific reasons for the change. The intent of this subsection is to ensure that the commission's reasoning is well documented should the commission's order be appealed.

Subsection (c) requires the commission to provide copies of an order for sanction to the employees being treated by the doctor and requires the doctors to do the same. This requirement is a carryover from previous requirements of §126.8.

Employees should be informed so they understand that sanctions have been imposed and why the sanctions were imposed. It is important for employees to know both of these things so that (even if the doctor was not deleted) they can decide whether they want to change doctors. For example, the sanctions might impact their access to care that might cause them to want to change. Alternately, when they hear the grounds for the sanction, it might make them concerned about the quality of care they are receiving.

Subsection (d) provides that the commission can issue further sanctions against a person who fails to comply with sanctions.

Subsection (e) allows a person who was sanctioned to request the sanction be lifted (whether through restoration of privileges or readmission to the list the doctor was deleted or suspended from). Requests shall be evaluated by the Medical Advisor with assistance and recommendations from the MQRP. The subsection also requires the requestor to pay for the cost of the review, which may involve an audit of the doctor or carrier's practices in order to establish the that sanctions should be lifted. This charge is authorized by Texas Labor Code §402.064 which requires the commission to set reasonable fees for services requested from the commission.

The subsection provides that if the commission believes it is appropriate to lift the sanctions, the commissioners shall receive and act on that recommendation. If the commission does not believe that it is appropriate to lift the sanctions, the requestor shall be notified and have the opportunity to respond within 14 days. The response would be reviewed by the Medical Advisor and a final recommendation made to the commissioners who will also be provided a copy of the doctor's response. This subsection was modified from proposal to clarify that it is the commission and not the Medical Advisor that sends the letter of intent notifying the doctor that the Medical Advisor intends to recommend that the sanctions not be lifted and to clarify that the commission shall provide the commissioners with the doctor's response.

This process is similar to the process previously in place for actions relating to the DDL but different than the previous process for requests for reinstatement to the ADL.

In reviewing the rule for adoption it was noticed that as proposed the rule could be interpreted as requiring the commission to provide a doctor an opportunity for a hearing if the doctor is deleted by the Executive Director pursuant to §408.0231(a) and §180.26(b). This was not the intent. The statute requires the Executive Director to delete a doctor from the ADL in certain situations (such as when the doctor's license is revoked, suspended, or not renewed by the appropriate licensing authority). The statute does not provide for an opportunity for a hearing for deletion by the Executive Director as it does for sanctions by the commission (under §408.0231(e)).

Therefore the commission has added a new subsection (f) to the rule that exempts deletions by the Executive Director under §180.26(b) from the requirements of §180.27. The new language requires a notice to be sent by verifiable means that explains the reason for the action. The doctor will then have fourteen days to respond. If it is found that the grounds for removal under §180.26(b) do not exist, the doctor shall not be removed by the Executive Director.

Comments supporting and/or opposing all or some of the proposed amendments and adoptions were received from: El Paso Physical Therapy, Medical Advanced Systems, Stephanie At Work, Indemni-Med Management, LLC, Insurance Council of Texas, Flahive, Ogden & Latson, Texas Medical Association, Texas Association of Business and Chambers of Commerce, The State Office of Risk Management, The Texas Mutual Insurance Company, Texas Orthopaedic Association, Medical Evaluation Specialists, and The American Insurance Association as well as other individuals.

In addition to supporting or opposing various portions of the rules, many commenters made suggestions for improvements to the rules or asked for clarification on certain points. Summaries of the comments and commission responses are as follows:

Introductory Comment: The commission initially proposed the key date for changes in the ADL and DDL be August 1, 2003. However, the commission has changed this date to September 1, 2003 to coincide with the beginning of the new biennium in case the next legislative session results in additional changes that affect the ADL and DDL.

The references in the comments are to the rules/subsections as proposed. Based upon comments, some of these subsections have been renumbered in the adopted rules.

General Comments

Comment: Commenter indicated that his organization "generally supports the proposed rules to implement these provisions of HB 2600," opining that the rules "represent substantial reforms to the Approved Doctor List that will hopefully lead to improved quality and lower cost delivery of health care to injured workers." Another commenter supported proposed rules 180.1 through 180.27 "in concept and action." Still another commenter "commends the Commission for its work on these proposed amendments." Other commenters stated that the "commission and its staff's hard work is appreciated and the difficulty in drafting rules such as these is recognized. However, the ability of health care providers to properly care for injured workers and to participate in the Workers' Compensation system should be considered and the rules amended to prevent adverse impacts to health care delivery."

Commenter indicated that it "strongly supports efforts to improve our system of delivering care to injured employees. Specifically, making certain that the injured worker receives quality healthcare promptly and at a reasonable cost." Commenters indicated that they were involved during the consideration of HB-2600 and support efforts to improve our system of delivering health care to injured employees, "specifically making certain that the injured worker receives quality health care promptly and at a reasonable cost. However, it is very important in achieving these goals that the system not become overburdened with administrative requirements and that the requirements of the system do not discourage health care providers who have always provided quality health care at a reasonable cost from participating in the system because of overly complicated and burdensome requirements."

Response: As noted, the commission agrees that it is important to not discourage providers who provide quality care at a reasonable cost from participating in the system. As discussed in response to specific comments, the commission has made changes based upon the recommendations of commenters that should prevent adverse impact to health care delivery and should not overburden or discourage doctors who provide quality care at a reasonable cost.

Comment: In response to language in the preamble which stated that increased compliance should reduce overpayments caused by late reports from doctors, one commenter asked whether late reports cause unnecessary treatment and asked for clarification.

Response: Late reports probably don't cause much unnecessary treatment to be provided; however, late reports such as TWCC-69s and TWCC-73s can cause carriers to overpay TIBs when the carrier does not timely receive the report containing information showing that the employee is no longer entitled to income benefits.

Comment: In response to language in the preamble which stated that some doctors offer improper inducements to employees, one commenter asked why the commission hasn't taken enforcement action against these providers in the past.

Response: Prior to the adoption of this rule, there was no prohibition against providing many inducements. Therefore, the commission did not have the authority to take enforcement action in response to many of the types of inducements that the rule now defines as improper.

Comment: The preamble noted that the increased ability of the commission to hold carriers responsible for their actions and inactions should result in improved compliance and, as a result, payments of medical bills may be more timely and accurate while disputes may be reduced. In response to this language, one commenter asked whether the commission will be more responsive to the medical community "before they all leave the work comp arena?"

Response: The commission endeavors to be responsive to all system participants. The commission works with a group of stakeholders who were involved in the development of HB-2600 which included health care provider representation. In addition, the Medical Quality Review Panel will help ensure that the commission has access to medical expertise to assist the Medical Advisor with recommendations about medical issues.

Comment: The preamble noted that to the extent that the commission is able to change utilization and return to work patterns (e.g. by changing behavior or by removing doctors who won't change behavior), costs shall be reduced. One commenter suggested that it "should scare the medical community to see that the [commission] would write something like this. There are a few bad apples and the TWCC is driving out the good ones."

Response: The commission agrees that efforts to control system participants who operate outside of acceptable standards (all system participants, not just health care providers) may hamper those who wish to operate within acceptable standards. However, these rules should assist the commission in setting processes to more easily identify outliers and attempt to get them to correct their behavior without hampering other participants.

Comment: One commenter commented on the fiscal impact statement from the proposal preamble noting that providers are small business owners that pay for workers' compensation insurance.

Response: The commission agrees that many providers are small businesses. As employers, providers should be concerned about the costs in the workers' compensation system that are driving up their premiums and supportive of reasonable efforts to bring those costs under control.

Comment: The proposal preamble noted that among the benefits that health care providers would receive from adopting these rules was dealing with carrier doctors who "will be better trained" which "should reduce unnecessary disputes (both prospective and retrospective)." Commenter interpreted this as a bias of the commission towards carriers.

Response: The language was referring to the fact that, under the new rules, carrier-selected doctors are required to be trained in workers' compensation issues and therefore will be better trained than they are now. The preamble was not saying that carrier-selected doctors are better trained in general than other doctors (such as those who provide treatment).

Comment: One commenter suggested that the reductions in costs would not result in any benefit to employers since "there is NO way to force the carriers to pass the savings on to the consumers as noted in [the] MFG preamble!"

Response: The commission disagrees. Workers' compensation premiums are set in accordance with regulations by the Texas Department of Insurance (TDI) and they include consideration of claim costs. If claims costs are reduced sufficiently, premium rates will be reduced.

Comment: One commenter expressed concern "that the proposed regulations, if adopted, would put in place a burdensome, costly and inflexible regulatory framework where effective and efficient utilization review is discouraged, rather than encouraged, by the state."

Response: The commission disagrees with the broad characterization made by the commenter of the rules as proposed but agrees with suggestions made by various commenters and has revised the rules to address many of this commenter's concerns. These changes and the reasons for them are described in response to other comments.

Comment: Commenter opined that the rules impose additional burdens on physicians primarily to appease the carriers and hold physicians to a more restrictive standard of performance than it holds carriers.

Response: The commission disagrees that the proposed rules impose additional burdens to appease carriers or that they hold physicians (or other providers) to a more restrictive standard of performance than they hold carriers. The proposed rules were developed in response to legislation passed by the 77th Texas Legislature in HB-2600. HB-2600 was developed over the course of the legislative session with input from a workgroup composed of system participants, including health care providers. HB-2600 gave full responsibility for regulating health care providers to the commission while it split certain duties and authority (such as the authority to sanction carriers) between the commission and TDI. Numerous other rules require or prohibit specific actions on the part of carriers or their agents. Carrier sanctions under §180.26(d) can be based on carrier violation of these other rules relating to medical benefit delivery.

Comment: Commenter expressed concern that the system is moving in the wrong direction as relates to reducing costs while improving quality, particularly since the system is already more burdensome and costly than providing treatment outside the workers' compensation arena.

Response: The commission disagrees. The commission anticipates that the new rules will improve medical quality and reduce costs in a number of ways. Key to these efforts has been the development of processes and rules that do not impede system participants who are acting within expectations as a way to control those who act outside of expectations. HB-2600 gives the commission the authority to reduce burdens and modify requirements for providers as appropriate. This may include providers whose practice patterns produce outcomes that are better than the norm and the commission will begin tracking outcome data for this purpose. Once the commission has obtained a sufficient amount of data to set such standards, the commission will be able to establish rules that reduce burdens as appropriate.

Comment: Commenter expressed concern that by "complicating the process, increasing the required hours of continuing medical education CME for participation, and reducing reimbursement rates, the Commission is driving physicians from the system."

Response: Through HB-2600, the Legislature gave the commission additional tools to use to better control medical benefit delivery. Part of Article 1 of HB-2600 requires providers in the system to be better educated about the requirements of the workers' compensation system. This can most clearly be seen in Article 1 where the Legislature changed participation in the system from automatic inclusion (based upon initial licensure) to a discretionary privilege. The commission was charged with establishing reasonable training requirements for doctors who wish to be on the ADL. However, the commission has removed the requirement that the training be CME-certified as some of the subject matter may not qualify for such certification.

The commission disagrees that these rules will drive doctors from the system in a way that would limit employees' ability to obtain reasonable and necessary medical care. The system and injured employees are better served if employees receive health care from providers who are well educated in the requirements of the workers' compensation system and who are committed to working within that system.

Comment: Commenter noted that his organization "has consistently expressed concern over the quality of care in the workers' compensation system and the need for TWCC to aggressively investigate and take action against those providers who are abusing both the system and injured workers. House Bill 2600 has invested TWCC with substantial authority to identify and sanction the bad actors in the system, giving you the tools necessary to ensure the Approved Doctor List will be comprised of quality providers that have been properly trained and are being properly monitored."

Response: The commission agrees that new authority granted by HB-2600 should improve the commission's ability to achieve the goals of improving medical quality and controlling system costs.

Comment: Commenter "supports the Commission's efforts to ensure compliance by parties in the workers' compensation system with Commission rules" and offered a number of comments for improving those rules.

Response: The commission's responses to specific suggestions are addressed elsewhere in this preamble.

Comment: Commenter indicated opposition to these rules/amendments because the commenter felt that: HB-2600

is socialized medicine and that doctors will leave the workers' compensation system if HB-2600 is implemented; workers' compensation premium rates have never gone down; an insurance carrier testifying on the prior proposal of the Medical Fee Guideline was lying (because if they were really spending $1.32 in claim costs for every $1.00 in premium they would be out of business); providers have to do too much paperwork to get paid and carriers don't pay timely half the time and don't pay at all 25% of the time; carriers claim they never got the bills even when the doctor sends them by certified mail; carriers get their payments from employers up front but the system delays payment to doctors; the Texas Legislature should not be making laws to protect or increase the profits of insurance carriers (carriers should just go out of business if they can't make a profit); there is nothing requiring carriers to pay benefits or giving them any rules to follow; carriers do not obey laws; and the commission does not enforce the laws.

Response: The commission disagrees. First, the changes contained in HB-2600 were adopted and have become Texas law. The commission and system participants are required to implement and comply with its provisions. Second, workers' compensation premium rates went down in the early and mid-nineties. Third, insurance carrier profits and losses are not solely based upon premium dollars collected versus benefits paid but also based upon investments. Fourth, these rules do not focus on the paperwork that doctors have to do to get reimbursed for medical services (other than the registration to be on the ADL). Further, the commission has conducted numerous audits of carriers in the past year and, although some timeliness problems were found, they were not widespread and compliance was not 50% as the commenter suggested. Fifth, not all carriers get paid up front. Many accounts are based upon a retroactive premium calculation where the premium is not calculated until the end of the policy period. Sixth, the commission has no position on what the Texas Legislature "should" or "should not" be doing and does not have the authority to ignore state law. Seventh, as discussed in response to other comments, carrier duties are covered in numerous sections of the statute and rules and there was no need to duplicate them here. Finally, though some carriers commit violations, the commission disagrees with the suggestion that there are no carriers that obey the statute and rules. The commission likewise disagrees with the suggestion that there are no doctors who provide quality care simply because some doctors fail to do so. When the commission finds noncompliance by any system participant, it takes enforcement action designed to ensure future compliance. The commission has attempted to use a progressive disciplinary approach to correct compliance problems and some system participants are beginning to reach the steeper part of the progressive curve.

Comment: Commenter suggested that carriers should have to log receipt of medical bills; send confirmation of receipt of the bills; and pay bills in seven days instead of 45 (as provided by statute).

Response: The commission disagrees. With the exception of language in §180.20(h) which addresses payment when a doctor is not on the ADL, these rules do not address the manner in which medical bills are to be processed and paid. If done by a paper confirmation, requiring confirmation of receipt of medical bills would be contrary to the intent of HB-2511, which requires the commission to develop a plan to reduce paper in the system. Finally, Texas Labor Code §408.027 provides that carriers have 45 days to take action on a medical bill. A change to this provision would have to be made by the Legislature.

Comment: Commenter suggested that doctors should receive 60% of any fines imposed for late payment of medical bills and the commission use the rest to go after more carriers.

Response: The commission disagrees. The suggestion would require a statutory change.

180.1 Comments

Comment: Commenter expressed concern that "the proposed amendments to rules 180.1(20), 180.1(21), 180.1(22), and 180.7 might improperly subject persons to liability for conduct that the Legislature has not defined as administrative violations of the Texas Workers' Compensation Act and which the Legislature has, in fact, declined to define as administrative violations. We also fear that the application of these proposed amendments could, in certain fact instances, result in parties being unconstitutionally deprived of their right to due process of law to the extent that they permit the assessment of administrative penalties against the parties when the Commission had on an earlier occasion merely expressed its belief to the parties that they were violating the Act or a Commission rule, whether or not that belief had resulted in a conviction of the parties on the prior occasion."

Response: The commission disagrees. HB-2600 amended §415.0035 by adding subsections (e) and (f) to specify that a carrier or a provider who violates a provision of the statute or rules commits an "administrative violation" and that the commission may issue an administrative penalty under §415.021 (not to exceed $10,000). The commission may issue a penalty under this new legislation if the violation is repeated after the commission has previously provided notice to the carrier or provider of noncompliance; if it was committed willfully; or if the violation was a violation of a commission order.

Given that none of the language the commenter is referring to removes the right of a person accused of committing an administrative violation to a hearing at the State Office of Administrative Hearings (SOAH), it is not clear how the proposed language could be used to violate a person's rights to due process. Prior to issuing an administrative penalty, the commission almost always offers the alleged violator the opportunity to informally respond to the allegation. This response often provides the commission with information that it did not previously have and which may cause the commission to change its position regarding the conduct in question. If the commission and the alleged violator are unable to agree upon the facts or can agree on the facts but disagree as to whether they constitute a violation, the person is offered the opportunity to request a hearing at SOAH where the parties will be able to present their positions to an administrative law judge.

Comment: Commenters noted that HB-2600 not only speaks of the ability to monitor and sanction health care providers, it also adds authority to the Commission to sanction insurance carriers and utilization review agents. Therefore, the commenters suggested that in the definition of "abusive practice," a subsection (D) should be added to state that abusive practice includes "the improper denial of medical benefits or improper delay or denial of payments of claims and benefits."

Response: The commission agrees that the behavior commented upon can be an abusive practice; however, it disagrees that the language needs to be added in the definition because it is already covered by subsection (C) of that section. Subsection (C) defines an abusive practice as a practice that does not meet standards required by statute, rules, or previous notification to a system participant. The issues the commenters were concerned

with are regularly looked at through the commission's monitoring efforts. With the definition as proposed, the commission will be able to label a pattern of practice of delaying payments or improperly denying benefits (as well as any other type of pattern or practice where compliance standards have been set by statute, rule, or prior notification) as an abusive practice. The proposed definition of abusive practice was written broadly to ensure that any type of abusive practice could be addressed.

Comment: Commenter wanted to know whether a Commission Hearing Officer or Appeals Panel Judge is an "administrative law judge" as contemplated by proposed §180.1(2), as used in proposed §180.26(f).

Response: Yes. §180.26(f) specifies that the commission can use the findings of fact or legal conclusions of an administrative law judge as evidence. This prevents the commission from having to "re-prove" what has already been "proven." Subsection §180.1(2) has been modified to ensure that it is clear that commission hearing officers and appeals panel judges are included.

Comment: Commenter pointed out that with regard to §180.1(3) "an element of a series containing three or more entries, there should be a comma between 'employee' and 'or attorney' in the first sentence."

Response: The commission agrees. The comma has been added.

Comment: Commenter felt that the example in §180.1(6) "is better placed in the preamble as opposed to the rule itself. Further the phrase "'get out' of continued noncompliance" is colloquial and should not be used in a rule that has the force of law.

Response: The commission disagrees that the example should be removed from the rule. Although preambles can and should be used to ensure system participants understand the intent of a rule, including the example will help improve understanding of the intent of the commission. The commission agrees that "get out" is colloquial and has changed the sentence to state that the person could "come into compliance" and has also simplified the example.

Comment: Two commenters noted the word "probated" in §180.1(8)(A) is misspelled.

Response: The commission agrees and has corrected the spelling. In addition, the term was misspelled in other areas of the rules. In reviewing the rules to make the corrections, the commission noticed that in some instances it used the term "probated" and in others it used "deferred." The intent was to cover any situation in which a judgment, finding, sentence, etc. was in any way held in abeyance. Therefore, the commission has modified the rules to reference "stayed, deferred, or probated" and this language should be read to apply broadly.

Comment: Commenters stated that the definition of "conviction" in §180.1(8) does not discuss the type of offenses that constitute a conviction. The most common criminal conviction is for violation of a traffic statute. Any criminal conviction must have some relevant nexus to the providing of health care services under the workers' compensation system.

Response: The commission disagrees. The definition is defining "conviction," not the type of convictions that are relevant. Section 180.26 establishes the types of convictions that are used for deleting doctors from the ADL, and it includes specific limitations that address the concerns of the commenters. Therefore, there is no need to differentiate between different types of convictions in this definition.

Comment: Commenter suggested putting the definition of "emergency" in this rule rather than referencing the definition in §133.1 (relating to Definitions).

Response: The commission disagrees. Because the definition of "emergency" is referenced in several different rules, all of these rules would have to be revised if the definition were quoted in each rule and the definition were revised in the future. By simply referencing the one definition in §133.1 (relating to Definitions for Chapter 133, Benefits - Medical Benefits), it is easier to make changes and maintain consistency at a future date.

Comment: Commenter asked whether there was a "gender neutral term" that could be used in §180.1 (10) & (11) rather than "his."

Response: Texas Government Code §311.012(c) provides that "words of one gender include the other genders."

Comment: Commenter suggested that in §180.1(15) there should be a comma after "to" as in "...but not limited to, forgiveness of debt."

Response: The commission agrees and has made the suggested change.

Comment: Commenters expressed concern regarding the language in §180.1(16) that makes it a significant violation if the violation "resulted" or "could have resulted" in significant physical or emotional harm to an injured employee or in significant economic harm to a system participant. The commenter felt that there are two different standards: one is that it actually has resulted in significant harm and the other is if it could have resulted in such harm. The commenter had no concern about calling a violation a "significant" violation in those cases where such harm did result. However, the commenter felt that the fact that a violation could have potentially resulted in such harm should not mean that it was significant and felt that it should be removed. One of the commenters pointed out that the language addressing deviation from acceptable standards for professional behavior exists to limit potential harm and that this should be sufficient.

Response: The commission disagrees. The phrase "could have resulted" is included because in many cases a violation may be discovered before it causes significant harm. A person who commits a violation that has the potential to do significant harm to a system participant should not be able to avoid having the violation labeled as a significant violation because the violation was caught before the damage resulted or because the potential harm did not materialize. Therefore, persons engaging in similar conduct are treated the same even if one person's violation is discovered before the harm results. Deviation from acceptable standards for professional behavior is directed more to quality of care issues and does not serve to limit potential harm in cases where the party intends to cause economic harm, such as deliberate cases of upcoding or unbundling.

Comment: Commenter expressed concern that the rule does not define "significant economic harm."

Response: The commission disagrees that such definition is needed or practical. The terms "significant" and "economic" are self-explanatory. Given the number of actions that could result in economic harm and the myriad of ways that one could experience such harm, further definition is not practical and would only

serve to hamper the commission's ability to enforce this provision rather than to strengthen it.

Comment: Commenter suggested that the definition of the term "Uncorrected Pattern of Practice" would be strengthened if the commission would identify in the rule what constitutes "notice" in relation to this term, and address whether in the event of a dispute, the violator is permitted to continue the practice pending final resolution on the legality of the practice.

Response: The commission agrees that "notice" should be clarified. The rule has been changed to require that notice be written as the commission anticipates using audits reports and Notices of Violation or Warning Letters as the means of notification. In the event of a dispute, the alleged violator would be well advised to correct their practice until such time as the dispute is resolved in the alleged violator's favor. If the behavior is found to be a violation, all the violations committed while pending the resolution of the dispute could potentially result in enforcement action.

Comment: Commenter expressed concern that §180.1(20) (which defines the term "violation" as "a failure to comply with a duty established under the Statute or Rules or commission of an act prohibited by the Statute or Rules.") is too broad. The commenter believed this "because even after the legislative amendments made by House Bill 2600 to Texas Labor Code section 415.021, subsection (a) of that section still limits the authority of the Commission to assessing administrative penalties only against persons who commit "administrative violations," which are individually defined by various provisions of the Act itself. Assessing a penalty against a person who merely commits a "violation" as defined by the proposed rule would thus go beyond what the Act authorizes." The commenter recommended §180.1(20) be withdrawn.

Response: The commission agrees that it may only take enforcement action under Texas Labor Code §415.021 in the event of a person committing an administrative violation (other than as provided by Texas Labor Code §408.0231 and §§180.21 and 180.26 of this title). However, the commission does not believe that defining "violation" as a failure to comply with a duty established under the Statute or Rules or commission of an act prohibited by the Statute or Rules goes beyond its authority. The definition of "administrative violation" is not inconsistent with the statute.

Comment: Commenter was troubled by §180.1(21), which defines the term "violator" as "a person found to have committed an administrative violation or another offense." "Because the Commission lacks statutory authority to enforce any statute other than the Workers' Compensation Act and because the only relevant enforcement powers vested in the Commission by the Legislature concern the power to assess administrative penalties against persons found to have committed administrative violations under the Act, the inclusion of the words "or another offense" is irrelevant to the Commission's exercise of jurisdiction and is overly broad." The commenter recommended that the words "or another offense" be deleted from the proposed rule.

Response: The commission disagrees. Whether the person violated the Texas Workers' Compensation Act or another statute, they can still be labeled as a "violator." The definition does not exceed the commission's authority. It would only be a problem if the commission attempted to use this definition in a way that exceeded its authority. For example, if the commission attempted to issue a $10,000 fine because a person was convicted of driving while intoxicated (and was thus a violator of the DWI statute), the commission would be exceeding its authority. However, none of the proposed rules exceed the commission's authority. The use of the term "violator" to cover violators of other statutes is merely a convenience and not an attempt of the commission to unlawfully expand its authority. Section 180.26 establishes the offenses that may be sanctioned.

Comment: Commenter pointed out that the term "willfully" is spelled differently in various places in the proposed rules.

Response: The commission agrees and has changed the spelling of all references to the word to "willfully." The confusion was caused by the spelling of the word in the Texas Labor Code, which does not match the spelling in most dictionaries and computer spell-checking programs. Therefore, the commission has modified the definition to specify that "willfully" is the same as "wilfully" and will use "willfully" in these rules.

Comment: Commenter suggested that the proposed definition of "willfully" in §180.1(22) (which defines it as "intentionally or knowingly" and "continuing conduct after being notified of noncompliance") is both unnecessary and improper. "The Commission by its proposal is attempting to define 'wilful' to include merely negligent conduct, in addition to intentional and knowing conduct. Such a definition would therefore represent an exercise of rule-making power in excess of the statutory authority conferred upon the Commission by the Legislature."

The commenter stated that the "term 'wilfully' is used in sections 415.001, 415.002, and 415.003 of the act to establish a mens rea requirement that must exist before someone can be determined to have committed an administrative violation under these statutes. The Legislature could have defined the term 'wilfully' in the Act the same way the proposed rule does, but it did not. Generally, Texas law holds that in the absence of a statutory definition of a statutory term that constitutes an element of a statutory cause of action (such as a civil cause of action for an administrative penalty based on the alleged occurrence of an administrative violation), the fact-finder should be free to determine the meaning of the statutory term without definitions or instructions from the party prosecuting the claim. This is especially true where the statutory term has a plain and ordinary meaning, as the term 'wilful' does. See, e.g., Accord v. General Motors Corp., 669 S.W.2d 111, 116 (Tex. 1984) ("The jury need not and should not be burdened with surplus instructions."); Depriter v. Tom Thumb Stores, Inc., 931 S.W.2d 627, 629-30 (Tex. App. -Dallas 1996, writ denied) (a trial court's refusal to submit a definition for the term "because," as used in a jury question, was upheld on appeal where the statute on which the plaintiff's claim was based contained the same term and the word "as used in [the statute] is not a legal term requiring a special definition.") ("When statutory violations are the basis of jury questions, the questions should be submitted in terms as close as possible to the language of the statute."); compare Tex. Bus. & Comm. Code Section 17.45(9) (statutory definition of the term "knowingly" as used in the Deceptive Trade Practices Act).

When the Commission pursues a party for an administrative penalty based on an alleged violation of section 415.001, 415.002, or 415.003, the finder of fact is not the Commission but an administrative law judge at the State Office of Administrative Hearings. That official is capable of determining the meaning of the term 'wilful' without the Commission's assistance, But in the proposal, the Commission is attempting to give the term 'wilfull' a meaning that the Legislature did not intend it to have. The proposed rule thus conflicts with well-settled Texas jurisprudence granting freedom to the fact-finder to determine

the existence or non-existence of elements of a cause of action without unnecessary instructions and definitions." The commenter recommended removing the proposed definition.

Response: The commission disagrees. "Negligent" conduct is covered by the definition of "willfully" only if the commission previously notified the violator of the noncompliance and the violator continued to commit the violations. Even if the initial act(s) was negligent, subsequent violations of the same type (particularly those that are part of an uncorrected pattern of practice) may be considered to be willful violations because the violator evidently failed to take the steps necessary to prevent a reoccurrence and thus the subsequent violations may have resulted from the violator's willful negligence.

The second application of the previous notice concept is more clearly understood when read with §180.7 where the commission may deem a violation to be willful if the violator remains in continued noncompliance 7 days after receiving notice from the commission of the noncompliance. The intent here is that if the commission tells someone they have committed a violation that needs to be corrected (e.g. a carrier has underpaid an injured employee and is required to pay the difference plus interest) and the violator fails to correct the behavior, then at that point, the continued noncompliance could be deemed to be willfully committed.

With regard to whether the commission is defining "willfully" in a way that is contrary to legislative intent, the commission also disagrees with the commenter. The Legislature has not defined "willfully" and thus it is within the commission's authority to do so for the purpose of implementation of the Workers' Compensation Act. However, the commission believes that the definition of "willfully" should not include notification of "noncompliance" because the term "willfully" is also intended to be used to characterize actions other than violations and the commission has modified the definition.

Comment: The commenter indicated that it believed that the intent behind attempting to define "willfully" was to enhance the ability of TWCC to issue violations and increase the likelihood of TWCC prevailing when a violation is appealed to the State Office of Administrative Hearings. The commenter was concerned that often employees and providers contact insurance companies and allege noncompliance with the statute and/or TWCC rules in instances where the insurance company is in compliance with the statute and/or TWCC rules and felt that the definition as proposed would "in all probability lead to factual disputes between injured employees or health care providers and insurance companies, and the filing of unfounded and unnecessary complaints with TWCC." Therefore, the commenter suggested that the language in the definition of the term "willfully" be modified to be clear that the notification of noncompliance referred to in the rule is notification "by the commission" which the commenter felt supported the Commission's intent as expressed in subsection (b)(2) of Rule 180.7.

Response: The commission disagrees that this will result in more referrals to the commission; the commission currently receives over 600 allegations of noncompliance per month and "willful" is merely an adjective that would be used to describe some violations. Nevertheless, the commission has modified this definition to refer to continuing to remain in noncompliance after notification by the commission (the rule originally did not reference who could serve the notice). The commission has also modified the subsection to allow the notice to come from another regulatory authority because the commission wants to be able to use the word "willfully" to characterize conduct outside the workers' compensation system as well as within it.

180.2 Comments

Comment: Commenter supported the adoption of Rule 180.2 as proposed.

Response: The commission agrees that the rule should be adopted but has also agreed that a change was appropriate based upon the following comment.

Comment: Commenter expressed concern regarding the scope of the language used in proposed new §180.2. "Insurance carriers do not provide medical care. To the extent a carrier is able to ensure quality medical care, such an ability is significantly tempered by an injured employee's legal right to choose his or her own health care provider. The scope of [the carrier's] duty to assist in ensuring quality medical care is not addressed by the rule." The commenter suggested removal of the reference to insurance carriers in regard to referrals for failure to provide/ensure quality medical care.

Response: The commission agrees that the language of the rule could be clearer but does not believe that the reference in the rule to the role of carriers relating to medical benefit delivery should be removed. HB-2600 addresses quality of care from both the carrier and provider sides. HB-2600 promotes quality care and recognizes that carriers have an important role to play in that regard. The high costs of benefits in the system cannot be attributed solely to provider overutilization or failure of the commission to regulate effectively. Overutilized care being paid for by carriers contributes to the system's failure to control costs. This rule makes it clear that the commission will accept referrals against carriers for their acts and omissions that hurt quality of care or unnecessarily raise system costs. However, to clarify the differences in the provider and carrier roles, the language has been amended.

Comment: Commenter asked how referrals are to be made.

Response: Referrals can be made by mail, telephone, facsimile, in person, and, in the future, email or internet form. (However, this is not available at this time as the commission has not yet built a secure form for sending confidential claimant information with referrals).

180.7 Comments

Comment: Commenter supported the adoption of Rule 180.7 as proposed.

Response: The commission agrees, but has clarified §180.7(b) in response to other comments.

Comment: In relation to 180.7(b)(2), the commenter asked whether all anticipated violations could be corrected in 7 days.

Response: Since most reports are required in 7 days or less and most benefits are paid weekly, the commission believes it is reasonable to expect system participants to correct their behavior within 7 days of notice. It is also worth noting that whatever time period is allowed under this rule, the violator already had the period of time originally allowed (e.g. a week in the case of income benefits) plus whatever period of time the violator was in noncompliance prior to receiving notice from the commission to come into compliance.

Comment: Commenters stated that making "a willful violation through failure to correct an error should only occur, if at all, after

hearing and appeals have been exhausted and given adequate time to remedy."

Response: The commission disagrees. There are several different ways that a violation can be deemed to be willful. Under current processes, alleged violators are informally notified when the commission believes they have committed a violation and are in continued noncompliance. The violator is then given the opportunity to informally rebut the commission's finding of noncompliance and, if the commission and the violator are unable to agree on the facts of the case or that they constitute a violation, then the commission issues the formal notice of violation pursuant to Texas Labor Code §415.023 and the violator is offered an opportunity for a hearing. The only change that might occur under the current process is that the commission might now characterize the continuing nature of the noncompliance to be willful (because the violator was notified of continuing noncompliance and did not correct the situation).

Comment: Commenters were concerned that there may be situations where it might not be possible to remedy a violation within the seven days or situations where there is a dispute as to whether or not there has been a violation.

Response: The commission disagrees. As noted, the commission believes that seven days is enough time to correct noncompliance in nearly all situations. Further, the language in §180.7 is discretionary which means that the commission can evaluate the situation and the good faith efforts of the violator to come into compliance within the seven days. There is no requirement to label the continued noncompliance to be willful in those instances where the commission believes that every reasonable effort was made to come into compliance within the seven days.

Comment: Commenter recommended that the proposed amendments to Rule 180.7 be withdrawn. "The proposed amendment to rule 180.7 eliminates the existing rule's standard for determining the precise time when an 'administrative violation' occurs and replaces it with one that determines the time when a 'violation' has occurred. The amendment goes on to provide that a 'violation may be deemed 'wilful' if the person who committed the violation: (1) did so knowingly or intentionally; or (2) remains in continued noncompliance 7 days after the date the commission brought the violation to the attention of the violator.'

This proposed amendment appears to exceed the Commission's statutory authority. As noted in our comment to proposed rule 180.1(20), Section 415.021 of the Labor Code, even as amended by House Bill 2600, restricts the Commission from assessing an administrative penalty against a party unless that party has first been found to have committed an 'administrative violation.' It is therefore irrelevant whether the Commission believes the party to have committed a 'violation,' within the meaning the Commission has chosen to give that term. Moreover, as noted in our comment to proposed rule 180.1(22), the Commission appears to be attempting to create a new standard for the assessment of an administrative penalty that is lower than the standard imposed by Section 415.021(a) of the Labor Code. The proposed lower standard would permit the imposition of an administrative penalty to sanction conduct that is not committed 'knowingly' or 'intentionally,' which are the traditional benchmarks for defining 'wilful' conduct. The proposed lower standard implicitly concedes that a party who 'remains in continued noncompliance 7 days after the date the commission brought the violation to the attention of the violator' does not necessarily violate the pertinent statutory or rule provision either 'knowingly' or 'intentionally.' In other words, the Commission implies that its proposed new, lower standard is aimed at parties who may be only negligent or reckless in failing to bring themselves into compliance once they have been warned by the Commission of their improper conduct. However, the Legislature in sections 415.001 through 415.003 of the Labor Code has not defined 'administrative violations' in terms of a negligent or reckless failure to comply with a statutory or rule provision.

Furthermore, the proposed rule's definition of 'wilful' allows the Commission to characterize a party's conduct in one specific instance involving one specific claimant, employer, and carrier as 'wilful' simply because the Commission has previously warned the same party five years, 10 years, or even 20 years earlier that its similar conduct on that previous occasion constituted a 'violation' (and not even an 'administrative violation' at that) even though the previous occasion involved a different claimant or employer, or, in the case of a carrier, involved a completely different adjuster from the one whose conduct is currently the subject of scrutiny. Indeed, the proposed rule does not limit how far back in time the Commission can reach to pluck one isolated instance of a statutory or rule violation and use such a distant violation as the basis for claiming that the current conduct at issue was 'wilful.' Such unlimited reach exceeds the Commission's rule-making power.

Also, under the proposed rule, the party charged with a current 'violation' could be ordered to pay an administrative penalty for a 'wilful' violation even though the party had not committed a violation of the same statutory or rule provision. Under the proposed rule, it is not necessary that the accused party have been previously adjudicated of having violated the statutory or rule provision in question in the current dispute. All that is required is that at one time, more than seven days before the date of the current alleged incident, 'the commission brought the violation to the attention of the violator.' The proposed rule thus allows the assessment of an administrative penalty against a party simply because the Commission once told that party that the Commission merely believed that the party had failed to comply with a statutory or rule provision on an earlier occasion. The proposed rule, allows the assessment of an administrative penalty in such situations *even if the Commission was incorrect in its belief or even if the Commission had actually prosecuted a claim for administrative penalties against the same party on the earlier occasion before SOAH with the result that SOAH had determined the party had not committed an administrative violation at all.* In such a situation, the Commission had in fact 'brought the violation to the attention of the violator.'

Moreover, the Commission could prevent a party from having an impartial adjudication of whether it has committed an administrative violation in any particular instance by simply issuing a 'warning notice' to the party and accusing it of having committed the violation. Since the Commission would not be charging the party with an 'administrative violation,' the party would have no right to a hearing before SOAH; nonetheless, the Commission could come back to that same party in the future and then charge it with a current 'violation' on the basis of the previously issued warning letter. The proposed rule thus might occasion an unconstitutional denial of due process in an administrative violation proceeding that is based on a prior event that involves something less than a determination of guilt after an adversary process or an absolute confession of guilt by the same party currently being charged. This is because an administrative penalty could be assessed against a party under the proposed rule due

to the party's having been warned by the Commission on an earlier occasion about the party's conduct even though the Commission never afforded the party the opportunity to defend itself in an adversarial proceeding with procedural safeguards in the earlier occasion."

Response: The Commission disagrees with the suggestion to withdraw the amendments and with the reasons offered by the commenter to do so.

First, as noted in response to this commenter's statements on §180.1(20) and §180.1(22), whether a person has committed a violation as opposed to an administrative violation is not relevant. Either way, the person violated the statute and/or rules regardless of whether the statute permits the issuance of an administrative penalty for the noncompliance. Further, as also noted, the rule does not lower standards for willfulness; it identifies ways for the commission to establish if the conduct was willful. Behavior is willful if the commission notified the violator that a violation had been committed and the violator did not to correct it.

Second, the suggestion that it is inappropriate for the commission to consider prior violations in taking enforcement action is clearly contrary to the requirements of the statute. Among the factors that the commission is, in fact, required to consider in assessing an administrative penalty (under Texas Labor Code §415.021(c)) is "the history and extent of previous administrative violations." By practice, the commission generally considers the two years prior to the violation in addressing violation referrals (however audit penalties generally go back to the prior audit and look at the change in performance as a measure of history - when performance goes up, penalties may be lowered, when performance goes down or remains essentially unchanged, penalties may be raised).

Third, regarding the suggestion that a person might have to pay a penalty for a willful violation where the underlying act was not a violation misinterprets the process. The commission is not planning on issuing separate penalties in these instances (one for the initial violation and one for the willful violation); rather, it would issue a single notice of violation that identifies the initial violation and then characterizes the continued noncompliance of the violator to be willful. If the accused violator goes to a hearing and is found to have not committed a violation in the first place, then it wasn't a willful violation either. Therefore, the commission's characterization of a violation as willful does nothing to limit the violator's right to due process. Similarly, the commission will not be using prior allegations of noncompliance that were found to not be violations by SOAH as "prior notice of noncompliance" or other history.

Finally, the commission is not attempting to prevent a party from having an impartial adjudication by issuing a warning letter and then using that warning to establish "prior notice of noncompliance." First, many warning letters are issued in accordance with a signed settlement agreement (i.e. with the violator's agreement of the facts). Second, although warning letters do not get appealed to SOAH, the commission often receives responses to the warnings that cause it to withdraw the notice. Third, if the commission were to use a warning letter as a means to establish a future violation as being willful, the violator would be able to raise the issue of the first violation in the hearing for the subsequent violation. It would be appropriate for the alleged violator to raise the issue of the validity of the prior notice that the commission is using to establish the subsequent violation as willful. The prior notice is a required element for proving the "willful nature of the subsequent violation" (unless it can be proven in other ways).

However, all of the comments and discussion on the issue of "previous notice" suggest that it would be helpful to better explain the difference between using notice on a prior violation to establish a willful subsequent violation and using notice of continued noncompliance as a way to establish that a current violation is willful. Therefore, the commission has modified §180.7 to better make this distinction.

180.20 Comments

Comment: Commenters opined that the goal of the approved doctor list should be to allow qualified health care providers to participate in the workers compensation system. Such list should not be unduly burdensome which would deter qualified physicians from participating in the system. The same holds true for the amount of training required to participate in the system. The commenter opined that "physicians normally take several hours of continued medical education annually. Some of the hours are required to maintain their license or board certification. While the number of hours required to participate in the compensation system may itself not appear burdensome, the number of hours required should be considered in light of the numerous areas of medical practice that the physician must stay current. Workers' compensation may not be a significant part of the practice of many physicians who treat injured workers and continuing education requirements might become a barrier to participation in the system. Burdensome rules likely would result in fewer providers delivering a greater percentage of the health care in the workers' compensation system."

Response: The commission agrees that the rules should not be so burdensome as to deter qualified, conscientious providers from participating in the system and has made some changes to the rule as proposed. The minimally required training under §180.23 can be completed via self-study/distance learning. This will make complying with commission training requirements less burdensome while improving quality of care at a reasonable cost.

Comment: Commenter suggested that for clarity and cross-reference, §180.20(a) should refer to Rule 126.8 by way of a statement such as: "Services provided prior to August 1, 2003, must be performed by a doctor on the ADL pursuant to §126.8 of this title (relating to Commission Approved Doctor List)."

Response: The commission agrees that having ADL provisions in two rules may be confusing. Therefore, the remaining provisions in §126.8 have been repeated in §180.20 much the way provisions from §126.10 were moved into §180.21. Therefore, the commission has restructured §180.20(a) and §180.20(b) to cover ADL issues both before September 1, 2003 and on or after that day. The commission intends §180.20 to be the governing rule should there appear to be any conflict between it and §126.8.

Comment: Commenter suggested that the following language: "or for the immediate post-injury medical care (care provided by the first doctor visited by the employee on the date the employee first seeks medical attention for the workers' compensation injury or illness)" from §180.20(a) be either clarified or deleted. The commenter was concerned that otherwise it might "become a loophole for providers to practice workers' compensation care without being on the ADL." The commenter felt that the commission should clarify that "immediate post-injury medical care" is very limited (e.g., one visit) or delete this language so that we

do not create an avenue for providers to skirt the ADL requirements." Another commenter echoed this concern but felt that a reasonable maximum period should be established to "encourage required medical attention and system incorporation."

Response: The commission agrees with the need to clarify this section. The proposed language was intended to cover the initial day of treatment only. It was meant to be the care provided the first time the employee sees a doctor not "any care provided by the doctor first seen by the employee" and the rule has been revised to clarify that.

The commission disagrees with adding to this rule that the employee be required to see a doctor within a specific period of time because this rule regulates medical care and doctors, not injured employees (other than requiring them to seek care from a doctor on the ADL). For clarification purposes, a definition of immediate post-injury medical care has been added to §180.1 and the duplicative language has been removed from §180.20(a).

Comment: Commenter suggested that the word "may" should be replaced with the word "shall" in §180.20(b) to clearly indicate that the requirements for inclusion on the ADL are exclusive and mandatory and not permissive or discretionary.

Another commenter suggested that §180.20(b) be changed from

"A doctor licensed in this state or licensed by another jurisdiction may apply to be included on the ADL by:" to

"A doctor licensed in this state or licensed by another jurisdiction with a high volume of Texas Workers' Compensation employees (in excess of 12 employees treated in a 12 month period) shall apply to be included on the ADL by:"

The commenter interpreted the proposed language as not requiring doctors in other jurisdictions (such as those in border states) who treat more than 12 employees in a twelve-month period to be on the ADL and suggested that these doctors be held to the same standards as other doctors in the system.

Response: The commission agrees that clarification would be helpful. The subsection used "may" because doctors are not required to be on the ADL (unless they want to provide treatment to workers' compensation claimants). The use of the word "may" in this subsection did not override the requirements of §180.20(a) (requiring the doctor to be on the list). However, for clarification purposes, §180.20(b) has been amended to specify that a doctor seeking admission to the ADL shall take the steps required by the section. The commission did not use the language proposed by the commenter as the Statute requires all doctors who wish to participate in the Texas workers' compensation system to be on the ADL.

Comment: Commenter suggested that along with the requirements listed in §180.20(c), a doctor who wishes to be on the ADL should also be required to have a certain minimum level of malpractice insurance. The commenter felt that this can serve both as an indication of competence and to ensure adequate coverage to satisfy a carrier's subrogation right in any malpractice that results in increased medical and indemnity costs. The commenter suggested that this would shift the risk of the doctor's malpractice and reduce costs to the system.

Response: The commission disagrees. Much the way there is an insurer of last resort in the workers' compensation system to ensure that anybody can obtain workers' compensation insurance, there is a similar feature in the malpractice insurance market. Thus, obtaining malpractice insurance would not necessarily be a mark of quality. However, it is worth noting that §180.20(e) has been revised to state that the commission shall deny admission or only admit with restrictions, a doctor who could be deleted under §180.26. Section 180.26 provides that the Medical Advisor is to recommend deletion of any doctor who has had three or more malpractice judgments. In addition, the commission does not believe that it is responsible for ensuring that doctors have malpractice insurance just as the agency does not have the responsibility to ensure that employers carry workers' compensation insurance.

Comment: Several commenters pointed out that some doctors might not have an email address and suggested instead that if the doctor has one, then it should be provided. One of the commenters pointed out that carriers are not required to accept electronic claims yet the proposed rule requires doctors to have electronic addresses. Another commenter felt that it was not appropriate to require doctors to have internet access because this would require purchasing a computer as well as paying a monthly fee. The commenter felt that there is no reason to mandate or to require a physician to pay a monthly or routine fee just for the sake of a commission rule, arguing that "this is an extra tax on physicians, who already pay taxes for the government Internet systems."

Response: The commission disagrees. HB2511 required the commission to utilize electronic transmission methods to reduce paper in the system. Although carriers are not currently required to accept electronic billing, this is likely to change in the future. However, the commission needs to have the ability to quickly and inexpensively contact doctors in the system and share information with them. Some providers do not keep apprised of commission advisories and may find out about rule changes after committing a violation and being notified of it by the commission. On the other hand, all insurance carriers are required to have an Austin Representative who picks up mail from the commission's central office location (and the cost of having such a representative is assumedly many times more expensive than having internet access). When the commission needs to notify carriers of changes or concerns, it can easily do so by simply placing a copy of a memo or advisory in the box. The commission has a need for a similar mechanism for contacting doctors and intends to use email for that purpose.

Internet access can be obtained for as little as $10.00 per month with a simple dial-up account using a modem that can be obtained for as little as $20.00. Therefore, it does not represent a significant cost. Further, it appears that Internet access for health care providers is common. As part of the commission's 2000 Customer Satisfaction Survey (published May 26, 2000), the commission asked respondents to indicate whether they had internet access. 68.3% of the health care providers responded that they did have such access. Given that the date that doctors would be required to meet the new ADL requirements is September 1, 2003 (more than 3 years after the original survey was conducted) and that Internet access is becoming more and more common throughout business and society, it is reasonable to assume that an even greater proportion of doctors participating in the system on a regular basis will already have Internet access.

Comment: Commenter suggested that a comma should be put after "facsimile numbers" in §180.20(c)(1).

Response: Commission agrees and has made the change.

Comment: Commenters were concerned that "relevant restrictions" in §180.20(e) is not defined. The commenter was concerned because "sometimes a physician may have restrictions for technical violations such as a chart not being updated. A definition should be added that ties restrictions to relevant quality of care issues."

Response: The "relevant restrictions" referred to in §180.20(e) are taken from the new statutory language in Texas Labor Code §408.023(c) which states that the commission, in determining whether to accept a doctor on the ADL or sanction a doctor, may consider and condition its approval on any practice restrictions applicable to the applicant that are relavent to the services provided under this subtitle.

The commission disagrees that restrictions for what the commenter terms "technical violations" like failing to update charts cannot be relevant. Carriers need documentation to determine whether care being provided in a claim is reasonable and necessary. In addition, complete documentation may be needed by the commission to monitor quality of care. Failure to properly document claims and care could obscure the relatedness of care being provided.

Comment: Commenter noted that the word "of" is missing between "denial" and "the doctor's" in §180.20 (f).

Response: The commission agrees and has made the change.

Comment: Commenters suggested that the word "may" in §180.20(e) be replaced with the word "shall" to clearly indicate that the requirements for inclusion on the ADL are exclusive and mandatory and not permissive or discretionary.

Response: The commission agrees. However, the commission is concerned that, if it inadvertently added a doctor to the ADL when the rule requires the doctor to be denied admission or only be admitted with restrictions, that the doctor would attempt to argue that the commission had lost its chance to use its authority to prevent the doctor from being on the ADL. Like the commenters, the commission believes that the items in §180.20(e) represent barriers to serving on the ADL or grounds for restricted acceptance and that it should not lose the right to impose the requirements of this subsection at a later date (particularly if the commission was unaware of the disqualifying factor at the time it admitted the doctor). Admission to the list does not constitute "forgiveness" of the offenses. Therefore, §180.20(f) was modified to make this clear.

It was noticed that the proposed language only provided an explanation and opportunity to respond in a case where the commission was denying an application but not in the event that it was approving the doctor with conditions or restrictions. The commission believes that doctors who are added with restrictions may want to know why and have the opportunity to respond. Therefore, in addition to making the change suggested by the commenters, the commission is adding language to address these other issues.

In addition, the commission provided additional detail regarding the process for reviewing and responding to ADL denials or restrictions. The proposed rule did not clearly indicate that the commission would review the doctor's response and might change its mind. The subsection is now much clearer in this regard and also specifies that if the final decision is still not an unrestricted approval, the commission shall explain its reason(s) to the doctor so that the doctor will know why his rebuttal did not convince the commission that it was appropriate to allow an unrestricted admission (or possibly even a restricted admission) to the ADL.

Comment: Commenter expressed concern about the ability of the commission to regulate out-of-state providers feeling that the commission has little or no ability to regulate these providers. The commenter claimed to know of many instances where out-of-state doctors, health care facilities, and health care providers who treat Texas workers' compensation employees refused to comply with the Texas Labor Code and commission rules, guidelines, and/or policies. The commenter suggested that the Executive Director exercise the authority granted by Texas Labor Code §406.074 to enter into interjurisdictional agreements with other states to help ensure compliance with the statute and rules.

Response: The commission agrees that it needs to ensure that all participants in the Texas workers' compensation system comply with the statute and rules. It appears that the Legislature attempted to help ensure that this happen by requiring out-of-state doctors who conduct peer reviews or utilization reviews do so under the direction of a doctor licensed in this state (as that will ensure that there is someone in the state's jurisdiction that can be more easily held responsible for the out-of-state doctor's actions and inactions).

However, the commission disagrees that interjurisdictional agreements would solve the problem of regulating out-of-state providers. Texas Labor Code §406.074 allows such an agreement to resolve various conflicts of jurisdiction and noncompliance by employers. However, the fact that the section specifically mentions noncompliance by employers and not by other system participants could make it difficult to use such an agreement as suggested. This problem is exacerbated by the fact that the Statute says that if such an agreement is adopted by the commission as a rule, then it "binds all subject employers and employees," not carriers, attorneys, or providers.

Comment: The commission received numerous comments regarding subsection §180.20(h). As proposed, the subsection requires insurers to pay the medical bills of doctors licensed in another jurisdiction and who are not on the commission's approved doctor list and are low-volume doctors (treat or evaluate 12 or fewer Texas workers' compensation employees each year).

A number of commenters were concerned that the proposed language would allow out-of-state providers to avoid registering for the ADL because carriers were not permitted to withhold payment simply because the doctors were not on the ADL (even if the doctors provided care to more than 12 claimants per year). "As currently proposed Rule 180.20(h) provides an end-run to Rule 180.23. The same requirements for "X" certification under Rule 180.23 provide an exception under Rule 180.20(h). Where, then, is the incentive to obtain "X" certification? Such a doctor cannot provide peer reviews, but can treat, which thwarts the legislative intention."

In addition, commenters were concerned that carriers would not be able to monitor these doctors to identify whether the doctors were truly low volume doctors (and thus had to be paid even if not on the list). Commenters felt that carriers didn't have the necessary information to perform this action and felt that it was contrary to the intent of HB-2600. "The regulation as drafted would unfairly put the responsibility on the carrier to determine on its own whether the doctor has treated more or less than 12

claimants in a given year, prior to making a reimbursement determination. There is no way a carrier would have ready access to such information. The regulation should be revised to allow the carrier to withhold a reimbursement demand where the doctor is not on the ADL. The burden must be on the doctor, not the carrier, to provide sufficient information--perhaps through a Commission certification--that the doctor is entitled to reimbursement even though not on the ADL. If the carrier cannot withhold payment even after determining that the doctor is not on the ADL, there simply is no reason to have an ADL."

One commenter recommended that the commission develop a process wherein it identifies all out-of-state doctors who are not low-volume doctors and advise them of the need to complete the application process and appropriate levels of training required to be approved for inclusion on the ADL. The names and license numbers of the out-of-state high volume doctors who fail to comply with the commission's application and training requirements after notification by the commission of those requirements would then be posted on the commission's website and carriers would be permitted to deny payment.

The commenters felt that entitlement to reimbursement should be consistent for high or low volume providers, regardless of the jurisdiction and one suggested changing the subsection to the following:

(h) A carrier shall not withhold reimbursement to a doctor who:

(1) Treats more than 12 Texas workers' compensation employees per year and is on the ADL, or

(2) Treats 12 or less Texas workers' compensation employees per year who submits a TWCC approved form (ex. ADL Exception Form) indicating their exemption from the ADL.

The commenters believed that an out of jurisdiction doctor who provides routine medical treatment to a high volume of Texas employees or who performs a Texas workers' compensation specific examination (RME or DD exam) should be held to the same standards and qualifications as a doctor licensed in the state of Texas. "If a Texas employee seeks treatment from a doctor who treats a low volume of Texas workers' compensation patients (either outside of or within the state of Texas), that doctor would not likely be aware of the compensation laws. It appears that the purpose of the ADL process is to ensure quality heath care for Texas workers' compensation patients. The addition of a form indicating the provider's exemption from the ADL would enable the carrier to verify the reason for the provider not being on the ADL prior to reimbursement. This would help eliminate reimbursement to providers who have been denied approval to the ADL through the correct process.

The addition of an exemption form would enable the Commission to track the number of Texas injured employees that each low volume provider has treated in a 12-month period. This tracking device would enable the Commission to maintain and publish 2 lists (the ADL and the Exemption list) via the Internet. These lists would provide the carriers with the necessary information to comply with the reimbursement requirements of this rule. Any doctor that is not on either listing would not be eligible for reimbursement."

Commenter recommended that the names and license numbers of the out-of-state high volume doctors who fail to comply with TWCC's application and training requirements after notification by TWCC of those requirements be posted on TWCC's internet website. "The availability of a list of out-of-state high volume doctors (doctors who treat or evaluate 13 or more Texas workers' compensation employees per year) will allow insurance companies to identify low volume out-of-state doctors who are not required to complete TWCC's new approved doctor list application process and training and ensure that payment of medical bills is not withheld because these doctors are not on TWCC's approved doctor list."

Response: Regarding the issue of in-state and out-of-state providers being held to the same standards, notwithstanding the difficulties the commission sometimes has ensuring that out-of-state providers remain in compliance, the commission definitely believes that all doctors should be held to the same standards, just as all carriers, employers, attorneys, and employees should.

Subsection (h) was intended to ensure that doctors who are not regular participants in the system (whether in-state doctors or out-of-state doctors) do not lose their right to reimbursement without having the opportunity to be admitted to the ADL (since these doctors may not be aware of the ADL requirements). However, the commission agrees that there is a potential for abuse if carriers are not allowed to withhold payment on bills of doctors who are not on the ADL and the commission has rewritten the subsection.

Subsection (h) now requires carriers to withhold reimbursement to doctors not on the ADL except when the health care provided was emergency or immediate post-injury medical care or the doctor receives exception from the commission. If the doctor has not been deleted or suspended from the ADL and has not had his application for admission to the ADL rejected, the carrier will be required to process the medical bills in accordance with chapter 133 and determine whether or not the medical bills will be paid once the doctor is added to the ADL. The carrier's explanation of benefits (EOB) will include an explanation that the payment will be made if the commission grants the doctor an ADL exception for that claim. This will allow the carrier the full 45 days to review the medical bill for reasonableness and medical necessity and at the same time, not require a doctor to have to go through the 45 day delay twice. Carriers will have 14 days from receiving documentation of the approved exception to pay all bills previously processed on the approved claim but not paid due to the ADL status question.

In some cases, doctors will be able to get payment for services that were provided prior to being admitted to the ADL. However, because the delay in payment will be caused by the doctor's failure to register for the ADL and not any fault of the carrier, the carrier will not be required to pay interest on the payment unless the carrier took more than the allowable time to initially review the bills or failed to timely pay the benefits when finally notified that the doctor was eligible for payment due to timely ADL approval or ADL exception.

Doctors who were not entitled to payment because they were deleted or suspended from the list or had their application to be on the ADL rejected by the commission will not be eligible for retroactive payment. They will only be eligible for payment for services provided on or after the date the doctor was reinstated/added to the ADL.

It should also be noted that doctors who are on the ADL at the time they provide health care shall not be required to provide such documentation to the carrier in order to secure payment.

Carriers shall have access to the ADL online and will be expected to use that information. Requiring doctors to submit documentation of ADL status with each medical bill or even an initial bill is unnecessary paperwork that runs contrary to the intent of HB-2511.

The commission disagrees with the suggestion that the commission post a list of exempt doctors separate and apart from the ADL. Doctors will be given exceptions on a claim-by-claim basis and the carrier will be given a copy of the approval. Therefore, such a list is unnecessary.

Regarding the issue of the difficulty that carriers will have identifying which doctors have exceeded the limit on the number of claimants they are permitted to provide health care to (for those doctors whose certification provides such a limit), the commission agrees that many carriers will be unable to identify doctors who are treating more than the permitted number of injured employees. Companies that have larger bill review companies should be able to easily track the number of patients a doctor is seeing using their computerized payment processing system. However, this could result in a doctor treating well over their maximum in a year without the carriers' knowledge if the employees did not all belong to the same carrier or to carriers using the same utilization review company. The commission will have to monitor doctors who are registered as doctors who infrequently provide care to ensure they comply with the participation restrictions which apply to that certification level. Doctors found to have violated the section will have the option of obtaining certification to treat employees without volume restrictions within 60 days or the Medical Advisor will recommend deletion from the ADL.

Comment: Commenter suggested that the commission make the information required in (i) available in a downloadable format by File Transfer Protocol (FTP), on its website, which carriers can use to keep their automated systems in sync with the commission's current list of qualified and approved doctors.

Response: The commission agrees and will make such files available for review and download when it begins posting the information on the website.

Comment: Commenters suggested that if the commission is going to put names of providers on their website who have been deleted from the list or have been sanctioned by the commission, the names of carriers and utilization review agents sanctioned should also be placed on the website.

Response: The commission believes that all system participants who have been sanctioned or otherwise penalized by the commission should be posted to the commission's website. However, this rule is not the proper place to put this requirement as it only focuses on doctors. Further, the reason that the commission is going to post information about sanctions against doctors is that these sanctions could have a significant effect on the doctor's eligibility to receive reimbursement, and thus, carriers need to be as aware of these sanctions as they need to know who is on the list. However, the commission anticipates developing a process for posting enforcement actions against all system participants as a deterrent and to build confidence in the system.

Comment: Commenter recommended changing §180.20(i)(1) to the following:

180.20 (i) (1) doctors (name, TIN #, license # and license state) on the ADL and their certification levels with the effective date of each level (once mandatory);

The commenter noted that the doctor's TIN, license # and state that they are licensed in will ensure accuracy when using the ADL listing. The addition of the effective dates for each level of certification also ensures proper reimbursement for services provided by a doctor as outlined within the ADL rules.

Response: The commission agrees that more than the simple names will need to be listed but disagrees with specifying exactly what information is to be provided as the information may change over time. For example, the commission anticipates relying on the national provider identification number required by the Health Insurance Portability & Accountability Act once it is available. The commission intends to make the list more and more comprehensive over time so that it will be able to be used for many things. For example, by including address information, it will eventually be possible for injured employees to find doctors in their areas who are on the ADL. Subsection (i) has been broadened to include additional information that will be posted on the website. For example, the commission will also identify doctors whose applications for the ADL were rejected (as this affects reimbursement). The commission also intends to post information about a doctor's privileges granted or restrictions imposed by the commission.

180.21 Comments

Comment: Commenter suggested that designated doctors who do a high volume of required medical examinations (RMEs) for carriers should be monitored by the commission for conflicts of interest. "These doctors, in some cases, are lacking in objectivity due to the ties with the carriers and the DD must always be beyond conflict of interest or an appearance of such a conflict." Another commenter suggested that all sources of income received by a designated doctor should be reported. The commenter felt designated doctors cannot be impartial if they perform carrier RMEs and thus should automatically be disqualified. Commenter accused the commission of intentionally appointing "corrupt" designated doctors.

Response: The commission agrees that designated doctors need to be unbiased and agrees that doctors who provide inaccurate ratings or incorrect assessments of MMI need to be removed from the designated doctor list (DDL). However, the commission disagrees that a doctor who has served as an RME doctor should be disqualified from serving as a designated doctor. The argument is predicated on the assumption that a doctor who does examinations for carriers is automatically biased towards carriers. The corollary to this position is that doctors who do not do examinations for carriers will be biased towards injured employees. The commission does not accept this premise as true.

The commission does not believe that it is appropriate to exclude doctors from being designated doctors based upon a perceived bias and what they might do. Rather, the commission will monitor designated doctor performance and take action when appropriate. The commission will be stepping up its monitoring of designated doctors, and these efforts will ensure that doctors whose quality of service as a designated doctor does not meet standards shall be removed from the designated doctor list. The commission disagrees that it would ever intentionally appoint a corrupt designated doctor.

However, in reviewing the comment, the commission noticed that, although the proposed rule required doctors to report "disqualifying associations" (as a means to ensure non-bias), the

rule did not contain a definition of what a disqualifying association is. In transferring the requirements of §126.10 to §180.21, the commission inadvertently left out the definition along with the definitions of "party" (which is integral to the definition of "disqualifying association") and "self-refer" (which is another term that was used in proposed §180.21 but was unintentionally not defined). Therefore, the commission has added these definitions from §126.10 to §180.21 in a new subsection (o).

Comment: Commenter suggested that for clarity and cross-reference purposes, §180.21(b)(1) should include a reference to Rule 126.8.

Response: The commission agrees that a reference to the ADL rule is necessary but has made the reference to §180.20 rather than §126.8 because §180.20 as adopted covers the ADL both before and after September 1, 2003. So a reference to §126.8 is not necessary.

Comment: One commenter suggested deleting §180.21(b)(2) (which requires designated doctors to have maintained for the past three years and continue to maintain routine office hours for the treatment of patients in an active practice of at least 20 hours per week). "The status of a provider's practice is not a measure of the ability of a provider to perform the duties of a designated doctor. Those providers that wish to be included on the designated doctor list will be subject to training requirements and will be tested to demonstrate proficiency. Requiring an "active practice" unnecessarily limits the availability of designated doctors. It would exclude many in academic and research settings whose knowledge of best practices may be superior to doctors in busy office practices who are unable to keep up with the medical literature. Providers that are board certified, licensed in good standing, and complete the training and other ADL requirements should not be prohibited from being designated doctors."

Another commenter echoed this concern: "While we believe that eligibility for the designated doctors list should be restricted to highly qualified doctors, the 20 hours of active practice rule seems somewhat arbitrary and will likely serve to prevent many highly experienced and highly qualified specialists from participating in the process. The 20 hour per week active practice requirement is not in the statute and we would advise against its adoption by regulation because it may unfairly exclude the more experienced Texas medical specialists who could provide their expertise to the workers' compensation system. To ensure a qualified designated doctor pool, we would recommend that the DDL be open to those doctors who are Texas licensed in good standing, are Board certified in their medical specialty and who have completed the Commission's required training for designated doctors. This will allow the workers' compensation system to benefit from the knowledge and expertise of the medical society's more experienced specialists."

However, other commenters indicated support for the 20 hours per week active practice requirement. One commenter suggested that doctors who do not have active practices "often lose touch with current medical practices and the plights of the injured workers." Another commenter echoed this concern, opining that after a doctor is out of active practice for a certain amount of time, the doctor's income is impacted and this means that carriers will have more influence on the doctor. The commenter felt that doctors who do not have an active practice have a place in the system but that there should be some type of limitation on time.

Response: The commission agrees that the requirement for a doctor to have an active practice should be deleted. In the past, there was a concern that doctors who no longer had active practices would not be as aware of trends in their field and thus, over time, might see their knowledge grow out of date. This is an issue of quality. The commission and supporters of the active practice requirement were concerned designated doctors without active practices would produce opinions of lesser quality than those of designated doctors with active practices. The commission now believes that this can be prevented.

The commission plans to develop and/or find supplemental training for designated doctors who do not have active practices. Designated doctors are required to complete training and testing every four years under both the old and new rules. However, those without active practices will be permitted to be on the DDL only if the doctor also completes supplemental training/testing on MMI/impairment evaluation every four years in an alternating cycle of two year intervals (first the mandatory training/testing then the supplemental training/testing roughly two years later, then the mandatory training/testing again, etc.).

The commission was also, at one time, concerned about quality and allowing a designated doctor cottage industry to develop. The commission is no longer concerned about this. With the changes made by HB-2600 that give the commission additional authority and resources to ensure quality in the system, the commission believes that it can ensure that designated doctors will provide quality opinions. Further, it may be that doctors who are more active as designated doctors will provide higher quality impairment ratings as repetition may improve performance.

Regarding the suggestion by a commenter that a doctor who does not have an active practice is more likely to be biased, the commission disagrees. The greatest value in requiring an active practice is that designated doctors would remain current regarding medical treatment. However, as noted, the commission believes that there are alternative ways of ensuring that doctors who do not maintain active practices are qualified to be designated doctors by requiring additional continuing education training.

Regarding implementation of this change, §180.21(b) applies to qualifications to be a designated doctor prior to September 1, 2003. The subsection was intended to essentially carry over the requirements currently in effect in §126.10 (relating to Commission Approved List of Designated Doctors). The only change from §126.10 was to clarify that "active practice" means at least 20 hours per week. The commission is not ready at this time to lift the active practice requirement as it has not yet developed or approved any supplemental training. Therefore the change will apply for doctors who wish to be on the DDL on or after September 1, 2003. In addition, the commission has added a definition of "active practice" to the end of the rule to simplify the construction of §180.21.

Comment: Commenter noted that the word "to" is missing before "August" in §180.21(d). The commenter also suggested putting a comma after "2003."

Response: The commission agrees and has made the suggested changes (but changed the reference month to "September").

Comment: Commenter noted that there should be a comma after the word "to" as in "...but not limited to, prior deletion..." in §180.21(g)(5).

Response: The commission agrees and has made the suggested changes.

Comment: Commenters suggested that the word "may" in §180.21(g) be replaced with the word "shall" to clearly indicate that the requirements for inclusion on the DDL are exclusive and mandatory and not permissive or discretionary. "The use of shall is consistent with the verbiage used in Section (e) of this rule. Sections (b) and (c) use the term must when listing the qualifications for approval as a designated doctor and Section (e) uses the term shall when listing the information required for the application for a designated doctor. It appears that the intent of this rule is to monitor the qualifications of the applicants for the DDL, therefore, if the applicant does not have or does not provide proof of the required qualifications, the applicant should not be placed on the DDL."

Response: The commission agrees. However, as was the case in §180.20, the commission is concerned that if it inadvertently added a doctor to the DDL who is not qualified, that the doctor would attempt to argue that the commission had lost its chance to use its authority to prevent the doctor from being on the DDL. This has been clarified in §180.21(h). Like the commenters, the commission believes that the items in §180.21(e) represent barriers to serving on the DDL and that it should not lose the right to impose the requirements of this subsection at a later date (particularly if the commission was unaware of the disqualifying factor at the time it admitted the doctor).

In addition, the subsection was changed to provide additional detail regarding the process for appealing a DDL denial. The proposed rule did not clearly indicate that the commission would review the doctor's response and might change its mind. The subsection is now much clearer in this regard and also specifies that if the final decision is still a denial not an unrestricted approval, the commission shall explain its reason(s) to the doctor so that the doctor will know why his rebuttal did not convince the commission that it was appropriate admit the doctor to the DDL.

Comment: Commenter felt that §180.21(g)(6) which provides that a doctor can be denied admission to the DDL for any "other activities which warrant the application denial" was too vague.

Response: The commission disagrees. To attempt to enumerate all possible grounds to deny admission to the DDL would require a level of prescience that is impossible. Further, the subsection provides examples of "other activities which warrant application denial" by referencing §180.26 which lists numerous grounds for sanction or removal of a doctor from the ADL.

Comment: Commenter suggested changing "deny" to "denial of" in the first sentence of §180.21(h).

Response: The commission agrees and has made the change.

Comment: Commenters expressed concern regarding the scope of authority to waive requirements for DDL admission pursuant to proposed §180.21(i). One commenter was of the opinion "that substantial doubt exists as to the accuracy of an impairment rating when an out-of-state doctor, who has not completed [the commission's] designated doctor training course, serves as a designated doctor for the purpose of resolving a dispute regarding an injured employee's impairment rating."

One noted that no "minimum controls are established, nor does the rule provide guidance on the scope of review required for the granting of such waivers." The commenter suggested establishing minimum standards for such out-of-state doctors, including but not limited to "such minimum requirements as licensure, familiarity with correct versions of *AMA Guides* and commission rules, etc." The commenter also requested "clear delineation in the rule to specify the procedures whereby alternate out-of-state doctors are selected and evaluated, and requirements for notice and participation of parties."

Both commenters noted that the rule makes no exception with regard to the presumptive weight status accorded reports of designated doctors under existing rules and believed that it would be inappropriate to accord presumptive status to out-of-state doctors by circumventing the Commission-established requirements for Designated Doctors via broad waiver provisions. The commenters suggested that an untrained out-of-state designated doctor should not be given the same degree of presumptive weight as a designated doctor who has completed the commission's designated doctor training course.

Response: The commission disagrees. First, the language that the commenters are objecting to is virtually identical to the language that has been in the existing rule since December 1, 1995 (the sole difference being the deletion of the word "deemed", as in "when deemed necessary"). Further, the requirements for serving as a designated doctor are set out by the commission and are thus within the authority of the commission to modify. HB2600 did not limit the commission's authority in this regard. Although the commission prefers designated doctors to go through its training and testing, this is clearly not going to be possible in all cases. The Texas workers' compensation system has had thousands of injured employees living in states other than Texas. It is not reasonable to expect a doctor in the state of Washington who might see one Texas workers' compensation claim in his or her career to attend training and take a test to perform one examination. Clearly some out-of-state doctors (such as those bordering Texas) will want to be added to the DDL much the way they are now. The commission does not intend to grant exceptions to doctors who are regularly serving as designated doctors but do not get the training.

Regarding the qualifications of out-of-state doctors who do not take commission training, other states and systems use the *AMA Guides* and have doctors who function in a manner similar to our designated doctors. They may have similar training requirements that could help ensure that the doctors selected are appropriately trained. In addition, the American Academy of Disability Evaluating Physicians, the American Board of Independent Medical Examiners and other state societies and boards offer training and certifications in the use of the *AMA Guides* that could serve as a substitute for commission training on a case by case basis.

Finally, regarding the issue of somehow lessening presumptive weight of a doctor to whom the commission granted an exception in order to have the doctor serve as a designated doctor, there is no such provision in the statute and the commission does not believe that the distinction is warranted because of the factors noted in the preceding paragraph.

Comment: Commenter suggested changing the 180.21(k) from "allowing" the commission to delete or suspend a doctor from the DDL for the listed infractions to "requiring" it to. The commenter felt that the grounds listed in Section (k) (1)-(12) are intended to ensure compliance with qualifications to be a designated doctor; necessary and cost effective health care treatment; and compliance with TWCC rules. "To ensure the most effective and necessary health care be provided to the injured workers in Texas, a

doctor who violates the standards required as a designated doctor should be deleted or suspended from the DDL until such time that the doctor can prove their pattern of practice has changed."

Response: The commission agrees. Some of the infractions listed in this subsection are clearly serious enough to require deletion from the list. However, others may be less serious and thus may require less severe action (such as a short term suspension). Nevertheless, changing the word "may" to "shall" does not remove the commission's discretion to address these issues in an appropriate manner as the subsection provides that the commission shall delete or suspend the doctor and the commission has changed the rule.

Comment: Commenter expressed concern about the breadth of reasons to delete a doctor from the DDL in 180.21(k). The commenter was also concerned that the provision relating to inaccurate reports "is quite broad and it can be very subjective." The commenter asked whether one failure to timely respond to a request for clarification allows the commission to remove a doctor from the DDL.

Response: The grounds for deletion or suspension from the DDL are not substantially broader than what existed under the original rule. The prior rule specified that a doctor could be deleted for "any violation of the Texas Workers' Compensation Act or Commission rules," and this would include a failure to timely respond to a request for clarification (since such a failure would be a violation).

The commission disagrees with the commenters' suggestion that the accuracy of reports is very subjective. Many of the things that may be inaccurate regarding a report are not at all subjective. Regarding medical issues, the commission will use the findings of the MQRP to evaluate the accuracy of the reports when the MQRP conducts case reviews or audits of a doctor. In addition, the commission can also use the findings of hearings officers and appeals panel decisions. Because designated doctor opinions are given presumptive weight, if the great weight of medical evidence is sufficient to overturn the designated doctor's opinion, then it is likely that there were significant errors in the report.

Regarding the question of whether one failure to timely respond to a request for a clarification is sufficient to delete a doctor from the DDL, the answer is that it can be under the right circumstances (e.g. a willful violation). However, to ensure that single, incidental occurrences do not automatically result in suspension or deletion, the commission has modified several of the provisions of subsection (k) to focus on willful violations or violations that are part of a pattern of practice including subsection (k)(5) regarding failure to respond to a request for clarification.

Comment: Commenter had questions about what the provisions of §180.21(k)(3) mean and how the commission would prove that a violation took place.

Response: Designated doctors are permitted to enlist the help of other health care providers in the assignment of impairment ratings and determination of MMI. This is intended to occur in two circumstances: when the doctor does not have sufficient experience with an aspect of an injury (such as hearing or vision loss) and needs a specialist to assist or when the doctor wants to let another provider perform the range of motion, strength, and sensory testing required by the *AMA Guides* as provided in Rule 130.6 (relating to Designated Doctor Examinations for Maximum Medical Improvement and/or Impairment Ratings). §180.21(k)(3) is intended to ensure that designated doctors who abuse this allowance (such as by referring the entire examination out to another provider) are removed from the DDL. The commission will likely use the MQRP to help determine whether a doctor makes unnecessary referrals under this provision.

Comment: Commenter suggested that there was a superfluous "an" in 180.21(k)(4).

Response: The commission agrees and has made the change.

Comment: Commenter asked how many assignments of MMI and/or impairment ratings would have to be overturned to result in suspension or deletion from the DDL as required by §180.21(k)(6).

Response: This decision will have to be made on a case-by-case basis or based upon standards set by the commission and the Medical Advisor with recommendations from the MQRP. The question is likely to include consideration of what percentage of challenges to the doctor's opinions are upheld and not just how many times it happened. The commission would also likely consider the reason that the doctor's opinion was overturned (e.g. the type or magnitude of the mistakes).

Comment: Commenter noted that there was an extra period in 180.21(k)(7).

Response: The commission agrees and has made the change.

Comment: Commenter suggested that for the sake of uniformity and maintaining a more central location, all notices of disqualifying associations from §180.21(k)(9) should be sent to the office of the medical adviser, rather than to the field offices.

Response: The commission disagrees. The Medical Advisor does not administer the process of assigning or reassigning designated doctors and thus does not need to receive or maintain this information. The field offices performed these functions under the prior rule and will continue to do so.

Comment: Commenters expressed concern that a listing on the internet of doctor sanctions and the type of sanction may lead to doctors not wanting to be designated doctors, because they could be sanctioned or removed for an inaccurate, though innocent, report.

Response: The commission disagrees and believes that all system participants who have been sanctioned or otherwise penalized by the commission should be posted on the commission's website. Although this rule is not the proper place to put this requirement as it only focuses on designated doctors, the commission anticipates developing a process for posting enforcement actions against all system participants as a deterrent and to build confidence in the system.

Commission comment: Texas Labor Code §408.0041 requires the commission to assign the next designated doctor on the list that meets the requirements for the individual claim. However, in reviewing the comments to these rules and in developing a new system to select and assign designated doctors in accordance with §408.0041, the commission noticed that there was no provision in the proposed rule that explained where on the list a doctor will be placed when added or readmitted to the list. Therefore, the commission added subsection (n) that puts doctors who are added to the list (whether for the first time or a readmission following suspension or deletion) at the bottom of the list.

180.22 Comments

Comment: Commenters opined that the treating doctor's role and responsibilities are "greatly increased" under the proposed rule and additional information is required that will increase the time and expense in providing that information. The commenters suggested that the treating doctor receive increased reimbursement for the increased duties and the costs of providing the information.

Response: The commission agrees that §180.22 places some additional requirements on treating doctors for submitting information on patient outcomes but disagrees with the suggestion that the treating doctor's role and responsibilities are "greatly increased." Treating doctors have always been considered gatekeepers in the system and Texas Labor Code §408.021(c) always required treating doctors to approve or recommend treatment not provided in response to an emergency. Likewise, the responsibilities of treating doctors to maintain efficient utilization of health care or to communicate about the employee's ability to return to work are not new ones. This rule does not govern medical fees.

It may be possible to get some of this data (particularly on work release and cost and utilization) from carriers. However, it is not yet clear how patient satisfaction data is going to be captured and it may well have to come from doctors themselves. The commission will work with all system participants in obtaining the information. There may be portions of the data that can and will be obtained from carriers.

Comment: Commenters felt that the duties of the referral doctor are increased as he or she must get preauthorization for every medical service from the treating doctor "(apparently for even the most minor or routine procedure)" and also must report to the treating doctor at least every 30 days. The commenters stated that this can also add to the costs of treating the injured worker and advocated additional reimbursement for these increased requirements.

Response: The commission disagrees. As noted, Texas Labor Code §408.021(c) always required treating doctors to approve or recommend treatment not provided in response to an emergency (thus meaning that other providers providing health care to the injured employee have needed to coordinate with the treating doctor). Likewise, the requirement for referral doctors to send status reports to the treating doctor every 30 days existed under §133.4 (Consulting and Referral Doctors) that this rule replaces. This rule does not govern medical fees.

Comment: Commenter felt that the proposed rules do not set out any of the roles and responsibilities of any other participant in the system. "What are the responsibilities of carriers and employers in the system? The carriers are on the receiving end of all the reports and have extreme latitude to question everything."

Response: The purpose behind this rule was to centrally locate and better differentiate between the various roles that doctors play in workers' compensation claims because there are so many. Carriers' and employers' responsibilities are fairly well laid out in other rules. However, as the commission continues to update its rules, it will evaluate whether additional "roles and responsibilities" rules would serve a useful purpose.

Comment: Commenter suggested that the "or" in Rule 180.22(a)(2) should be an "and." The commenter opined that although each of these constitutes a "medical benefit" pursuant to section 401.011 of the Labor Code, a "health care provider" should strive to provide all three.

Response: The commission disagrees with the specific suggestion for changing the rule but agrees that providers should strive to provide care that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, AND enhances the ability of the employee to return to or retain employment. However, if the commission substituted the word "and" for "or" as suggested, then the rule would require providers to only provide medical benefits that meet all three requirements which does not mirror the definition of medical benefits found in the Statute. In some cases, a provider might need to provide a treatment that only meets one or two of the three requirements, and this would be perfectly appropriate under the statute. However, to emphasize the importance of trying to provide care that meets all three requirements, the commission has changed the "or" to "and/or".

Comment: Commenter suggested putting a comma between "including" and "but" in 180.22(b).

Response: The commission agrees and has made corrections relating to the phrase "including, but not limited to," throughout the rules.

Comment: Commenters suggested that "sf 12" in 180.22(c)(4)(C) was either extraneous material or else a misspelled word.

Response: The commission disagrees. "sf 12" stands for Short Form 12, a simple outcomes measure with 12 functional categories. It is an abbreviated rendition of the more sophisticated SF-36. Both are widely accepted outcomes measurement tools. However, the commission has modified the rule to clarify what is meant by "sf 12."

Comment: Commenter recommended that "health" be substituted for the word "medical" in 180.22(c) since a treating doctor can be a chiropractor and the word "medical" does not apply to a chiropractor.

Response: The commission agrees that the term "health care" is appropriate because this term is defined by statute while "medical care" is not. However, the adjective "medical" doesn't automatically exclude chiropractors (e.g. chiropractors submit "medical bills," not "chiropractic care" bills). The commission has made the change here and in other places in these rules where applicable. However, the commission used the phrase "immediate post-injury medical care" rather than "immediate post-injury health care" in these rules because the language is used in 408.0023; but the context clearly indicates that it applies to chiropractors as well.

Comment: Commenter felt that the requirement in 180.22(c)(1) that treating doctors approve or recommend all health care rendered to the employee (except in an emergency) would drive doctors out of the system.

Response: The commission disagrees. This requirement mirrors §408.021(c) and has existed since the act was first passed. Further, it was contained in rule 133.3 and is merely being moved to this new rule. This language does not represent a new requirement on treating doctors.

Comment: Commenter felt that the requirements under 180.22(c) regarding reporting work release data, cost and utilization data, and patient satisfaction exceeded the commission's authority as HB-2600 did not specify that treating doctors had to provide this information. The commenter suggested that carriers should have to do this as they have the data.

Response: The commission disagrees. Texas Labor Code §408.025 provides that the commission by rule shall adopt requirements for reports and records that are required to be filed with the commission. It may be possible to get some of this data (particularly on work release and cost and utilization) from carriers. However, it is not yet clear how patient satisfaction data is going to be captured and it may well have to come from doctors themselves. The commission will work with all system participants in obtaining the information. There may be portions of the data that can and will be obtained from carriers.

Comment: Commenter recommended including "insurance carrier" after the word "employer" in 180.22(c)(3) so as to ensure that the insurance carrier is kept abreast of the injured employee's ability to work or any work restrictions on the employee.

Response: The commission agrees and has made the change. In addition, the commission noticed that the rule did not require the treating doctor to communicate return to work information with the injured employee which was an oversight that has been corrected. Communicating with injured employees is important to ensuring a timely and appropriate return to work.

Comment: Commenter recommended adding a new subsection (c)(5) to 180.22 which requires the treating doctor to report the employee's status, prognosis, plan of treatment, response to past and on-going treatment, and expected date of maximum medical improvement to the insurance company within 30 days of initiation of treatment and at every 60 days thereafter.

Response: The commission disagrees. The commenter's proposal would put back into place requirements that existed prior to the introduction of the Work Status Report in §129.5 (relating to Work Status Report) and the addition of the requirement to submit chart notes with medical bills for specific types of treatment. Those requirements coincided with the repeal of the rules that required filing the Initial Medical Report and the Subsequent Medical Report and those changes were made based upon the input of stakeholders; the commission does not agree that there is a need to reintroduce the repealed reporting duties.

Comment: Commenter suggested adding a new subsection to 180.22(d) that would require the consulting doctor to forward a copy of the consultation report to the insurance company. The commenter also suggested changing 180.22(e)(2) to require the referral doctor's report to the treating doctor also be sent to the carrier. The commenter felt that insurance companies are not always provided with the necessary medical records and documentation necessary to effectively manage workers' compensation claims and that it is extremely important that the insurance company receive a copy of the consulting doctor's consultation report and the referral doctor's status report so as to allow the insurance company to properly manage the claim, set proper levels of claim reserves, and keep abreast of the status of the injured employee.

Response: The commission agrees that the consulting doctor's report needs to be sent to the carrier and §133.104 (relating to Consultant Medical Reports) already requires it. However, the commission has copied requirements into §180.22 to make it easier to locate. In addition, the commission has modified the rule to specify that the referral doctor's status report is to be provided to the carrier as well as to the treating doctor.

Comment: Commenter suggested changes to §180.22 (d) and (e) to prohibit consulting and referring doctors from making referrals to other providers for either treatment or another consultation. The proposed rule prohibited a consulting doctor from making referrals for treatment without the treating doctor's approval and was silent on referring for consultation and the rule was likewise silent on the issue of the referral doctor making any referrals. The commenter also suggested requiring the treating doctor to provide written approval to the consulting doctor prior to the consulting doctor providing treatment (the proposed rule did not require written approval).

The commenter was concerned about the situation where a referral or consulting doctor might make further referrals and sets up a "daisy chain" of referrals where the treating doctor is likely to lose control of treatment. The commenter was worried the health care provider, who receives the second level referral, may not know who the treating doctor is and felt that allowing only the treating doctor to make referrals to other health care providers would enhance the quality and cost-effectiveness of care.

The commenter based these recommendations on the general understanding that "a consulting physician is a specialist who examines a patient and makes a written report back to the referring physician. There is no circumstance where the consulting physician should be referring the patient to another health care provider for treatment or consultation. That is the job of the treating doctor. A consulting doctor should not be able to convert a referral for consultation into a referral for treatment without the written approval of the treating doctor."

Response: The commission agrees in part. The commission agrees that the rule should control consulting and referring doctors trying to make referrals to other providers for consultation or treatment but disagrees that this should be completely prohibited. There may be circumstances where the consulting or referral doctor feels that another doctor's opinion is needed, particularly in a complicated case. Although such referral should not be made without the treating doctor's approval, the consulting or referral doctor may know of or have a working relationship with another doctor who has the additional medical expertise being sought and, therefore, it would be appropriate for the consulting or referral doctor to make the referral with the treating doctor's written approval. Regarding the suggestion that the referral or approval to initiate treatment be made in writing, the Medical Advisor has advised that this does not follow standard medical practices for this type of situation. It is very common for doctors to telephone one another on such matters for approval and this is a more efficient way to handle the referral or approval. However, it is important for the new consulting or referral doctor to know who the treating doctor is. Therefore the rule was changed to ensure this information is provided with the referral. In addition, the commission modified subsection (f) to provide that if the RME doctor makes a referral, the same requirements apply.

Comment: Commenter believed that the rule should be modified because the commenter felt that §180.22(f) as proposed did not require an RME doctor to provide unbiased evaluations regarding MMI and impairment (when permitted to perform such evaluations).

Response: Although implied, the commission agrees that this could be clearer and has modified the rule.

Comment: Commenter asked whether the peer reviewer in §180.22(g) has to have the same licensure and specialization as the doctor whose care is being reviewed. The commenter

also suggested that a utilization review doctor under §180.22(h) should be a true peer and be familiar with current tests and procedures.

Response: §180.22(g) outlines the role of a peer reviewer and utilization reviewer but does not govern the specific qualifications that a doctor should have to conduct a specific peer review. Under §133.304 (relating to Medical Payments and Denials), if a carrier chooses to deny a bill because the carrier has a peer review that indicates that the care is not reasonable or necessary, the carrier is required to use a licensed provider who: 1) is of the same or similar specialty as the provider who prescribed or performed the health care under review; 2) is licensed to prescribe or perform the category of health care under review; and 3) if a doctor, must not have been removed from the ADL.

Comment: Commenter suggested combining §180.22(g) and (h) because the functions of peer review and utilization review doctors are largely the same. The commenter suggested changing this in other rules using the terms as well. Further, the commenter pointed out that the level of training for both types of doctors is the same.

Response: The commission agrees and has combined the subsections.

Comment: Commenter expressed concern with the language in the rule relating to membership on the MQRP. The commenter's concern related to the fact that the focus is on "doctors" even though HB2600 clearly allows other health care providers to be on the MQRP.

Response: The commission agrees that the language regarding MQRP membership should be broader and has modified the rule to change the reference from "doctor" to "provider."

180.23 Comments

*Introductory Comment:*The commission received numerous comments that related to the proposed certification levels and their authorizations. Some of the concerns related to the amount of training that doctors would be required to receive. Other concerns related to the various authorizations and limitations that each certification level had (such as the number of claims that doctors who infrequently provide care would be permitted to treat). Still others related to the issue of impairment rating training.

As originally proposed, there were four distinct certification levels. Based upon the public comment and a reanalysis of HB-2600 and the needs of the system, the commission is adopting a different structure. There are 2 different certification levels for doctors on the ADL. Level 1 Certification shall be for doctors who either infrequently provide care or doctors who only wish to perform peer/utilization review functions for carriers. Level 2 Certification shall be for doctors who wish to fully participate in the system. Training necessary to achieve these certifications will be available through self-study/distance learning.

Full authorization to evaluate MMI/impairment is separate from the doctor's certification level and optional. Doctors who do not choose to seek full authorization will not be permitted to certify MMI or assign an impairment rating in the case where the employee has permanent impairment as a result of the compensable injury. When faced with such a situation, an unauthorized doctor will either have to receive permission by exception from the commission (which will be reserved primarily for cases where the employee is living well out of state) or refer the employee to a doctor who is fully authorized to perform such evaluations in the workers' compensation system. These provisions are consistent with recent amendments to rules in chapter 130 (relating to Benefits - Impairment and Supplemental Income Benefits).

Given the importance that impairment ratings play in the system and the fact that they generally do not occur throughout the claim, the rule requires doctors seeking full authorization to evaluate MMI/impairment to successfully complete commission-prescribed training and testing. This training/testing is the same that designated doctors are required to complete. Training all doctors who evaluate MMI/impairment to the same level of competence is expected to result in more accurate certifications and ratings which should reduce disputes and costs.

A simplified structure and more flexibility for doctors regarding the training they need to obtain are among the advantages these changes offer. The proposed rule required doctors who wished to be treating doctors to take impairment rating training even though they might not have wanted to be responsible for assigning impairment ratings. Under the adopted rule, these doctors can concentrate their practices on the employee's clinical recovery and return to work and make referrals to another doctor for assignment of an impairment rating should the injury result in permanent impairment.

The training requirements for designated doctors (other than the MMI/IR training) were moved to §180.21 which regulates the DDL. This places training requirements with requirements for supplemental training for doctors who do not have active practices. However, on or after September 1, 2003, §180.21 requires designated doctors to obtain full authorization under §180.23 to be a designated doctor.

These changes are based upon comments addressed previously in this preamble and on other comments that follow.

Comment: Commenter supported the adoption of Rule 180.23 as proposed.

Response: The commission agrees. However, the commission believes that some changes are appropriate as discussed in response to other comments.

Comment: Commenters suggested that the commission remember that physicians annually have many continuing education requirements for either licensure or board certification for their particular specialty or for a need to stay current in their various areas of specialty or practice. The commenters cautioned the commission to not set up the training requirements such that they deter doctors from participating. The commenter recommended utilizing online training and other innovative training methods that would limit the amount of time that the doctor would have to spend away from the office.

Response: The commission agrees with this and other suggestions that the commission needs to ensure that its training requirements not serve as deterrents to participating in the system. As noted, the commission has modified its proposed training requirements and simplified its certification level structure.

Comment: Commenter felt that "it is inappropriate for physicians to have to receive additional training of any kind to be able to provide care for TWCC patients. There is no reason to have continuing education credits required within the TWCC system to take care of patients that are the same patients that we routinely care for in our everyday practices. I am strongly opposed to this requirement. I believe that burdens imposed by the new certification requirements will cause many Texas physicians to

seriously reconsider participating in the Texas Workers Compensation System."

Response: The commission disagrees. The commission is required by §408.023 to specify reasonable training and registration requirements for doctors who wish to participate in the Texas workers' compensation system. There are aspects of the workers' compensation system that are different from other health care systems. However, although doctors will be required to complete training to participate in the system, as previously noted, the commission has removed the requirement that the training be CME approved because it is believed that some of the subject matter may not qualify for such accreditation.

Comment: Commenter supported the requirement that doctors who practice in the workers' compensation system on a regular basis should have at least one day of basic training in the rules and definitions used in the system. However, the commenter felt that since most doctors have already passed numerous boards, one or two days more of training will not ensure quality of care.

Response: The commission agrees that training alone may not ensure quality of care in all situations. However, a better understanding of the general requirements of the system and how reporting and benefit delivery are interdependent can improve quality of care because doctors are more likely to act in a manner that reduces disputes and helps ensure the uninterrupted delivery of reasonable and necessary benefits.

In addition, general workers' compensation training puts doctors on notice as to what is expected of them particularly as relates to return to work. Further, it improves the commission's ability to take enforcement action if a doctor is not providing quality care or otherwise violates the statute or rules as the commission can prove that the doctor was aware of the requirements.

Comment: Commenter suggested that the training requirements for RME doctors, peer or utilization review doctors and designated doctors be made the same. The commenter explained that it was his experience that the specialty or licensing board of the doctor meant very little when it came to quality medical care and to quality medical reports, based on the peer reviewed medical literature and the *AMA Guides.*

The commenter believed that, with rare exception, a bad designated doctor is a bad RME doctor, and a bad designated doctor is a bad treating doctor. The commenter felt that no amount of training or testing will make a bad required medical exam doctor an excellent designated doctor.

Response: The commission agrees in part. Under the adopted rule, if an RME doctor wants to be able to evaluate employees for MMI and assign impairment ratings when the employee has permanent impairment, the doctor will have to successfully complete the same training and testing relating to MMI/impairment that a designated doctor does.

However, the commission has not required the same training for peer/utilization review doctors as designated doctors because the statute requires the commission to modify its registration and training requirements for doctors who only provide peer review or utilization services for a carrier. Further, the difference in training will largely be a matter of depth of coverage of the material on basic workers' compensation matters, and MMI/Impairment training (which peer and utilization review does not really have a role in).

Comment: Commenter felt that the treatment of the injured worker should be based on accepted medical practices, based on the peer reviewed medical literature. The subsequent evaluations performed by physicians, whether at a peer review level, utilization review level, required medical exam level, or designated doctor exam level, should also be based on accepted medical practices, based on the peer reviewed medical literature. This is what is best for the injured worker and for the system.

Response: The commission agrees the treatment of the injured worker should be based on accepted medical practices, based on the peer reviewed medical literature. HB-2600 requires any treatment guidelines adopted by the commission to be "nationally recognized, scientifically valid, and outcome-based and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care." Therefore, as the commission adopts new guidelines they should help ensure that the care provided meets the commenter's suggestion. However, this rule does not govern how medical care is provided or reviewed and thus such a requirement does not belong here.

Comment: Commenter felt that the phrase "per year" (as in 12 employees or fewer per year) was unclear. The commenter wanted to know if "per year" was a calendar year or if the year was a 12 month period that would rotate with each provider upon first treating an injured employee (i.e. if the first employee was treated on September 23, 2001 then the time frame would go until September 23, 2002 and the doctor could not treat/evaluate more than 12 different employees during this period).

Other commenters suggested that the number of claimants that a doctor who has "Level X Certification" (which the adopted rule replaces with "Level 1 Certification") should be raised from 12 per year to 24 per year. The commenter was concerned that in some areas there may be a limited number of doctors available and employees should have access to care as close to home as possible.

Response: The commission agrees that a change in the number of claimants that a doctor who infrequently provides care can see in a one year period, is appropriate. The commission has performed a rough analysis of fiscal year 1999 system data to identify the number of claimants seen by the providers in the system. Based upon this analysis, the commission has changed the number from 12 to 18. This should ensure that about 80% of all employees are seen by a doctor who has received the regular training and is fairly active in the workers' compensation system. That will mean that roughly 20% of the employees will receive care from doctors who are less active participants. In addition, the commission has modified the requirement so that providing only emergency care or immediate post-injury medical care to an injured employee does not count toward the 18 claimant limit. This is important in a case where a doctor has already provided care to 18 claimants during a year and a new employee comes in following an injury needing immediate treatment.

Because a rolling period would probably be harder for doctors to track, the period shall be calendar years beginning January 1 of each year. This is more fully explained in §180.23 as well.

Comment: Commenters felt that the proposed requirement that a doctor receive Level 2 Certification to be a treating doctor was excessive and recommended that Level 1 Certification be the level required. The commenter noted that even Level X doctors were allowed to be treating doctors and that the Level 1 Certification required training more often that Level 3 Certification (once every 2 years versus once every 5 years).

Another commenter suggested that the Level 1 Certification should allow the certification of MMI, which would be a prerequisite to referring out to a Level 2 or 3 doctor to evaluate the permanent impairment. "A certification of MMI is nothing more than a determination that the claimant is unlikely to improve with further medical treatment. If the treating doctor is able to prescribe treatments that are designed to get the claimant to MMI, it would seem that he or she would be qualified to determine when those treatments have had a satisfactory result. This is a simple medical opinion. It is the evaluation of permanent impairment that requires special training."

Still another commenter disagreed with the proposal that doctors with Level X Certification be allowed to certify MMI and evaluate impairment. The commenter felt that only those doctors with appropriate training should be authorized to certify MMI and evaluate impairment. The commenter expressed concern that providing for exceptions without adequate controls will result in confusion regarding the scope of commission authority and increased costs relating to disputes.

Response: The commission agrees that the training requirements relating to MMI and impairment should be modified so that doctors who do not wish to be fully authorized to certify MMI and assign impairment ratings will not have to go through the training. The commission does not want to force doctors who are uncomfortable or uninterested in assigning impairment ratings and certifying MMI when there is impairment to do so because it would likely result in lower quality evaluations.

Doctors who want full authorization will be required to successfully complete training and testing relating to MMI/impairment evaluation. Otherwise, a doctor on the ADL will receive training in determining whether an employee has permanent impairment. They will be able to certify MMI if the doctor finds that the employee does not have permanent impairment. If the doctor finds that there is permanent impairment, the doctor will either have to refer the employee to a doctor who is fully certified to evaluate MMI and impairment or would have to receive permission from the commission by special exception (which the commission anticipates will happen primarily in cases where the employee lives well out of state) to perform those examinations.

Comment: Commenter noted that §408.023(f) provides for exceptions to being on the ADL for out-of-state doctors reviewing health care services provided under the statute for a carrier but that the proposed rule did not comply with this provision. The statute provides an exception as long as the doctor works under the direction of a doctor who is licensed in Texas. However, the proposed rule required the doctor to be on the ADL and to work under the direction of a doctor licensed in Texas.

In addition, commenters suggested that the doctor who directs the out-of-state doctors should not have to have Level 3 Certification. The commenters noted that peer/utilization review does not deal with MMI and impairment and the chief difference between Level 1 Certification and Level 3 Certification (as proposed) was the additional focus on impairment ratings and testing to be a designated doctor. The commenters pointed out that this would need to be changed in §180.20 as well.

Response: The commission agrees in general. The commission agrees that it is not necessary for the supervising doctor to have the same level of training as a designated doctor (which is what the proposed rule required). Doctors performing peer and utilization review functions for carriers do not need MMI/Impairment training as a designated doctor does. When a carrier has concerns about a designated doctor's report, the carrier is permitted to have an examination by a doctor of their choice and this doctor will required to have the MMI/Impairment training as well as passing the same test required to be on the DDL.

In addition, the commission agrees that HB-2600 provides for an exception such that out-of-state doctors performing peer/utilization review functions for carriers are not required to be on the ADL. Therefore, the commission has modified the rule to reflect these changes. However, the rule requires that a doctor directing out-of-state doctors have Level 2 Certification, which requires more in-depth training. Although one might argue that the medical director should only be required to have Level 1 Certification because that level allows a doctor to perform peer/utilization review for carriers, the commission disagrees. A medical director has more responsibility for ensuring quality reviews of health care services than a doctor simply performing the services. Essentially, a doctor who directs multiple doctors will impact far more reviews and thus it is more important that this doctor be better trained.

Comment: Commenter expressed concern that the rules were silent on the qualifications of medical directors of utilization review agents who do not conduct utilization review or peer reviews. The commenter wanted to know whether these qualifications would be addressed by the Department of Insurance.

Response: §408.023 provides that any doctor who wishes to provide services under the statute and rules is required to be on the Commission's approved doctor's list. Under the new certification structure adopted under this rule, a medical director for a utilization review agent would be required to be on the ADL and have Level 2 Certification if the doctor is supervising peer/utilization review doctors who are not licensed in Texas. Utilization review and peer review functions can encompass reviewing preauthorization requests.

Comment: The commenter pointed out that psychologists, PT, OT etc are involved in peer review and other utilization review functions for services rendered by a like professional within their scope of practice. "TDI rules require preauthorization reviews be performed by someone trained and licensed to perform the service under review. Thus, only psychologists can review psychological testing, since even physicians do not receive such training. This has implications for peer, UR, and MQRP participation." The commenter felt that Level 1 training would be appropriate.

Commenter recommended that either: a separate set of rules be developed quickly for "other healthcare providers" who will perform peer review, UR, or serve on the MQRP, or 2) the present rule be clarified that "other healthcare providers" performing peer review, utilization review, or serving on the MQRP require only Level 1 or at most Level 2 training.

Response: The commission disagrees. This rule focuses on training requirements for doctors. Setting training requirements for other providers who provide peer and utilization review services for carriers or serve on the MQRP goes beyond the scope of these rules.

Comment: 180.23(c)(4)(A)(i) misspelled word: "toe" should be "to"

Response: The commission has rewritten the language regarding certification levels and training requirements.

Comment: Commenter supported the availability of limited exceptions to the certification and training requirements under

§180.23 but was concerned that the rule is silent as to the mechanism of carrier notification of approved exceptions.

Response: The commission agrees and has amended subsection (b) to require the commission to provide the carrier a copy of the approved exception when it is approved.

Comment: Commenter suggested moving "every two years" in §180.23(c)(2) after "complete in-depth training."

Response: The commission has rewritten the language regarding certification levels and training requirements.

Comment: Commenter suggested that the commission should make a special effort in its implementation of the doctor training under 180.23 to utilize vendors who are non-profit in nature and who have demonstrated ties to the state of Texas, due to the complexity of the law in this state and its unique nature, especially considering the probability of having the network established in the next 12 months.

Response: The commission has modified the training requirements so doctors can receive some training directly from the commission based on the concerns raised about the amount of time doctors might have to take away from their practices to attend training. The TWCC Doctor Training and the Modified TWCC Doctor Training Modules will be developed by the commission in various self-study/distance learning formats.

The main training that doctors will receive in person from a commission-approved trainer will be for certifying MMI and assigning an impairment rating when an employee has permanent impairment as a result of a compensable injury. This training will likely be very similar to existing impairment rating training required of designated doctors but will have a testing component. It is likely that many of the commission's currently approved trainers (some of which are non-profit in nature with Texas ties) will be among the first to be approved to provide the new training. However, the commission will not limit its approval to those entities as suggested by the commenter. There may be other qualified entities that can provide such training.

180.24 Comments

Introductory Comment: The commission noticed that there were two misreferenced subsections in the proposed rule and corrected them. The first was in subsection (a)(2)(C) and the other was in (b)(3)(B).

Comment: Commenter supported the adoption of Rule 180.24 as proposed.

Response: The commission believes that the rule should be adopted but that revisions were appropriate as a result of various comments received.

Comment: Commenter felt that the rule will "further compromise the role of the independent practitioner of rehab services. For a physician owned facility, services will be requested as financial gain is clearly linked with the referral however for a treating doctor to have to sit and wait for a carrier to authorize or speak to the referring doctor is not practical. Further this is not found in any present general form of health care. If you link this rule with a Stark II type approach where a doctor can't refer if he owns the facility then you'll save money and persons will get good care. Since Stark II, our Medicare patient load has more than doubled since physician owned facilities are reluctant to deal with the federal government."

Response: The commission disagrees. Texas Labor Code §413.041 differs from federal provisions in that it does not prohibit "self-referrals." The section mandates that the commission adopt rules requiring the disclosure of financial interests. However, it does not prohibit referrals when financial interests are involved.

Comment: Commenter suggested that all sources of income received by a designated doctor should be reported. The commenter felt that "TWCC is determining someone's life and to appoint a corrupt [designated doctor] is a civil rights violation. TWCC does appoint corrupt [designated doctors] intentionally and TWCC violates civil rights by intentionally depriving an injured worker of statutory guaranteed benefits.

Response: The commission disagrees that it would ever intentionally appoint a corrupt designated doctor or violate an employee's civil rights. The intent of the rule is to address fraud and overutilization issues by ensuring timely disclosure of certain financial arrangements or interests. The issue the commenter is addressing is not a matter intended to be covered by the financial disclosure requirements of §413.041. Bias of the designated doctor is sufficiently addressed by §180.21, which requires the doctor to report if he or she has a disqualifying association. Further, the commission intends to monitor designated doctors to ensure the quality of their decisions using the Medical Advisor and reviews and recommendations by the MQRP.

Comment: Commenter suggested that the terms "health care practitioner" and "health care provider" need to be defined and suggested that, if no difference is intended between the two, then the commission should use only one term. Otherwise, define one or both terms in the definition section of the chapter, making clear the difference.

Response: The commission disagrees that definitions are necessary. The language in the rule is consistent with the Statute. These terms are defined in the Act. Pursuant to §401.011(21), "health care practitioner" means "(A) an individual who is licensed to provide or render and provides or renders health care; or (B) a nonlicensed individual who provides or renders health care under the direction or supervision of a doctor." Pursuant to §401.011(22), "health care provider" means "a health care facility or health care practitioner."

Comment: Commenters noted that HB-2600 requires a doctor to disclose financial interests in other health care providers as a condition of registration. "There is no requirement to disclose information to the carrier as set out in the proposed rule. To require a disclosure to the carrier of every patient referred to such entities is unduly burdensome and exceeds the statutory authority granted in HB 2600. The information on any interest a doctor has in another entity is already filed with the commission and is available there."

Response: The commission agrees that requiring separate disclosure at the time of a referral would be duplicative to the practitioner's disclosure that was already made to the commission and that will be available on the commission's website for viewing and/or download. Therefore, proposed subsection (c) which contained this requirement has been deleted and proposed subsection (d) renumbered as (c). However, the commission does not agree that this proposed disclosure requirement exceeded the commission's authority as the commission is authorized to define the reports providers are required to file.

The commission also noted that the proposed rule required annual disclosure which the commission has reevaluated and believes is unnecessary. Therefore, the rule was rewritten to take out the reference to annual disclosure. In general, practitioners will be required to disclose financial interests within 30 days of the first time they make a referral to the other provider. However, doctors will also be required to make the disclosure when they apply to be on the ADL and then will be required to update their disclosure within 30 days of any change.

Comment: Commenter recommended replacing §180.24 (a)(2)(C) with the following:

"The statutory and regulatory exceptions that apply to referrals in Title 42, United States Code §1395nn(b) - (e) and have been adopted at the time of the adoption of this rule shall apply to the disclosure requirements of the interests in paragraph (1)(A) and (B) of this subsection. In determining whether to incorporate revised or new Federal Statute or regulations, the Executive Director shall consider whether use is consistent with applicable statutory requirements and with commission rules in effect on the date of the revision. The Executive Director shall inform the commissioners of a determination not to adopt a revision or a new Federal Statute or regulation on the effective date established by the publisher, and shall inform the public by issuing a commission advisory regarding the determination and by filing the determination for publication in the Texas Register."

The commenter preferred this language as it would automatically keep state and federal standards aligned unless the Executive Director saw a need to make them different (which is the opposite of what the proposed language provided). "Consistency between state and federal standards is almost always beneficial to all participants in the workers' compensation system."

Response: The commission agrees that change is necessary but disagrees with the suggested language. In reviewing comments on the issue of financial disclosure and, in particular, those relating to the rebuttable presumption created that a referral is not reasonable and necessary if there is a failure to disclose, the commission realized that the exception concept needed to be tied to the consequences for failing to disclose, not to the duty to disclose itself.

HB-2600 changed Texas Labor Code §413.041 to require "each health care practitioner to disclose to the commission the identity of any health care provider in which the health care practitioner, or the health care provider that employs the health care practitioner, has a financial interest" (emphasis added). The statute further required the commission to adopt "financial interest" as provided in analogous federal regulations. Under the federal statute, the exceptions are exceptions to the prohibition against referrals to an entity with which a provider has a "financial relationship" (which is the term used by the federal rules). Therefore these exceptions aren't really part of the definition itself but rather the use of the definition. As such, the commission has removed the exception from the definition and referenced it in subsection (c)(3) (originally proposed as subsection (d)(3)). Under the adopted rule, if a practitioner makes a referral without making the required disclosure, there is a rebuttable presumption that the services provided under the referral are not reasonable and necessary unless the financial interest was one of those covered by one of the exceptions. The rule does not apply the rebuttable presumption to referrals that the federal system would not prohibit because the evidence that such practices increase referrals that are not reasonable and necessary is not as well established.

Comment: Commenter suggested that the financial disclosure address direct and indirect interests. "It should also address legal and beneficial interests. Indirect interests arise when a doctor owns an interest in a corporation that has a subsidiary that provides durable medical equipment. A beneficial interest, as opposed to a legal interest, arises when a doctor is a beneficiary of a family trust that owns the durable medical equipment company. Disclosure of all direct and indirect beneficial interests should be required."

Response: The commission believes that, as a result of changes made in response to the prior comment, the rule covers disclosure as suggested by the commenter (though it doesn't use terms like "legal interests" and "beneficial interests"). The rule already covered direct and indirect interests.

Comment: Commenter asked whether a health care practitioner who owns a building and rents space out to another health care provider would have to disclose this relationship as a financial interest.

Response: Rental of office space by one provider from another may be a disclosable financial interest. Rule 180.24 closely tracks the language of the Stark law (42 U.S.C.A. §1395nn). Given that the Legislature mandated that the commission adopt federal standards that relate to referrals, and the fact that the provisions are patterned on the federal provisions, interpretations of federal law will be persuasive authority as they relate to the commission's rules. Consistent with Texas Labor Code §413.041, however, the rule does not prohibit self-referrals, it simply requires that the information relating to ownership or compensation arrangements be disclosed. When in doubt, the practitioner should err on the side of disclosing the arrangement in the manner and at the time set forth in the commission's rules.

Comment: Commenter suggested that in addition to providing a disclosure of the financial interests of the doctor, the provider should also be required to disclose the financial interests in the doctor's practice.

Response: The commission disagrees. Texas Labor Code §413.041 requires the commission to establish rules requiring that health care practitioners (including doctors) disclose their financial interests and those of the providers who employ them. These financial interests are considered relevant because they may lead to excessive referrals and overutilization of services. This conclusion is derived from a number of studies that consistently found that physicians who had ownership or investment interests in entities to which they referred ordered more services than physicians without those financial relationships (some of these studies involved compensation as well). However, there is no provision to require the kind of disclosure recommended by the commenter. The commission does, however, note that the information may be obtainable from the reverse. That is, a doctor may not have to disclose who has an interest in his practice but if another practitioner does have such an interest, then that practitioner will have to make the disclosure and reviewing the data will allow the relationship to be seen. The commission is planning to maintain financial disclosure information in a relational database to allow such analysis.

Comment: In reviewing §180.24(d), which outlines the consequences of failing to disclose, the commenter was concerned about inadvertent nondisclosure, such as when a practitioner is unaware of the existence of a financial interest. The commenter provided an example in which the referral doctor recommends

an MRI and the treating doctor ends up sending the employee to a facility in which the referral doctor had a financial interest.

Response: The commission agrees that given the complexity of some financial interests, the fact that the rule extends broadly to many family members, and what could be a substantial forfeiture for noncompliance as required by the statute, some knowledge requirement is appropriate. Consistent with federal provisions found at 42 CFR 411.354 for Designated Health Services entities in indirect relationships, the commission adopts the "actual knowledge or reckless disregard or deliberate ignorance" standard. The commission believes that the "knows or has reason to suspect" standard fairly balances the burden of compliance against the abuse that Texas Labor Code §413.041 is intended to prevent. This is especially fair to practitioners in light of the fact that compliance with the commission rule requires only a disclosure, unlike federal provisions that may require restructuring of financial and business relationships. In adopting this standard, the commission cautions that this standard imposes a duty of reasonable inquiry, which requires that practitioners in possession of facts that would lead a reasonable person to suspect the existence of a financial relationship take reasonable steps to determine whether such a financial relationship exists. The reasonable steps to be taken will depend on the circumstances.

Regarding the commenter's example, if the treating doctor refers the injured employee to a facility in which only the referral doctor has an interest, there is no financial interest of the treating doctor to disclose.

Comment: Commenter asked whether §180.24(d)(1), which prohibits a health care practitioner from billing for services rendered on a claim during a period in which the practitioner was out of compliance with the disclosure requirements, applies to all injured employees seen by the practitioner. The commenter also wanted to know whether it applied to the practitioner or the facility that he/she has interest in.

Response: The prohibition against billing is intended to apply only to the claim in which the practitioner is in noncompliance. The commission has modified the rule to reference "the claim" rather than "a claim" to make this clearer and also inserted "for that claim" into subsections (d)(1) and (d)(2) (now subsections (c)(1) and (c)(2)) for the same purpose. However, if the doctor has multiple claims that were referred without disclosure as required, then the doctor is not eligible for reimbursement on any of the affected claims.

Regarding the question of whether the prohibition applies to the practitioner or the facility, the subsections are limited to health care practitioners. Facilities are not included in the definition of health care practitioner under the definition in §401.011(21). Facilities are not required to disclose; therefore, facilities cannot be noncompliant with regard to disclosure.

Comment: Commenters believed that the portions of the rule relating to penalties for failure to disclose exceed the authority of the statute. The commenters pointed out that a medical service provided by the doctor unrelated to the referral (and thus not subject to disclosure) could be forfeited or required to be refunded, even if medically necessary.

Response: The commission disagrees. §413.041(c) clearly states "a health care provider that fails to comply with this section is subject to penalties and sanctions as provided by this subtitle including forfeiture of the right to reimbursement for services rendered during the period of noncompliance." Thus, during a period in which the referring provider is in noncompliance regarding a required disclosure, that provider is not entitled to reimbursement for services rendered during the period of noncompliance. For example, if a doctor made a referral to a physical therapy facility in which the doctor had a minor interest but which the doctor had failed to disclose, the statute prohibits the doctor who made the referral to receive reimbursement for any services provided on that claim (including those unrelated to the referral). To read the statute differently would mean that the physical therapy facility that was not in violation would be penalized while the doctor that committed the violation would avoid the consequences.

Texas Labor Code §413.041 provides that the Commission by rule shall adopt the federal standards relating to fraud, abuse, and kickbacks. However, §413.041 differs from the federal provisions in two important ways. First, federal law prohibits "self-referrals." Second, federal law prohibits the payment to any entity for covered services provided in violation of the provisions, prohibits billing of the services, and requires the entity to refund any amounts collected (42 U.S.C. §1395nn). By contrast, §413.041 does not prohibit "self-referrals." It only requires the disclosure of information that will assist in evaluating "self-referrals." Moreover, as discussed elsewhere in these comments, compliance by disclosure is a simple process. Also, §413.041 provides that the doctor or health care provider that fails to comply with the section is subject to penalties including forfeiture of the right to reimbursement for services rendered during the period of noncompliance. It does not provide for forfeiture by any other entity. Therefore, if the forfeiture of payment provision is read as limited to only the services that were not in compliance (services that resulted from referrals to providers in which the practitioner had an interest), as the commenter suggests, it would be ineffective. In the example above, the doctor who made the referral had no right to reimbursement for the physical therapy anyway because it was provided by the physical therapy facility not the doctor. Under Texas Labor Code §134.801 (relating to Submitting Medical Bills for Payment), with limited exception, the health care provider that provided the service is the only party that is permitted to submit the bill. Under the commenters' interpretation, there would be no significant consequence to the noncompliant referring practitioner. The commission declines to read the provision of §413.041 in a manner which gives it no effect.

Comment: Commenters opined that the commission does not have the authority under the statute or in fact to create a "rebuttable presumption" that services provided for which there was a requirement of disclosure were not medically necessary.

Response: The commission disagrees that in implementing Texas Labor Code §413.041, it cannot create a presumption. While the legislature sets forth policy and standards, the agency is expected to fill in the detail by prescribing rules and regulations that promote the spirit and intent of the statute. As stated in the preamble to the proposed rules, the rebuttable presumption is justified by both the absence of disclosure and a number of studies that consistently found that physicians who had ownership or investment interests in entities to which they referred, ordered more services than physicians without those financial relationships (some of these studies involved compensation as well). Increased utilization occurred whether the physician owned shares in a separate company that provided ancillary services or owned the equipment and provided the services as part of his or her medical practice. This correlation between financial ties and increased utilization was the impetus for Congressional action resulting in section 1877 of the Social

Security Act. See 66 Federal Register 856, 859 (January 4, 2001). Once the predicate facts are established, (1) that there was a financial interest known to the practitioner and (2) that the interest was not disclosed by the practitioner, a prima facie conclusion that the services were not medically necessary is justified. The conclusion logically flows from the predicate facts. The presumption simply shifts the burden of bringing forth evidence of medical necessity when the predicate facts are shown. Moreover, the presumption is rebuttable and its effect is tempered by the commission's adoption of the "knows or has reason to suspect" standard with regard to nondisclosures described previously. In addition, as noted, the adopted rule provides for exceptions to the rebuttable presumption that are analogous to the federal exceptions in Title 42, United States Code §1395nn(b)-(e).

180.25 Comments

Comment: Commenter suggested that the commission draft rules in the future relating to advertising content and that there should be an approval process for advertising.

Response: There are statutes that govern advertising content and misrepresentations and may commission may propose rules in the future.

Comment: Commenter asked whether the rule would prohibit the use of "advertising, public relations or other legitimate marketing business functions" through television, radio, yellow page ads, or billboards. Commenter wanted to ensure that "legitimate advertising and marketing is excluded from [the prohibition of] this rule." The commenter also asked whether the rule prohibits an employee from using advertising information to decide which doctor to select.

Response: By the terms of the rule, advertising is not included. Advertising itself is not an improper inducement. The particular services being advertised or offered are, however, subject to the provision of the rule. Further, to the extent that an improper inducement is advertised, the advertisement itself may be considered in enforcement actions (for example, with regard to intent, likelihood to induce, etc.).

Comment: Commenter asked whether the language in §180.25(b)(1) and (2) prohibits an advertising agency from receiving payments to design and develop advertising materials or buying media for a health care provider. The commenter argued that such advertising can inform an employee that "a health care provider accepts workers' compensation, is on the new approved doctors' list, provides transportation, provides translator services or provides patient advocate services. Providing this information may cause a particular provider to be selected and thus generate services for which payments are made under statutes and rules."

Response: §180.25(b)(1) and (2) do not regulate an advertising agency's right to receive payment for developing advertising for a provider (even advertising which offers improper inducements). §180.25(b)(1) and (2) prohibit actions in return for referrals whether to a third party or to the injured employee. Advertising is not within the scope of this prohibition.

Comment: Commenter asked whether §180.25(b)(2) would prohibit things that are legal under the statute such as attorney services. The commenter felt that this was excessive.

Response: The language in §180.25 is directed at medical benefits. Therefore, the commission has modified §180.25(b)(1) and (2) to more clearly make this point. However, regarding the commenter's example of providing attorney services, though such services would not be prohibited under subsection (b)(2), they would be prohibited under subsection (b)(3). Section 180.25(b)(3) prohibits providing any financial incentive to have the employee treat with the provider or comply with the provider's proposed treatment. Providing monetary benefits either by cash, gifts, gift certificates, or by such things as services (for instance, by providing free of charge services that are normally subject to charge) is prohibited.

Situations in which free legal services are offered to injured employees and where injured employees are provided supplemental food, clothing support, or other services that normally cost money through gift certificates are considered financial incentives and are thus prohibited. Free advice or referrals for undiscounted professional services are not financial incentives or income enhancements and are permitted. However, paying for or providing a discount for professional services (such as those provided by an attorney) for an injured employee and free professional advice provided to an injured employee are financial incentives and/or income enhancements and when provided to induce the employee to treat with a specific provider or otherwise follow a given form of treatment are prohibited by this rule.

Comment: Commenter asked whether the language in 180.25(b)(3) prohibits the "education of an injured worker about their entitlement to rights and benefits or to the education of an injured worker about their duties and responsibilities. If an injured worker is informed that they might be entitled to mileage reimbursement this would have the effect of enhancing the workers' income benefits. Many injured workers have never seen a TWCC-3 thus they don't know if their AWW is correct. If an error was made and subsequently corrected this would also enhance an injured workers' income. Providing this information may cause a particular provider to be selected and thus generate services for which payments are made under statutes and rules."

Response: Free legal advice or referrals for undiscounted professional services are not financial incentives or income enhancements and are permitted. However, paying for or providing a discount for professional services for an injured employee and free professional advice provided to an injured employee are financial incentives and/or income enhancements which are prohibited by this rule. Mileage reimbursement is not an income benefit.

Comment: Commenter noted that the items listed in the rule as "conveniences" is not all inclusive and felt that the use of the term "etc." implied that such a list could be generated. The commenter asked what criterion should be used to determine if a service is a convenience (and thus permitted under this rule). The commenter went on to ask whether any of the following would be conveniences: a Patient Advocate that provides individual or group counseling sessions, i.e. benefits, rights, responsibilities; ensures the availability of all TWCC Employee forms; investigates complaints regarding treatment, staff, doctors, schedules, etc.; provides a liaison function between the injured worker and a clinic; provides a liaison function between the injured worker and an attorney; coordinates a transportation schedule; or performs a translation service.

Response: The commission agrees that the reference to "conveniences" is unclear. Moreover, upon reviewing the proposed rule the commission notes that some or all or the items listed could in the appropriate circumstances be contrary to federal law as it relates to federal programs. Health care providers that offer free

goods or services to Federal health care beneficiaries may be subject to civil monetary penalties under federal law. In section 1128A(a)(5) of the Social Security Act, Congress specifically addressed the issue of providers offering remuneration to Medicare and Medicaid beneficiaries in order to influence their selection of a particular provider by authorizing the imposition of civil monetary penalties against such providers. Moreover, conveniences such as free transportation services may implicate the criminal anti-kickback statute which prohibits offering anything of value to any "person" (including a federal health care beneficiary) to reward or induce referrals (including self-referrals) for items or services reimbursable under any federal health care program. Even when the value of the convenience is small, frequent rendering of items or services to an individual may preclude such items and services from being classified as nominal in value. For example, transportation, although occasionally of nominal value, has been noted as an area of historical abuse (Department of Health and Human Services OIG Advisory Opinion No. 00-7). Because Texas Labor Code §413.041 requires the commission to adopt the federal standards, and because commission rule 180.25 is patterned in part on the federal law, the proposed exclusion is not tightly enough defined.

The allowance of conveniences raises considerable concerns with regard to kickbacks. The federal legislative history regarding concerns over increased system costs caused by kickbacks, and the similar concern shown by §413.041, indicates the term "kickback" does not mean only the secret return of a sum of money received. As interpreted by federal law, "kickback" also includes a payment for granting assistance to one in a position to control a source of income. Therefore, in the case of an inducement, even if the practitioner performs some service for the money received, the potential for unnecessary costs to the worker's compensation system remains. The Texas Workers' Compensation Act is aimed at the inducement factor. Section 180.25(b)(1) & (2) of the rule refer to "any remuneration." Under analogous Federal law that includes not only payment for which no actual service was performed but also payments for which some professional time was expended. Therefore, to the extent that the injured employee controls an income stream by having the right to select the provider, payments to the injured employee (directly or indirectly, in cash or in kind) implicate improper kickbacks even when professional services are in fact provided.

Regarding the examples offered by the commenter, as noted in response to other comments, provision of professional services (other than health care) is an improper inducement. To the extent that the "patient advocate" is providing professional services (such as representation), the conduct is not permitted. However, other activities such as reviewing a complaint regarding the treatment provided by the provider's staff or the providers at a facility are allowable as they are merely customer service functions. Similarly, services to ensure the employee's access to care, such as transportation to and from the provider (which does not include chauffeur services elsewhere) and translation services while being evaluated or receiving treatment are appropriate as is providing access to worker's compensation information or forms. However, when the provider or staff begins to provide "a liaison function between the injured worker and the attorney," this is inappropriate because the function being provided is that of support staff for the attorney, which is essentially part of the provision of professional services. Accordingly, the exclusion has been modified to more clearly tie the exclusions to the provision of care and provide for limited exceptions in this area unique to the Texas workers' compensation system.

Comment: The commenter supported the commission's effort to prohibit the use of threats by any system participant but believed that it should be extended beyond the language presented in the proposed rule. "As written the rule prohibits threatening to make a claim or assertion which might interfere with a participant's license, but ignores the far more serious reality of threats against the safety or lives of system participants. Especially at this time, when all citizens recognize our vulnerabilities, the commission should make a strong statement condemning threats of violence and not merely those of groundless action or accusation."

Response: The commission agrees. A subsection (6) has been added that prohibits intentionally, knowingly, or willfully making or causing to be made a threat against life, safety, or property directed toward a system participant related to their performance of duties arising under the Statute or Rules. This language is intended to cover threats against anybody, not just the system participant to whom the threat is communicated.

Comment: Commenter recommended that 180.25(c) include a list of exemptions for clarity or access to United States Code.

Response: The commission disagrees. The exceptions are too lengthy to make listing in the Rule practical. The United States Code and the Code of Federal Regulations are publicly available in print and are also readily accessible through Government websites such as http://law2.house.gov.

Comment: Commenter recommended the addition of a new subsection (d) regarding refunds of amounts collected for billed services delivered as the result of offering improper inducements and threats. The commenter recommended the following language be adopted as the new subsection (d) "If a health care provider collects any amount for billed services delivered to an injured employee as result of offering improper inducements and threats, regardless of whether the services were medically necessary, the health care provider shall be liable to the individual or entity for, and shall timely refund, any amounts collected."

Response: The commission disagrees. A refund provision similar to that provided in §180.24 exceeds statutory intent in this area. In the realm of financial disclosure, the legislature specifically addressed forfeiture of payment as being included within permissible penalties and sanctions. Further, federal law similarly specifically provides for refunds in the area of financial interests. With respect to inducements and threats, appropriate penalties and sanctions elsewhere in the commission's rules serve as adequate deterrents. Moreover, the provision suggested could be read too broadly to require refunds of medically necessary services even in cases in which the provider of the service was not involved in the improper activity. To the extent that threats or inducements result in unnecessary medical services, these can be handled by appropriate refund orders.

Comment: Regarding §180.25(b)(4) commenter felt that a distinction should be made between inducements that are offered in order to influence an injured employee to seek the services of a particular provider and those inducements that are provided in order to motivate an injured employee to follow through with treatments that have already been approved. "After all, the medical necessity of treatment has been established by the insurance company or the commission, prior to the beginning of treatment. It seems counterproductive and cost ineffective not to attempt to motivate an injured employee to get the most out of treatment that is being paid for by the employer. It would seem that one would want to maximize compliance with treatments that have been deemed medically necessary.

For many years, behavioral research has demonstrated the powerful effect of incentives in shaping human behavior. This has become a clinically accepted form of treatment in many settings. It is important to understand that the injured worker, in many instances, has to make a tremendous shift from being a patient to becoming a productive person again. Certain types of incentives are used to maintain the worker's motivation over the difficult period of transition.

By the time that injured workers get into pain management treatment, they typically have been through months and often years of primary and secondary care, which has done very little to provide pain relief. They predictably feel defeated and discouraged. They have begun to see themselves as permanently disabled and have adopted life-styles and patterns of behavior that correspond to their belief that they will no longer be able to lead fulfilling lives.

When these patients enter into pain management, they are highly skeptical of how this treatment will be of any benefit when all others have been heartbreakingly disappointing. It takes at least several weeks of intensive treatment before they begin to accept that their condition does not have to be defined by a removal of their pain. That is to shift the goal of treatment from one of pain relief to one of improved functioning. However, during these initial weeks, their pain typically increases because of their increased level of activity in therapy. Incentives such as small gift certificates or movie tickets seem to keep them coming in to the clinic until the fruits of their own efforts begin to become evident to them.

Our experience over the years has taught us that the most salient factor in determining which patients will be successful and which will remain disabled is the consistency of participation in prescribed treatment regimens. Inconsistency leads to higher medical costs since treatment is pain for whether participation is conscientious and productive or halfhearted and lackluster."

Response: The commission disagrees. Injured employees are responsible for their own actions. The commission agrees that injured employees need to be educated as to the potential result of remaining off work for extended periods (which is the reduced likelihood of ever returning) and of failing to seek medical treatment and comply with appropriate treatment plans. The statute and rules specify the forms of compensation an employee is entitled to: these include income and medical benefits. The amount of income benefits an employee is entitled to is very clearly laid out by statute and rule based upon the employee's average weekly wage. Likewise, "medical benefits" are very clearly defined by statute. Neither includes provisions for paying an employee to continue or complete treatment. Inducements to do so are therefore inappropriate and forbidden by this rule.

The injured employee has a responsibility in the recovery and return to work process, and it is important that the employee understand this role. Education is an essential component in ensuring the injured employees' compliance with all treatment. The health care provider is responsible for providing education to the injured employee about health care treatment appropriate to the workers' compensation injury. Health care providers must encourage injured employees to be active participants in their health care treatment regimens. This is to be done through communication with the injured employee, not by offering financial incentives.

The concern of the federal provisions incorporated by the legislature in Texas Labor Code §413.041 is the risk of overutilization of services when remuneration is involved. The commission has heard of instances in which employees have felt ready to return to work but were offered inducements to complete programs such as work hardening at a substantial additional cost to the system. This is inappropriate. There is a substantial risk of overutilization of services when an injured employee is provided economic incentives to participate in treatment whether those incentives are gift certificates, movie tickets, or other rewards. Further, the incentives mentioned by the commenter may violate both the federal kickback laws (self-referral) and Section 1128A(a)(5) of the Social Security Act. With respect to kickbacks, in the commission's view, the federal legislative history regarding concerns over increased system costs caused by kickbacks, and the similar concern shown by §413.041, indicate the term "kickback" does not mean only the secret return of a sum of money received. As interpreted by Federal law, "kickback" also includes a payment for granting assistance to one in a position to control a source of income. Therefore, in the case of an inducement, even if the practitioner performs a service for the money received, the potential for unnecessary cost to the workers' compensation system remains. The statute is aimed at the inducement factor. The rule refers to "any remuneration." Under analogous federal law that includes not only sums for which no actual service was performed but also those amounts for which some professional time was expended. Similarly, to the extent that the injured employee controls an income stream, payments to the injured employee (directly or indirectly, in cash or in kind) implicate improper kickbacks even when professional services are in fact provided.

Comment: In reviewing §180.25(b)(5), commenter suggested that "frivolous" is ambiguous and should be defined or examples should be given in the preamble. The commenter stated that the preamble states that the subsection "prohibits attempting to influence the opinion of a provider or carrier by threatening to file a complaint or embroil them in other legal action" but "this is not what the subsection provides" suggesting that the language used should match the intent.

Response: The commission agrees that the term "frivolous" should be better defined. The term "frivolous" was meant to have its ordinary legal meaning. However, for clarity the term has been defined in §180.1. The definition is consistent with the provision of §415.009 of the Act (relating to Frivolous Actions; Administrative Violation) and reads as follows:

"Frivolous - that which does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

The commission disagrees that the language in the preamble does not match the language in the rule. The rule prohibits either threatening to or actually making, presenting, or filing any frivolous claim or assertion. The commission does not want to deter people from filing legitimate allegations.

Comment: Commenter expressed concern that, while §180.25(b) prohibits various improper inducements designed to influence the provision of care, selection of a doctor, etc. there is no similar prohibition against attempting to influence a provider to issue opinions favorable to a carrier or to terminate an employee's treatment. The commenter cited the example of carrier-selected RME doctors who the commenter believed are pressured to cut off the employee's benefits. The commenter stated that there was no way to regulate fees to RME doctors and that therefore, they could be influenced to issue the opinions that carriers want (because the consequence of doing otherwise is not being selected by the carrier and the doctor would lose

access to conducting these exams that the commenter believes have higher, unregulated fees). The commenter felt that this sort of activity adds cost to the system because the employee is inappropriately delayed in getting necessary care that causes the injury to linger much longer.

Response: The commission agrees in part. The intent of the rule is to ensure quality of care by prohibiting actions that could affect delivery of medical benefits. Care is supposed to be based upon reasonableness and medical necessity (not coupon books, gift certificates, threats, etc.). Therefore, prohibiting inducements that would improperly limit medical or income benefits is clearly within the original intent of the rule, and the commission has modified §180.25(b)(3) to clearly prohibit that.

The commission also agrees that unnecessarily delaying reasonable and necessary medical care can drive system costs up. However, the commission disagrees with the commenter's statement that costs for RME exams are not regulated. The commission's Medical Fee Guideline clearly prescribes maximum allowable reimbursements (MARs) for these exams and as such regulates their maximum costs. Carriers that pay in excess of these MARs for these examinations are in violation of the statute and rules.

Although the commission intended the rule to allow employers and carriers to provide employees with incentives to seek health care from providers within a network (as evidenced by the exception under §180.25(b)(3)), the proposed language unintentionally limited the exception to voluntary networks that may be created after a feasibility study conducted under the direction of the Healthcare Network Advisory Committee (HNAC). The statute provided that carrier-established networks will have to comply with the standards recommended by the HNAC.

The rule has been modified to allow employers and carriers to offer employees incentives to seek health care from within an insurance carrier network. However, the rule prohibits employers or carriers from limiting the employee's right to request an alternate treating doctor under Texas Labor Code §408.023 as insurance carrier networks do not have that power under §408.0023. However, the rule provides certain limits on the incentives to ensure that they are not constructed in such a way that they could be a barrier to the employee exercising his or her right to request authority to select an alternate treating doctor. The incentives must be conditioned in such a way that even if the employee leaves the network, the employee retains entitlement to the incentive the employee was entitled to while participating in the network. For example, if the employee was paid $20.00 per week to remain in the network and after twelve weeks leaves the network, the employee retains entitlement to the $240.00 of incentive owed for those twelve weeks.

180.26 Comments

Comment: Commenters were concerned that the rule provides that some of the conduct that could result in sanction "requires a knowing, intentional or willful intent to engage in conduct while others, regardless of intent, even when accidental or minor, can result in deletion from the list." The commenters were concerned that the rules are analogous to "holding in football" which could be called on every play regardless of intent to violate the rules.

Response: The commission disagrees. The rule requires recommendation for deletion from the ADL in cases of significant conduct/violation, which will generally mean those that are willful/intentional or part of a pattern of practice or that result in significant harm or substantial risk of significant harm. The main exception is under subsection (c) which provides for deletion in cases involving dishonest conduct. The behaviors that result in deletion are serious issues that go to the heart of a doctor's duties under the statute and rules and quality of care; they are not incidental matters.

However, based on this comment and others received, the commission has changed the rule as proposed for clarity. It is the commission's hope and belief that most system participants whose actions fall outside of acceptable standards will correct their behavior and become valuable contributors to the system. This has been evidenced through the commission's various enforcement methodologies it has used over the years relating to correcting other noncompliance.

The fact that the proposed rule required the Medical Advisor to recommend deletion or sanction in a wide variety of situations was not intended to remove the commission's ability to work cooperatively with doctors or carriers who are willing to correct their practices. A progressive disciplinary approach allows the commission to work cooperatively with those whose conduct requires the Medical Advisor to recommend deletion or sanction. Nothing in the proposed rule prevented the carrier or doctor from entering into an agreement relating to sanctions but the commission has modified the rule by adding a new subsection (e) to make it clear that the commission has the authority to enter into a progressive disciplinary agreement with the carrier/doctor. The rule allows this to occur only if the commission believes that such an agreement will achieve the goals of improving medical quality and cost containment in the Texas workers' compensation system.

There will be situations where the commission refuses to enter into such an agreement because the commission does not believe that an agreement can achieve the goal. There will also be situations where the commission offers such an agreement but the carrier or doctor is unwilling to agree to the sanction and monitoring. In that situation, the Medical Advisor will be required to recommend deletion or other sanction (depending on whether §180.26(c) or (d) applies).

In addition to outlining the circumstances under which the commission may enter into an agreement, the subsection specifies what is required to be included in such an agreement. Requirements include: the duration of the agreement; the specific goals of the agreement ("improving medical quality and cost containment" is a general, not a specific goal); the way that progress toward the goal is to be measured (to eliminate any arguments at the end of the agreement as to whether it was successful); and the consequences of failing to meet the goals (breaking the agreement requires the Medical Advisor to recommend deletion or sanction under §180.26(c) or (d)). In addition, given that in many of these cases, verifying compliance with the agreement and progress towards the goals will require a commitment of commission resources, the progressive disciplinary agreements shall require the sanctionee to agree to pay the cost of monitoring.

The agreement will also describe the action(s)/behavior(s) that were the grounds for the sanction(s) and the agreement will contain no denial of these grounds by the doctor or carrier. The agreement does not require admission but will not include denial. The commission is interested in changing inappropriate behavior. If the other party does not believe that the behavior is inappropriate or denies that the action(s)/inaction(s) occured, the other party should appeal the recommendation to SOAH.

An agreement may include any sanction provided by statute or rule or otherwise agreed to by the parties. However, whatever sanction(s) is agreed upon must be specified in the agreement. The commission's intent with regard to all sanctions (whether agreed upon or otherwise imposed) is that they directly impact the behavior that the commission is trying to change. For example, if the commission finds that a carrier's screening criteria for a given type of health care inappropriately denies approval in some situations, the progressive disciplinary agreement might require the carrier to amend their screening criteria. If a doctor is abusing a given type of treatment, the agreement could call for the doctor to obtain concurrence from a member of the MQRP or a peer or the insurance carrier before performing the treatment (even if it did not require preauthorization).

Comment: Several commenters were concerned that the rules focused most closely on doctors and not enough on insurance carriers. Two commenters stated that the rules only listed one type of conduct by a carrier that could result in sanction (unjustifiably denying preauthorization). Another commenter opined that carriers sometimes delay or deny treatment and there is no factual or justified reason as to why that treatment would be denied. This commenter thought that a standard needed to be set in the rule that would deal with this situation. The commenters pointed out that the language in HB 2600 gave the commission authority to monitor and enforce rules regarding providers and carriers and felt that the rules should apply to all of those involved. Another commenter recommended removing references to carriers from rule 180.26 and possibly providing provisions specific to carrier sanctions in a separate rule that specifies the scope of such sanctions.

Response: The commission agrees that these rules are more specific with regard to conduct that can result in sanction of a doctor than that which can result in sanction of a carrier; however, the commission disagrees that this implies that the commission does not intend to hold carriers to high standards as relates to medical benefit delivery. The difference is that the statute and rules are already filled with specific requirements and prohibitions that govern carrier behavior as it relates to medical benefit delivery while there are fewer such specific (though a number of general and otherwise implied) requirements for doctors. For example, Texas Labor Code §408.027(d) requires a carrier who does not believe that a provider is entitled to payment for a service to provide a report that sufficiently explains the reasons for the denial. Failure to provide sufficient reason is a violation of the statute, and §415.0035 provides that a subsequent violation is subject to penalties not to exceed $10,000 under §415.021. The commission fully intends to take action to ensure both carrier and provider compliance with the statute and rules.

The standards that apply to doctors who provide care for injured employees are intended to also apply to doctors employed by carriers when they evaluate injured employees and the health care provided or proposed to be provided. If a doctor in the employ of a carrier is deleted or sanctioned under the various grounds listed in §180.26, there is a reasonable possibility that the carrier too would be subject to action. For example, if the carrier's doctor has a pattern of practice of unreasonably denying preauthorization, the doctor may be removed and the carrier may otherwise be sanctioned based upon its responsibility to ensure quality review of requests for preauthorization.

However, the commission does agree that the rule needs clarification on the issue of conduct by the carrier or its doctors and has made a number of changes to this effect such as changing subsection (c)(4) to apply to both the delivery and evaluation of health care, and including those described in response to other comments. In doing so, the commission also added references to violating commission agreements and guidelines as they are also relevant to this rule.

In addition, with the passage of amendments to §134.600 (relating to Preauthorization, Concurrent Review and Voluntary Certification of Health Care), simply referencing "preauthorization" in the rule is too limiting. The intent was to focus on improperly seeking approval or improperly denying approval of health care. In order to ensure that the rule is not interpreted as only applying to preauthorization, the word "preauthorization" was removed from the rule and instead "requests for approval," "seeking approval" and similar phrases have been added. "Approval" is intended to refer to both prospective and retrospective approval because, when a carrier pays a bill, such payment is essentially "approval."

Comment: Commenters felt that subsection (b)(4) should provide some consideration for a revocation or suspension for technical reasons, such as late payment of annual licensure fee. They suggested that deletion should apply to those situations involving quality of care, fraud, or related criminal conduct.

The commenters were also concerned that proposed subsection (e) provided that a doctor that did not timely renew training requirements was suspended as they believed that this "will adversely affect injured employees under the care of a doctor and also will potentially lead to many doctors saying comp is not worth the hassles." The commenters felt that subsection (e) should provide for notice to the doctor of upcoming training requirements and a grace period if the doctor fails to meet the requirements as this "is the standard operating procedures of most licensing authorities. The punishment in the rule as written does not fit the crime and disrupts medical care to patients."

Response: The commission agrees that revocation or suspension of a license for nonpayment of licensing fees or failure to meet continuing education requirements are not as serious an issue of quality of care, fraud, or criminal conduct. However, the statute provides no discretion in this area. Texas Labor Code §408.00231(a)(3) requires the Executive Director to delete from the ADL a doctor whose license to practice in this state is revoked, suspended, or not renewed by the appropriate licensing authority.

Under §180.20(b), training is part of the minimal registration and certification requirements for being on the ADL. Further, when the doctor receives his or her certificate, it will have an expiration date on it. The commission is required by statute to provide at least 60 days notice to doctors prior to the expiration of their registration. Given that the training will be available through self-study/distance learning and that the doctor should already be familiar with the information to be covered, there is no reason to provide anything but a minimal grace period.

Because training is part of the registration and re-registration requirements (successful completion of the follow-up training required by §180.23(h) serves as a defacto re-registration), Texas Labor Code §408.0231(a) requires the Executive Director to delete a doctor who fails to meet his or her training requirements. Therefore, the commission has deleted the proposed language in §180.26(e) and put a reference to training requirements in §180.26(b)(1). In addition, the commission has moved some of the language relating to the doctor's duty to notify any employees treating with the doctor that they need to

seek care from other doctors to §180.26(i) which already placed requirements on doctors who were deleted or suspended.

In an attempt to prevent unnecessary deletions under this section in a situation where the doctor is able to relatively quickly correct the problem (such as where the doctor can quickly pay the licensing fee or complete required training), adopted §180.27 now provides that a doctor will be sent a notice of intent to delete under §180.26(b) and given 14 days to file a response (filed means received). The intent here is to provide doctors with an opportunity to prove that the grounds for deletion do not exist. In addition, if the matter was relatively minor (such as paying licensing fees) and the doctor is able to correct the matter prior to the expiration of the 14 day period, the Executive Director will not delete the doctor. Otherwise, a doctor who is deleted by the Executive Director will have to request to be readmitted to the list once the doctor's license/training is back in good standing.

Comment: Commenter asked what the definition of "significant" was as used in §180.26(c)(1).

Response: "Significant" refers to "significant violation," which is defined in §180.1.

Comment: Commenters suggested that very few courts or legal scholars have been able to agree on which offenses involve moral turpitude and that the offenses involving moral turpitude should either be defined or the part of the subsection mentioning moral turpitude be deleted.

Response: The commission disagrees. Throughout Texas statutes are references to the commission of a crime of moral turpitude precluding participation in various activities or employment. This concept is well established.

Comment: Commenters felt that under subsection (c)(3), a single negligent event, without regard to severity of injury, could result in suspension. The commenters also felt that the list is arbitrary in some respects, e.g., surgeons are singled out for "excessive surgical care" and "excessive complication rates," whatever these terms may mean.

Response: The commission agrees in part. Although subsection (c)(3)(A) provides for deletion for engaging in any negligent practice resulting in death, injury, or substantial probability of death or injury to the provider's patients, the introductory heading in subsection (c)(3) describes the standard as being a professional failure to practice in a manner consistent with the public health, safety, and welfare. To ensure this intent is upheld, the commission has modified subsection (c)(3)(A) to focus on death or "significant injury" or substantial probability of "significant injury" (rather than just "injury").

The commission also agrees that subsection (c)(3)(B)(i), referring to excessive surgical care, is more specific than necessary. In addition, in order to ensure that the rules adequately cover doctors who over treat and those who under treat, the subsection has been changed to refer to "excessive or deficient care." However, the commission does not believe that "excessive complication rates" is too specific or that it singles out surgeons. The references to repeat surgeries and infections are merely examples of "excessive complication rates" (an example of a professional failure to practice in a manner consistent with the public health, safety, and welfare).

The commission has the authority to enter into progressive disciplinary agreements where appropriate and thus doctors who are sincerely committed to improving their practices will, in some cases, be able to avoid deletion.

Comment: Commenters were concerned about a provision in subsection (c)(3)(B)(iv) requiring deletion of a doctor with three or more malpractice judgments. The commenters felt that deletion for having three medical malpractice claims without regard to a time frame was not reasonable because "some of the most capable physicians practice in high risk areas" and that this "sometimes results in higher than normal claims activity and many of these cases are settled for nominal amounts because of the high dollar exposure and not because of negligence. There should be a timeframe such as three judgments in a five-year period."

Response: The commission disagrees. The proposed rule did not provide for deletion for three malpractice claims, or even three malpractice settlements. It provided for the Medical Advisor to recommend deletion if a doctor has had three final adverse malpractice judgments. The commission is aware that sometimes doctors and their malpractice insurance carriers are willing to settle malpractice claims that are without merit simply because it is less expensive to settle the claim than fight it. The standard was written as "final adverse malpractice judgments" because these would be cases in which a judge or jury found guilt or liability on the part of the doctor and thus represents a significant occurrence. A time period of "during the doctor's career" has been added to clarify the rule.

Comment: Commenters suggested that "cause" under subsection (c)(3), which provides for deletion if a doctor loses hospital privileges or is excluded or removed from participation in other health plans "for cause," be defined to relate to quality of care issues, fraud, or similar conduct.

Response: The commission disagrees. Although the commission agrees that quality of care, fraud, or similar conduct are among the most serious reasons that a doctor might lose privileges, the commission believes that other offenses that the commenters implied should not be grounds for sanctions (such as failing to maintain accurate patient records) would in fact constitute cause and thus grounds for sanction. Inaccurate/incomplete records can pose a danger to a patient's health and further suggest that the doctor might not be willing or capable of meeting reporting and record keeping requirements in the workers' compensation system. It is important to remember that due to the addition of the provisions relating to Progressive Sanction Agreements, the commission will have the discretion to offer the doctor the opportunity to enter into an agreement that provides for a lesser sanction than deletion where the commission believes that such a sanction will achieve the goals of improving medical quality and cost containment. Therefore, doctors who demonstrate their willingness to improve their practices by entering into an agreement, will be able to avoid deletion if the commission agrees that it is appropriate.

Comment: Commenters were concerned that the authority to delete a doctor because of over prescribing medications "potentially has a chilling effect on doctors properly taking care of their injured workers-an area of health care where it is likely to have a greater percentage than average of cases involving pain."

Response: The commission disagrees. Overprescribing medication negatively impacts costs in the system, the employee's condition, and return to work. However, the commission has modified the subsection slightly to reference willfully overprescribing or doing so as a pattern of practice to ensure that a single inadvertent case does not result in deletion under subsection (c)(3)(H).

The commission also disagrees with the suggestion that injuries in the workers' compensation system are more likely to involve pain (and thus need prescription medications) than other health care systems. The commenter provides no evidence to support the idea that there is more "pain" in a practice that focuses on workers' compensation claims than one that does not. There is no reason that an orthopedist's or a chiropractor's workers' compensation patients are in more pain than their patients who had similar injuries from recreational activities. When looking at the question of appropriateness of care, care will be evaluated based upon the type of injury and standards of care.

Comment: Commenter was curious whose opinion would be used as the standard (or who would set the standards) for judging actions under subsections (c)(3)(B), (G), and (H).

Response: The statute provides that the Medical Advisor, with the assistance of the Medical Quality Review Panel, will have the responsibility of evaluating quality of care issues and recommending or setting the standards.

Comment: Commenters felt that subsection (c)(4) has very broad categories relating to doctors' deletion from the list and "could subject physicians who do not have the intent to violate commission rules and standards to sanctions and deletion from the list."

Response: The commission disagrees. The subsection clearly applies to having a "significant pattern of practice," which is defined as willful or uncorrected, and not simply incidental conduct.

Comment: Commenters questioned §180.26(c)(4)(B), which relates to doctors having unjustifiable differences between their charges or fees and the commission's fee guidelines. The commenters pointed out that providers are directed to bill their usual and customary amounts and that these may well exceed the Maximum Allowable Reimbursements under the guidelines. Another was curious whose opinion would judge whether the differences were "unjustifiable."

Response: The commission agrees that the provision should be clarified. The language was intended to address violating the fee guidelines in such a way as to raise the doctor's reimbursement beyond that to which the doctor is entitled. It also applies to the situation in which the doctor is billing more to provide workers' compensation care than the doctor would bill other payors. The commission has modified the subsection to address "billing" differences and to clarify this has moved the language proposed as §180.26(c)(4)(F) into this subsection. It should also be noted that this provision is analogous to one of the provisions explicitly listed in the statute. Regarding whose opinion would be used, it will be the commission's based upon findings through the medical dispute resolution process, the audit or violation referral review processes, or the fraud investigation process.

Comment: Commenter asked whether §180.26(c)(4)(C), which provides that a doctor can be deleted for having a significant pattern of practice of administering improper, unreasonable, or medically unnecessary treatment or services and/or seeking preauthorization for same, meant that too many preauthorization denials could result in deletion and asked how many denials would be too many.

Response: Section 180.26(c)(4)(C) provides that a doctor who has a significant pattern of practice of seeking preauthorization for improper, unreasonable, or medically unnecessary treatments or services shall be recommended to be deleted from the ADL. The specific number of denials necessary to establish a "significant pattern of practice" will vary depending on the facts of the particular case. The commission intends to monitor preauthorization activity of both doctors and carriers to identify inappropriate conduct and take action to correct it. In the case of a doctor under this subsection, if the doctor's practices were not willfully committed, then the doctor would be given the opportunity to correct the practice. If the practice is not corrected, then the doctor shall be recommended for deletion.

Requesting preauthorization for health care that is not reasonable or necessary has the potential to significantly add costs to the system. First, the preauthorization request and response process costs time and money for both the requesting doctor and the carrier. Second, because carriers are required to pay the costs of a preauthorization dispute that is appealed to medical dispute resolution (even if the carrier wins), carriers may be inclined to approve unnecessary health care because it is less costly to approve it than to rightfully deny it (the commission will be monitoring this behavior as well). Finally, requesting approval for care that is not reasonable and necessary needlessly raises the level of tension in the system because it increases the number of denials even though the denials are appropriate because the care is, in fact, not reasonable and necessary.

Comment: Commenters stated "none of the items on the list in (c)(5) require any intent to engage in the conduct. An inaccurate statement or report or failure to include information may not be 'dishonest or criminal conduct' but could result in deletion from the list."

Response: The Commission disagrees. The commission does not believe that failing to dot "I's" and cross "T's" will result in deletion as these are not actions of "dishonesty" (which requires either lying or wilfull ignorance of the truth). However, in reviewing this comment, the commission realized that referencing both "dishonest" and "criminal" conduct in the rule was redundant to other portions of the rule. Therefore, the word "criminal" was removed from the rule and it merely focuses on "dishonest conduct."

Comment: In commenting on §180.26(c)(6), which provides for deletion for refusing to refund monies improperly paid to the doctor when ordered, commenter claimed that in "almost every case in which a carrier requested a refund the carrier was in error" and asked whether "there some where to go if the request is inaccurate?"

Response: The subsection only applies when a doctor fails to refund money pursuant to an order, not simply when the carrier requests a refund. If a provider refuses to refund monies in response to the carrier's request, the carrier can request medical dispute resolution and the commission will issue an order to refund the money if it finds in favor of the carrier. This order can be appealed to SOAH.

Comment: Commenter supported the behaviors that could result in deletion but felt that the commission had left out "false statements, misrepresentation, and omission of facts that cause the carrier to DENY payment or preauthorization." The commenter claimed to have seen many peer review and preauthorization reviews "where the reviewing professional has left out information or misrepresented the facts in a way that was grossly inaccurate and resulted in the injured worker being denied care inappropriately. This too is dishonest, fraudulent, and must be sanctioned to protect the injured workers." The commenter opined that "only balanced, fact based, and research supported opinions should

be used for decision making, whether they come from the treating doctor or a UR doctor" and that "those who dishonestly promote overtreatment OR block necessary treatment need to be kicked out of the system."

Response: The commission agrees in part. As noted in response to a prior comment, the Commission intended this rule to apply to all doctors in the system, not just doctors who provide care to injured employees. Therefore, the commission has gone through the rule and made modifications to ensure that inappropriate actions includes actions that can be taken by a doctor to cause fees to be paid or care to be rendered which is not reasonable and necessary and also includes actions taken to cause reasonable and necessary care not to be rendered or paid for.

The language in proposed subsection (c)(5)(A) included submitting a false statement or misrepresentation or omitting pertinent facts used to determine entitlement to payment (which includes actions by the carrier's doctor that could deny payment, or actions by the billing doctor that could result in payment) and therefore does not need to be modified. However, proposed subsection (c)(5)(C) only applied to actions by the provider requesting approval and so has been modified.

The commission agrees that those whose behavior is not appropriate or in compliance either should change their habits or be removed from the system.

Comment: Commenter noted that the word "monies" is misspelled in §180.26(d)(4).

Response: The commission agrees and also noted other places where it was misspelled. The errors have been corrected.

Comment: Commenter recommended modifying subsection (d) to read as follows:

(d) The Medical Advisor may recommend a sanction against a doctor or a carrier or the deletion or suspension of a doctor from the ADL if any of the following occur:

(1) violation of the Texas Labor Code, commission rules and/or guidelines, or a final commission decision or order;

(2) violation of other statutes or regulations not administered by the commission but relevant to the provision of health care;

(3) conduct of a doctor relating to the delivery or evaluation of health care that the commission finds is not fair and reasonable and does not meet professionally recognized standards of health care; or

(4) refusing to pay moneys owed to a health care provider if the health care is medically necessary, reasonable, related to the compensable injury, and the carrier is liable for payment of the health care, has preauthorized the health care, or approved a request for concurrent review.

The commenter felt that the substitute language would clarify the circumstances under which the Medical Advisor could recommend that a sanction be imposed against a doctor or a carrier or that a doctor be deleted or suspended from the ADL because the proposed language "is too broad and includes the authority to recommend that TWCC take action against an insurance carrier for an act which violates statutes, such as the Insurance Code, which are not administered by TWCC. The Insurance Code regulates the business of insurance in the state of Texas. The Texas Department of Insurance is the only regulatory agency which has jurisdiction over an insurance company which violates a provision of the Insurance Code.

The Texas Legislature did not direct or authorize TWCC to adopt or amend rules which result in dual regulation of insurance companies when it passed HB 2600 as this rule would if adopted as proposed. TWCC's authority to sanction an insurance company is limited to acts which violate the Texas Labor Code and the rules properly adopted by TWCC. Texas courts have ruled that a state agency has only the powers and authority granted to them by statute and are precluded from the enactment of rules which are inconsistent with the expression of the Legislature's intent."

The commenter included case cites and summaries of four court decisions which the commenter believed were relevant to the issue at hand: Stauffer v. City of San Antonio, 344 S.W.2d 158 (Tex. 1961), State v. Jackson, 376 S.W.2d 341 (Tex. 1964) and Sexton v. Mt. Olivet Cemetery Assn., 720 S.W.2d 129 (Tex.App. - Austin 1986).

"In Stauffer v. City of San Antonio, the Texas Supreme Court held that 'an administrative agency...has only such powers as are expressly granted to it by statute together with those necessarily implied from the authority conferred or duties imposed. See Brown v. Humble Oil & Refining Co., 126 Tex. 296th, 83 S.W.2d 935...' The authority to sanction an insurance company who violates a statute administered by another regulatory agency rests solely with that agency.

The Texas Supreme Court ruled in State v. Jackson, that '[i]t is elementary that the legislature may withdraw from an administrative agency it has created any or all of the powers delegated, for authority to give includes authority to take away. Moreover, delegated powers maybe withdrawn by preemption as well as by expressed declaration when the legislature acts with respect to a particular matter, the administrative agency may not so act with respect to the matter as to nullify the legislature's action even though the matter may be within the agency's general regulatory field...the rule-making power of administrative agencies does permit the enactment of regulations which are inconsistent with the expression of the lawmakers intent in statutes other than those under which the regulations were issues.'

The inclusion of a provision in a rule proposed by TWCC that provides for the sanctioning of an insurance company who fails to comply with a statute not administered by TWCC is not consistent with the Texas Legislature's intent as expressed in the Texas Labor Code and HB 2600.

In Sexton v. Mt. Olivet Cemetery Assn., the Austin Court of Appeals ruled that '[i]t is axiomatic that...agencies are creatures of statutes and have no inherent authority. They may, therefore, exercise only those specific powers conferred upon them by law in clear and expressed language and no additional authority will be implied by judicial construction.' TWCC's powers are limited to those conferred by the Texas Labor Code. Those powers do not include the authority to expand the scope of the liability of insurance companies for payment of health care treatment and services beyond the liability set forth in the Texas Labor Code.

The Texas Labor Code does not provide TWCC with the authority to adopt a rule that allows its Medical Advisor to recommend that an insurance company be sanctioned for failing to comply with a statute not administered by TWCC."

Response: The commission agrees in part. Regarding subsection (d)(1), the commission disagrees that a reference to violating "guidelines" should be added because guidelines are adopted by commission rule and thus such a reference would be redundant. In addition, the commission does not agree that only "final" orders should be referenced. Many orders are binding during the

pendency of an appeal and it is a violation to fail to comply with them. There are orders that are not final but that are still binding during the pendency of an appeal. As such, it would be more accurate to describe the orders as "final or otherwise binding." However, if the order is not binding or final (and thus otherwise binding), then it cannot be violated. As such, it would be redundant to add such adjectives to the rule.

The commission disagrees with the suggestion for (d)(2), which would remove the commission's authority to recommend sanctions for violations of other statutes not administered by the commission but relevant to the payment for health care (thus removing carriers from the scope of this subsection). For example, if a carrier is found to have violated preauthorization review requirements in another jurisdiction that are largely similar to those in Texas, the commission believes that it would be appropriate to impose a sanction such as requiring training on §134.600 (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care). The statute says that the criteria for "recommending or imposing sanctions may include anything the commission considers relevant." The commission considers this relevant. The commenter did not recommend that similar provisions in the rule that focus on doctor behavior should also be removed for exceeding the commission's authority, although as doctors are similarly regulated by other government entities beside the commission. Finally, any action taken in this regard would be in accordance with the memorandum of understanding between the commission and the Texas Department of Insurance. Thus, there will not be duplicative regulation of insurance carriers.

For the same reasons, the commission also disagrees with the suggestions for (d)(3), which would once again remove carriers from the scope of this subsection. The commenter's reason for this suggestion is not clear as the commenter's argument about enforcing other statutes does not seem relevant to this subsection.

However, the commission does agree that additional clarification to subsection (d)(4) could be helpful. The commission has modified this subsection consistent with the commenter's suggestion but has used slightly different wording.

Finally, the commission disagrees with the suggestion that subsection (d)(5), which provides for sanctions for other activities that warrant a sanction, be deleted, as this category is intended as a catch-all to ensure that inappropriate conduct can be sanctioned.

Comment: Commenter wanted to know whether a commission Hearing Officer or Appeals Panel Judge is an "administrative law judge" as used in §180.26(f).

Response: Yes. "Administrative law judge" is defined in §180.1 and the definition was modified to make it clear that it includes a commission Hearing Officer or an Appeals Panel Judge. If a contested case hearing or appeals panel makes a finding of fact or conclusion of law that establishes the facts in a situation and those facts make a doctor or carrier subject to sanction of some kind, the commission intends the finding or conclusion to be used as evidence in subsequent sanction actions.

Comment: Commenters felt that the grounds in subsection (f) are relevant in consideration of sanctions but that the establishment of certain items as "conclusive grounds" for sanction or deletion (as subsection (g) does) is arbitrary but otherwise takes discretion away from the commission. "The commission should have the authority to look at the items and make decisions based upon sound judgment and not by rule make any of the items conclusive. Under this rule a plea of nolo contendere for a traffic ticket would be conclusive grounds for sanction. The decision of a court or independent review organization on a minor matter or even non-relevant matter would be conclusive grounds. The provision relating to conclusive grounds should be deleted."

Response: The commission disagrees. Subsections (f) and (g) do not provide criteria for sanction. The subsection merely identifies sources of proof that the criteria for sanction have been met and ensures that, in three of the situations, the commission does not have to reprove the facts that substantiate that the criteria for sanction were met. Since a simple traffic infraction, such as failing to come to a complete stop at a stop sign does not meet the requirements for sanction under subsections (c) or (d), a plea of nolo contendere for such a violation can not establish conclusive grounds for sanction.

Comment: Regarding subsection (f), commenter objected "to the inclusion of any provisions which would allow TWCC to sanction an insurance company for any action taken by a federal, state, local court, an administrative law judge, an independent review organization, licensing or certification authority or regulatory authority on matter in which an insurance company was or had the opportunity to be a party." The commenter's based this position upon the same rationale for the commenter's suggestions for subsection (d): "TWCC is attempting to adopt a rule which exceeds its statutory authority and [is] inconsistent with the expression of the Legislature's intent." The commenter also felt that the language in subsection (f)(5) "gives the appearance that TWCC is attempting to provide the Medical Advisor with authority not provided for by the Texas Labor Code."

Response: As it did before in response to this commenter's suggestions for subsection (d)(2) and (d)(3), the commission disagrees with the commenter's position on subsection (f), which would remove the commission's authority to recommend sanctions for violations of other statutes not administered by the commission but relevant to health care delivery. The statute says that the criteria for "recommending or imposing sanctions may include anything the commission considers relevant." In addition, the statute provides that the commission may consider "findings of fact and conclusions of law made by a court, an administrative law judge of the State Office of Administrative Hearings, or a licensing or regulatory authority."

However, in reviewing the rule and the comment, the commission decided to clarify the language in subsection (g) to make it clear what the intent of these subsections is: that certain things constitute evidence and other constitute conclusive evidence until and unless overturned on appeal.

Comment: Commenter suggested that subsection (g) should be changed so as to clarify that the commission can impose sanctions on an insurance company or a utilization review agent in accordance with a memorandum of agreement between the Texas Department of Insurance and the commission for issues related to health care decisions reached by the insurance company or utilization review agent under the provisions of the Texas Labor Code and Article 21.58A of the Insurance Code. The commenter felt that the "current language in subsection (g) gives the appearance that TWCC is attempting to exceed its statutory authority described in Section 408.023(e) of the Texas Labor Code."

Response: The commission disagrees. Subsection (h) specifies the kinds of sanctions the commission may impose or recommend against a doctor or carrier, and it references the memorandum of understanding.

However, in reviewing this comment, the commission noticed that subsection (a)(4) stated that the rule established the types of sanctions the commission may "issue" rather than "recommend or impose" and that other subsections contained similar, incomplete language. Therefore, the commission has changed the language throughout the rule to include "recommend and impose."

Comment: Commenter questioned whether the term "section" was the correct word to be used in §180.26(g) instead of "subsection."

Response: The correct term is "subsection." The term "section" would refer to the rule as a whole. Since the reference is to specific portions of the rule, the term "subsection" is appropriate. However, the proper language would be "subsections (f)(1), (2), or (4) of this section," and the rule has been changed to reflect this.

180.27 Comments

Comment: Commenter supported the adoption of Rule 180.27 as proposed.

Response: The commission agrees.

Comment: Commenter suggested that the rule require the sanction notice sent by the commission in subsection (a) to be sent by return receipt so that the receipt shall require the signature of the doctor.

Response: The commission disagrees for several reasons. First, the commission occasionally experiences instances in which system participants refuse to sign for certified mail from the commission. Second, some system participants have all their mail delivered to a post office box and the Postal Service will not deliver certified mail to post office boxes. Finally, such a requirement would reduce the commission's flexibility. Currently, the commission sends such notices to doctors by certified mail, return receipt to the extent possible and sends a second copy via regular, first-class mail because §102.5 (relating to General Rules for Written Communications To and From the Commission) deems a document to be received five days after the date mailed unless the great weight of evidence indicates otherwise. However, future notices may be sent by any number of other means, such as the Postal Service's "Delivery Confirmation" service, which is less expensive and which does not require signature of the recipient. Further, the commission generally sends these notices to carriers via the carrier's Austin Representative Box at the commission's central office.

Comment: Commenter noted that carriers have been excluded from notice of sanctions requirements and authority to appeal such sanctions under §180.27. The commenter felt that the rule should require notice to carriers and authorize carrier requests for hearings at SOAH.

Response: The commission disagrees. Pursuant to Texas Government Code §311.005(2), the term "person" includes "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." Thus, "person" in §180.27(a) already included carriers and carriers receive notice under this rule and can request hearings at SOAH. However, to be clearer, the subsection has been modified.

Commission Comment: In reviewing the rule for adoption it was noticed that as proposed the rule could be interpreted as requiring the commission to provide a doctor an opportunity for a hearing if the doctor is deleted by the Executive Director pursuant to §408.0231(a) and §180.26(b). This was not the intent. The statute requires the Executive Director to delete a doctor from the ADL in certain situations (such as when the doctor's license is revoked, suspended, or not renewed by the appropriate licensing authority). The statute does not provide for an opportunity for a hearing for deletion by the Executive Director as it does for sanctions by the commission (under §408.0231(e)). Therefore, when the rule was proposed, the language in §180.27(a) applied when "the commission" intended to take action under this §180.26.

However, as noted, the commission believes that the proposed language was confusing. Therefore the commission has added a subsection to the rule that exempts deletions by the Executive Director under §180.26(b) from the requirements of §180.27. The new language requires a notice to be sent by verifiable means that explains the reason for the action. The doctor will then have fourteen days to respond. If it is found that the grounds for removal under §180.26(b) do not exist, the doctor shall not be removed by the Executive Director.

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

28 TAC §180.1, §180.7

The new and amended rules are adopted pursuant to: the Texas Labor Code §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010 which authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §408.021 which states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.022 which address choice of treating doctor; the Texas Labor Code §408.023 which requires the commission to develop a list of approved doctors and lay out the requirements for being on the list; the Texas Labor Code §408.0231 which provides the commission with the responsibility for maintenance of the list, with the authority for imposing sanctions, and requires the commission to adopt rules; the Texas Labor Code §408.025 which requires the commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §413.002 which requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code §413.012 which requires the commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.013 which requires the commission by rule to establish a

program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services, and a program to increase the intensity of review; the Texas Labor Code §413.014 which requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request precertification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained or ordered by the commission; the Texas Labor Code §413.017 which establishes medical services to be presumed reasonable when provided subject to prospective, concurrent review and are authorized by the carrier; the Texas Labor Code §413.031 which establishes the right to access medical dispute resolution; the Texas Labor Code §413.041 which requires financial disclosure of financial interests by health care providers and their employers, which requires the commission to adopt federal standards prohibiting payment of acceptance of payment in exchange for health care referrals, and which prohibits payment to a provider during a period of noncompliance with disclosure requirements; the Texas Labor Code §413.0511 which creates the position of Medical Advisor and imbues the position with certain responsibilities and authority; the Texas Labor Code §413.0512 which creates the Medical Quality Review Panel (MQRP) and grants it certain responsibilities and authority; certain responsibilities and authority; the Texas Labor Code §413.0513 which lays out confidentiality provisions relating to the MQRP; the Texas Labor Code §414.007 which allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; and; the Texas Labor Code §415.0035 which establishes administrative violations for repeated administrative violations.

The new and amended rules are adopted pursuant to: the Texas Labor Code, §401.011, §401.024, §402.042, §402.061, §406.010, §408.021, §408.022, §408.023, §408.0231, §408.025, §413.002, §413.011, §413.012, §413.013, §413.014, §413.017, §413.031, §413.041, §413.0511, §413.0512, §413.0513, §414.007, §415.0035.

§180.1. Definitions.

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

(1) Abusive practice--a practice that:

(A) does not meet professionally recognized standards for health care or insurance claims adjusting; or

(B) does not meet standards required by statute, rules, or previous notification to system participant; or

(C) is inconsistent with sound fiscal, business, or medical practices and that results in:

(i) unnecessary system costs or in reimbursement for services that are not medically necessary; or

(ii) improper reduction or increase of benefits.

(2) Administrative Law Judge--an administrative law judge (ALJ) designated by the State Office of Administrative Hearings (SOAH) to preside over the hearing, or a hearing officer of a state or federal tribunal which would include commission hearing officers and appeals panel judges.

(3) Agent--a person or entity that a system participant (insurance carrier, health care provider, employer, employee, or attorney) contracts with or utilizes for the purpose of providing claims service or fulfilling duties under the statute and rules. The system participant that the agent works on behalf of is responsible for the acts and omissions of that agent executed in performance of services for the participant.

(4) Charged Person (also Alleged Violator)--the person who is charged with an administrative violation or wrongful act. As used in these rules, charged person includes both person(s) initially charged and those found guilty of an administrative violation(s).

(5) Compliance--a person is in compliance if the person timely and accurately fulfills his duties under the statute and rules in the form and manner required (does not commit a violation by an act of omission or commission) and if the person does not commit an act which is prohibited.

(6) Continued Noncompliance (also Active Noncompliance)--a person is in "continued noncompliance" if the person has committed a violation of the Statute or Rules and has yet to take action to come into full compliance. For example, a person who fails to file a required report (or who files an incomplete report) would be in "continued noncompliance". The person could come into compliance by filing a properly completed report (although, doing so would not eliminate the existence of a violation for failing to timely file a complete report in the first place).

(7) Controlled substances--"controlled substance" as defined by the Texas Controlled Substances Act (Texas Civil Statutes, Article 4476-15) or its successor and the Federal Controlled Substances Act (21 USCA §8.01 et seq.) or its successor.

(8) Conviction or convicted--

(A) A person is considered to have been convicted when:

(i) a judgment of conviction has been entered against the person in a federal, state, or local court;

(ii) the person has been found guilty in a federal, state, or local court;

(iii) the person has entered a plea of guilty or nolo contendere (no contest) that has been accepted by a federal, state, or local court;

(iv) the person has entered a first offender or other program and judgment of conviction has been withheld; or

(v) the person has received probation or community supervision, including deferred adjudication.

(B) A conviction is still a conviction until and unless overturned on appeal even if:

(i) it is stayed, deferred, or probated;

(ii) an appeal is pending;

(iii) the judgment of conviction or other record related to the conduct is expunged; or

(iv) the person has been discharged from probation or community supervision, including deferred adjudication.

(9) Emergency--as defined in §133.1 of this Title (relating to Definitions for chapter 133).

(10) Frivolous--that which does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(11) Immediate post-injury medical care--that health care provided on the date that the employee first seeks medical attention for the workers' compensation injury.

(12) Intentionally--a person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(13) Knowingly--a person acts knowingly with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(14) Noncompliance or Noncompliant Act--a violation of the Statute or Rules.

(15) Pattern of Practice--the acts or omissions of a participant in the workers' compensation system which are repeated. This term is synonymous with similar terms such as "business practice," "pattern of conduct," "matter of practice," etc.

(16) Rules--the commission's rules adopted under this Statute.

(17) Remuneration--any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, including, but not limited to, forgiveness of debt.

(18) Significant Violation--a violation which:

(A) based upon the facts surrounding it, raises reasonable concern about a system participant's ability to conform its future conduct to applicable laws or rules;

(B) resulted or could have resulted in significant physical or emotional harm to an injured employee;

(C) resulted or could have resulted in significant economic harm to a system participant; or

(D) was either willfully committed or which is part of an uncorrected pattern of practice.

(19) SOAH--the State Office of Administrative Hearings.

(20) System Participant--a person or entity required to comply with the statute and rules. This will generally be an insurance carrier (carrier), employer, health care provider (provider or HCP), attorney, injured employee (employee) or other claimant.

(21) Uncorrected Pattern of Practice--a pattern of practice which continues even after the commission provides written notice to the person committing the violation(s) of the noncompliance.

(22) Violation--a failure to comply with a duty established under the Statute or Rules or commission of an act prohibited by the Statute or Rules.

(23) Violator--a person found to have committed an administrative violation or another offense.

(24) Willfully--intentionally or knowingly. Also, continuing conduct after being notified by the commission or other regulatory authority. NOTE - "wilful" and " wilfully" as used in the Statute are the same as "willful" and "willfully," respectively.

§180.7. Date Violation Deemed to Have Occurred; Establishing Willful Violations.

(a) A violation is deemed to have occurred:

(1) on the date a noncompliant action is taken; or

(2) when no action is taken by the close of business on the date that the Statute or Rules requires an action to be taken.

(b) A violation may be deemed to be "willful" if the person who committed the violation:

(1) did so knowingly or intentionally;

(2) remains in continued noncompliance seven or more days after the date the commission brought the violation to the attention of the violator; or

(3) after previously being notified by the commission that a given action or inaction violates the Statute or Rules, repeats the same action or inaction.

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 February 22, 2002.

TRD-200201090
Susan Cory
General Counsel
Texas Workers' Compensation Commission
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Proposal publication date: August 31, 2001
For further information, please call: (512) 804-4287

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28 TAC §180.2

The new and amended rules are adopted pursuant to: the Texas Labor Code §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010 which authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §408.021 which states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.022 which address choice of treating doctor; the Texas Labor Code §408.023 which requires the commission to develop a list of approved doctors and lay out the requirements for being on the list; the Texas Labor Code §408.0231 which provides the commission with the responsibility for maintenance of the list, with the authority for imposing sanctions, and requires the commission to adopt rules; the Texas Labor Code §408.025

which requires the commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §413.002 which requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code §413.012 which requires the commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.013 which requires the commission by rule to establish a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services, and a program to increase the intensity of review; the Texas Labor Code §413.014 which requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request precertification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained or ordered by the commission; the Texas Labor Code §413.017 which establishes medical services to be presumed reasonable when provided subject to prospective, concurrent review and are authorized by the carrier; the Texas Labor Code §413.031 which establishes the right to access medical dispute resolution; the Texas Labor Code §413.041 which requires financial disclosure of financial interests by health care providers and their employers, which requires the commission to adopt federal standards prohibiting payment of acceptance of payment in exchange for health care referrals, and which prohibits payment to a provider during a period of noncompliance with disclosure requirements; the Texas Labor Code §413.0511 which creates the position of Medical Advisor and imbues the position with certain responsibilities and authority; the Texas Labor Code §413.0512 which creates the Medical Quality Review Panel (MQRP) and grants it certain responsibilities and authority; certain responsibilities and authority; the Texas Labor Code §413.0513 which lays out confidentiality provisions relating to the MQRP; the Texas Labor Code §414.007 which allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; and; the Texas Labor Code §415.0035 which establishes administrative violations for repeated administrative violations.

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§180.2. Referrals.

Any person may make a referral to the commission for fraudulent acts or omissions by any system participant for failure of a health care provider to provide reasonable and necessary health care, for failure of an insurance carrier to ensure that all and only reasonable and necessary health care is approved and reimbursed in accordance with the statute and commission rules, or for other violations of the Statute or Rules by any system participant.

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 February 22, 2002.

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Susan Cory
General Counsel
Texas Workers' Compensation Commission
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Proposal publication date: August 31, 2001
For further information, please call: (512) 804-4287

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SUBCHAPTER B. MEDICAL BENEFIT REGULATION

28 TAC §§180.20 - 180.27

The new and amended rules are adopted pursuant to: the Texas Labor Code §401.011 which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code §401.024, which provides the commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010 which authorizes the commission to adopt rules regarding claims service; the Texas Labor Code §408.021 which states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.022 which address choice of treating doctor; the Texas Labor Code §408.023 which requires the commission to develop a list of approved doctors and lay out the requirements for being on the list; the Texas Labor Code §408.0231 which provides the commission with the responsibility for maintenance of the list, with the authority for imposing sanctions, and requires the commission to adopt rules; the Texas Labor Code §408.025 which requires the commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §413.002 which requires the commission to monitor health care providers and carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011 which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code §413.012 which requires the commission to review and revise medical policies and fee guidelines at least

every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.013 which requires the commission by rule to establish a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services, and a program to increase the intensity of review; the Texas Labor Code §413.014 which requires the commission to specify by rule, except for treatments and services required to treat a medical emergency, which health care treatments and services require express preauthorization and concurrent review by the carrier as well as allowing health care providers to request precertification and allowing the carriers to enter agreements to pay for treatments and services that do not require preauthorization or concurrent review. This mandate also states the carrier is not liable for the cost of the specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained or ordered by the commission; the Texas Labor Code §413.017 which establishes medical services to be presumed reasonable when provided subject to prospective, concurrent review and are authorized by the carrier; the Texas Labor Code §413.031 which establishes the right to access medical dispute resolution; the Texas Labor Code §413.041 which requires financial disclosure of financial interests by health care providers and their employers, which requires the commission to adopt federal standards prohibiting payment of acceptance of payment in exchange for health care referrals, and which prohibits payment to a provider during a period of noncompliance with disclosure requirements; the Texas Labor Code §413.0511 which creates the position of Medical Advisor and imbues the position with certain responsibilities and authority; the Texas Labor Code §413.0512 which creates the Medical Quality Review Panel (MQRP) and grants it certain responsibilities and authority; certain responsibilities and authority; the Texas Labor Code §413.0513 which lays out confidentiality provisions relating to the MQRP; the Texas Labor Code §414.007 which allows the review of referrals from the Medical Review Division by the Division of Compliance and Practices; and; the Texas Labor Code §415.0035 which establishes administrative violations for repeated administrative violations.

The new rules are adopted pursuant to: the Texas Labor Code, §401.011, §401.024, §402.042, §402.061, §406.010, §408.021, §408.022, §408.023, §408.0231, §408.025, §413.002, §413.011, §413.012, §413.013, §413.014, §413.017, §413.031, §413.041, §413.0511, §413.0512, §413.0513, §414.007, §415.0035.

§180.20. Commission Approved Doctor List.

(a) This section governs the commission's approved doctor list (ADL).

(1) Except in an emergency, as defined in §133.1 of this title (relating to Definitions For Chapter 133) or for the immediate post-injury medical care, injured employees (employees) shall receive health care from a doctor on the ADL.

(2) On or after September 1, 2003, doctors who provide any functions in the Texas workers' compensation system are required to be on the ADL.

(b) Until September 1, 2003, unless deleted from the list by the commission, the ADL includes all doctors licensed in Texas on or after January 1, 1993, and doctors licensed in other jurisdictions who have been added to the list by the commission. Doctors licensed in other jurisdictions may ask to be added to the list by submitting a written request containing information prescribed by the commission. Doctors on the ADL on or after September 1, 2003, whether licensed in Texas or licensed by another jurisdiction, shall have:

(1) successfully completed the training required by §180.23(h) of this title (relating to Commission Required Training for Doctors/Certification Levels);

(2) applied for a certificate of registration with the commission in the form and manner prescribed by the commission; and

(3) disclosed financial interests as required by Texas Labor Code §413.041 and §180.24 of this title (relating to Financial Disclosure) with the application.

(c) An application for registration to be admitted and remain on the ADL on or after September 1, 2003 shall include:

(1) general contact information including, but not limited to: name, mailing address, voice and facsimile numbers, and an email address;

(2) the training certificate indicating the level of training completed;

(3) Impairment Rating Skills Examination score, if applicable;

(4) verification of licensure;

(5) disciplinary actions or practice restrictions by an appropriate licensing or certification authority, if any;

(6) an agreement that the doctor will comply with the statute and rules, including but not limited to, cooperating with commission monitoring and review efforts such as audits by the commission and paying audit bills when required by statute or rule; and

(7) if the doctor applying for the ADL is not licensed in this state but wishes to perform utilization review and/or peer reviews for an insurance carrier or its agent, a signed sponsorship affidavit by a doctor who is licensed in this state, who is on the ADL at Level 2 Certification (as provided in §180.23) and who has agreed to direct the doctor's reviews. This affidavit shall be in the form and manner prescribed by the commission.

(d) The commission may utilize members of the Medical Quality Review Panel for evaluating ADL applications and making recommendations to the Medical Advisor to approve, approve with restrictions, or deny admission to the ADL.

(e) Doctors shall be denied admission to the ADL or admitted with conditions or restrictions for:

(1) failing to submit a complete application in accordance with this section;

(2) failing to complete required training;

(3) having relevant restrictions on their practice (including, but not limited to, prior deletion from the ADL); or

(4) other activities which warrant application denial or restriction such as grounds that would require the Medical Advisor to recommend deletion of a doctor from the ADL or other sanction of a doctor as specified in §180.26 of this Title (relating to Doctor and Insurance Carrier Sanctions) or the statute and rules.

(f) The commission shall notify a doctor of the commission's approval or denial of the doctor's application to the ADL.

(1) Denials or approvals with conditions or restrictions shall include the reason(s) for the action.

(2) Within 14 days after receiving the notice, the doctor may file a response which addresses the reasons given for the denial or admission with restrictions.

(A) If a response is not received by the 15th day after the date the doctor received the notice, the action shall be final and no further notice shall be sent.

(B) If a response which disagrees with the action is timely received, the commission shall review the response and shall notify the doctor of the commission's final decision. If the final decision is not an unrestricted approval, the commission's final notice shall explain the reason why the doctor's response did not convince the commission to grant the doctor an unrestricted admission to the ADL.

(3) All notices under this subsection shall be delivered by a verifiable means.

(4) The fact that the commission did not take action to deny or restrict admission to the ADL does not waive the commission's right to review or further review a doctor and take action at a later date.

(g) Any doctor on the ADL prior to September 1, 2003 who does not apply to be on the ADL in accordance with subsections (b) and (c) of this section or who applies but is not approved under subsections (d) through (f) shall be deleted from the ADL on the earlier of:

(1) the date the doctor is denied approval; or

(2) September 1, 2003.

(h) Chapter 133 of this title (relating to Benefits - Medical Benefits) applies to all medical bills, including those from doctors who were not on the ADL at the time the health care was rendered.

(1) All licensed doctors, whether on the ADL or not, are entitled to reimbursement in accordance with the statute and rules for providing reasonable and necessary emergency or immediate post-injury medical care.

(2) Only a doctor on the ADL is entitled to reimbursement for directly or indirectly providing reasonable and necessary health care (other than emergency or immediate post-injury medical care) or other medical services (such as peer reviews or other evaluations) under the statute and rules.

(A) A doctor on the ADL at the time the service(s) was provided is entitled to reimbursement in accordance with the doctor's certification(s) and the statute and rules.

(B) A doctor not on the ADL at the time service(s) was provided because the doctor had been suspended or deleted under §180.26(c), (d), or (e) of this title (relating to Doctor and Insurance Carrier Sanctions) or the doctor's application for admittance to the ADL had been rejected is not entitled to and shall not be given reimbursement even if the doctor is later added to the ADL.

(C) A doctor not on the ADL at the time service(s) was provided for reason(s) other than those listed in subsection (h)(2) of this subsection is only entitled to reimbursement in accordance with the doctor's certification(s) and the statute and rules if the doctor receives an exception from the commission.

(i) A carrier that receives a medical bill in this situation shall timely process the medical bill and send the required explanation of benefits (EOB).

(ii) The EOB shall explain that the doctor must receive an exception from the commission before the doctor can receive reimbursement.

(iii) The EOB shall also identify the amount that the carrier has found that the doctor will be reimbursed if the doctor is granted the exception.

(iv) Within 14 days of receipt of notice that the doctor has been granted an exception, the carrier shall remit payment.

(v) The doctor shall not be entitled to interest for the period between the date the carrier provided the EOB and the 14th day following the carrier's notification that the doctor has been granted an exception. Otherwise the provisions of Texas Labor Code §413.019 apply.

(3) Notwithstanding this subsection, a doctor's entitlement to direct or indirect reimbursement for health care or medical opinions directly or indirectly provided (other than for emergency or immediate post-injury medical care) may be limited by sanction imposed by the commission.

(i) The commission shall make available through its internet website the names, licensure and other identification information, and ADL status of:

(1) doctors who are not on the ADL because their applications were rejected;

(2) doctors on the ADL (including a description of any privileges, conditions or restrictions placed on the doctor by the commission);

(3) doctors deleted or suspended from the ADL or otherwise sanctioned by the commission (including a description of the sanction); and

(4) doctors reinstated to the ADL or whose sanctions were lifted by the commission.

(j) Doctors on the ADL shall provide the commission with updated information within 30 days of a change in any of the information provided to the commission on the doctor's ADL application.

§180.21. Commission Designated Doctor List.

(a) In order to serve as a designated doctor, a doctor must be on the Designated Doctor List (DDL).

(b) To be on the DDL prior to September 1, 2003, the doctor shall at a minimum:

(1) be currently active on the Approved Doctor List (ADL) as set forth in Texas Labor Code §408.023 and §180.20 of this title (relating to Commission Approved Doctor List);

(2) have maintained for the past three years and continue to maintain;

(3) have filed a request to be on the DDL in the form and manner prescribed by the commission and been approved by the commission; and

(4) meet the following training requirements:

(A) have successfully completed commission-approved training in the proper use of the *AMA Guides* prior to submission of an application;

(B) have successfully completed commission-approved training at least every two years from the date of the last training; and

(C) have passed the commission-approved written examination for impairment rating training within the timeframe specified by the commission.

(c) To be on the DDL on or after September 1, 2003, the doctor shall at a minimum:

(1) be currently active on the ADL as set forth in Texas Labor Code §408.023 and §180.20 of this title;

(2) have had an active practice for one year during their career;

(3) have Level 2 Certification and be fully authorized to assign impairment ratings and certify maximum medical improvement (MMI) under §180.23(i) of this title (relating to Commission Required Training for Doctors/Certification Levels);

(4) have filed a request in the form and manner prescribed by the commission, and have been approved by the commission to be included on the DDL; and

(5) either maintain an active practice or successfully complete commission-approved supplemental training on medical issues relevant to workers' compensation and/or serving as a designated doctor. Supplemental training shall be completed between 18 and 30 months following the doctor's passing the testing required to obtain and retain full MMI/impairment authorization.

(d) Any doctor on the DDL prior to September 1, 2003, who does not apply to be on the DDL in accordance with subsection (e) of this section or who applies but is not approved under subsections (f) through (h) shall be deleted from the DDL on the earlier of:

(1) the date the doctor is denied approval; or

(2) September 1, 2003.

(e) A DDL application shall include:

(1) general contact information including, but not limited to: name, mailing address, voice and facsimile numbers and an email address;

(2) the training certificate indicating the level of training completed;

(3) Impairment Rating Skills Examination score;

(4) verification of licensure;

(5) information on the doctor's training and experience in various types of health care and injury areas; and

(6) disciplinary actions or practice restrictions by an appropriate licensing or certification authority, if any.

(f) The commission may utilize members of the Medical Quality Review Panel (MQRP) for evaluating DDL applications and making recommendations to the Medical Advisor to approve or deny admission to the DDL. The commission may also utilize members of the MQRP regarding deletion, suspension, or other sanction of a designated doctor as provided in this section.

(g) Doctors shall be denied admission to the DDL for:

(1) not being on the ADL with no restrictions;

(2) failing to submit a complete application in accordance with this section;

(3) failing to successfully complete required training;

(4) failing to pass the required test;

(5) having a relevant restriction on their practice (including, but not limited to, prior deletion from the ADL or DDL or a prior ADL restriction); or

(6) other activities which warrant application denial such as grounds that would require the Medical Advisor to recommend deletion of a doctor from the ADL or other sanction of a doctor as specified in §180.26 of this Title (relating to Doctor and Insurance Carrier Sanctions) or the statute and rules.

(h) The commission shall notify a doctor of the commission's approval or denial of the doctor's application to the DDL.

(1) Denials shall include the reason(s) for the denial.

(2) Within 14 days after receiving the notice, the doctor may file a response which addresses the reasons given for the denial.

(A) If a response is not received by the 15th day after the date the doctor received the notice, the denial shall be final and no further notice shall be sent.

(B) If a response which disagrees with the denial is timely received, the commission shall review the response and shall notify the doctor of the commission's final decision. If the final decision is a denial, the commission's final notice shall explain the reason why the doctor's response did not convince the commission to admit the doctor to the DDL.

(3) All notices under this subsection shall be delivered by a verifiable means.

(4) The fact that the commission did not take action to deny or restrict admission to the DDL does not waive the commission's right to review or further review a doctor and take action at a later date.

(i) When necessary because the injured employee is temporarily located or is residing out-of-state, the commission may waive any of the requirements as specified in this rule for an out-of-state doctor to serve as a designated doctor to facilitate a timely resolution of the dispute.

(j) Doctors on the DDL shall provide the commission with updated information within 30 days of a change in any of the information provided to the commission on the doctor's DDL application.

(k) In addition to the grounds for deletion or suspension from the ADL or for issuing other sanctions against a doctor under §180.26, the commission shall delete or suspend a doctor from the DDL, or otherwise sanction a designated doctor for noncompliance with requirements of this section or any of the following:

(1) four refusals within a 90 day period, or four consecutive refusals to perform within the required time frames, a commission requested appointment for which the doctor is qualified;

(2) misrepresentation or omission of pertinent facts in medical evaluation and narrative reports;

(3) having a pattern of practice of unnecessary referrals to other health care providers for the assignment of an impairment rating or determination of MMI;

(4) submission of inaccurate or inappropriate reports as a pattern of practice due to insufficient examination and analysis of medical records;

(5) willful failure to timely respond to a request for clarification from the commission regarding an examination or failure to timely respond as a pattern of practice;

(6) assignments of MMI and/or impairment ratings overturned in a contested case hearing, appeals panel decision and/or court decision;

(7) any of the factors listed in subsection (f) of this section that would allow for denial of admission to the DDL;

(8) failure to timely successfully complete training and testing requirements as specified in subsections (b) or (c) of this section;

(9) failure to notify the commission field office of any disqualifying association within 48 hours of receiving notice of being selected as a designated doctor as a pattern of practice or conducting an examination when there is a disqualifying association;

(10) failure to maintain an active practice or failure to maintain the alternate training requirements outlined in subsection (c)(5) of this section;

(11) self-referring for treatment or becoming the employee's treating doctor for the medical condition evaluated by the designated doctor; or

(12) other significant violation of Statute and/or Rules while serving as a designated doctor.

(l) The process for notification and opportunity for appeal of a sanction is governed by §180.27 of this title (relating to Sanctions Process/Appeals) except that suspension, deletion, or other sanction relating to the DDL shall be in effect during the pendency of any appeal.

(m) The commission shall make available through its internet website the names of:

(1) doctors on the DDL;

(2) doctors deleted or suspended from the list or otherwise sanctioned by the commission (including a description of the sanction); and

(3) doctors reinstated to the list or whose sanctions were lifted by the commission.

(n) When a doctor is added to the DDL or readmitted following a suspension or deletion, the doctor shall be placed at the bottom of the list for rotation purposes under Texas Labor Code §408.0041.

(o) The following definitions apply to this section:

(1) Active practice--a doctor has an active practice if the doctor maintains routine office hours of at least 20 hours per week for the treatment of patients.

(2) Disqualifying Association--any association which may reasonably be perceived as having potential to influence the conduct or decision of the designated doctor.

(A) A disqualifying association between a designated doctor and a party may include:

(i) receipt of income, compensation, or payment of any kind not related to health care provided by the doctor;

(ii) shared investment or ownership interest;

(iii) contracts or agreements that provide incentives, such as referral fees, payments based on volume or value, and waiver of beneficiary coinsurance and deductible amounts;

(iv) contracts or agreements for space or equipment rentals, personnel services, management contracts, referral services, or warranties, or any other services related to the management of the doctor's practice;

(v) personal or family relationships; or

(vi) any other financial arrangement that would require disclosure under §180.24 of this title (relating to Financial Disclosure).

(B) Receipt of normal payments rendered for services provided pursuant to managed care/preferred provider contracts or any payment in accordance with the Texas Workers' Compensation Act and rules, is not a disqualifying association.

(3) Party--any of the following entities including any of their agents or representatives: the insurance carrier, health care provider (including designated doctor and treating doctor), injured employee, or employer.

(4) Self-Refer--treatment by the designated doctor or referral for treatment to another health care provider with which the designated doctor has a disqualifying association.

§180.22. Health Care Provider Roles and Responsibilities.

(a) Health care providers shall provide reasonable and necessary health care that:

(1) cures or relieves the effects naturally resulting from the compensable injury;

(2) promotes recovery; and/or

(3) enhances the ability of the employee to return to or retain employment.

(b) In addition to the general requirements of this section, health care providers shall timely and appropriately comply with all applicable requirements under the statute and rules, including, but not limited to:

(1) reporting required information;

(2) disclosing financial interests;

(3) impartially evaluating an employee's condition; and

(4) correctly billing for health care provided.

(c) The treating doctor is the doctor primarily responsible for the efficient management of health care and for coordinating the health care for an injured employee's (employee) compensable injury. The treating doctor shall:

(1) except in the case of an emergency, approve or recommend all health care rendered to the employee including, but not limited to, medically reasonable and necessary treatment or evaluation provided through referrals to consulting and referral doctors or other health care providers, as defined in this section;

(2) maintain efficient utilization of health care;

(3) communicate with the employee, employer, and insurance carrier (carrier) about the employee's ability to work or any work restrictions on the employee;

(4) make available, upon request, in the form and manner prescribed by the commission:

(A) work release data

(B) cost and utilization data

(C) patient satisfaction data, including comorbidity, "Short Form 12" outcome information (also known as "sf 12"), and recovery expectations.

(d) The consulting doctor is a doctor who examines an employee or the employee's medical record in response to a request from

the treating doctor, the designated doctor, or the commission. The consulting doctor shall:

(1) perform unbiased evaluations of the employee as directed by the requestor including, but not limited to, evaluations of:

(A) the accuracy of the diagnosis and appropriateness of the treatment of the injured employee;

(B) the employee's work status, ability to work, and work restrictions;

(C) the employee's medical condition; and

(D) other similar issues;

(2) submit the narrative report required by §133.104 of this title (relating to Consultant Medical Reports) to the treating doctor, the employee, the employee's representative (if any), the carrier and, the commission (if the requestor was the commission);

(3) not make referrals without the approval of the treating doctor and, when such approval is obtained, ensure that the provider to whom the consulting doctor is making an approved referral knows the identity and contact information of the treating doctor;

(4) initiate or provide treatment only if the treating doctor approves or recommends the treatment; and

(5) become a referral doctor if the doctor begins to prescribe or provide health care to an injured employee.

(e) The referral doctor is a doctor who examines and treats an employee in response to a request from the treating doctor. The referral doctor shall:

(1) supplement the treating doctor's care; and

(2) report the employee's status to the treating doctor and the carrier at least every 30 days; and

(3) not make referrals without the approval of the treating doctor and, when such approval is obtained, ensure that the provider to whom the referral doctor is making an approved referral knows the identity and contact information of the treating doctor.

(f) The Required Medical Examination (RME) doctor is a doctor who examines the employee's medical condition in response to a request from the carrier or the commission under Texas Labor Code §408.004. The RME doctor shall:

(1) perform unbiased evaluations of the employee as directed by the RME order including, but not limited to, evaluations of:

(A) the accuracy of the diagnosis and appropriateness of the treatment of the injured employee;

(B) the employee's work status, ability to work, and work restrictions;

(C) the employee's medical condition; and

(D) other similar issues;

(2) not make referrals without the approval of the treating doctor and when such approval is obtained, ensure that the provider to whom the RME doctor is making an approved referral knows the identity and contact information of the treating doctor;

(3) initiate or provide treatment only if the treating doctor approves or recommends the treatment; and

(4) not evaluate the employee's maximum medical improvement (MMI) status or permanent whole body impairment except following an examination by a designated doctor or otherwise directed by the commission and when performing such an examination, shall do so in an unbiased manner.

(g) The peer or utilization reviewer evaluates medical and health care services, including evaluation of the qualifications of professional health care practitioners and of health care provided by those practitioners. Peer or utilization reviews generally include the evaluation of the:

(1) accuracy of a diagnosis;

(2) quality of the care provided by a health care practitioner; and/or

(3) the reasonableness and medical necessity of health care provided or proposed to be provided to an employee.

(h) The designated doctor is a doctor appointed by the commission to recommend a resolution of a dispute as to the medical condition of an employee. The qualifications and responsibilities of a designated doctor are governed by §180.21 of this title (relating to Designated Doctor List) and other rules providing for use of a designated doctor.

(i) A member of the Medical Quality Review Panel (MQRP) is a provider chosen by the commission's Medical Advisor under Texas Labor Code §413.0512. All eligibilities, terms, responsibilities and prohibitions shall be prescribed by contract and the MQRP members shall serve on the MQRP as prescribed by contract. A provider must meet the performance standards specified in the contract to be eligible for selection by the Medical Advisor to serve on the MQRP. Doctors who seek membership on the MQRP are required to be on the ADL.

§180.23. Commission Required Training for Doctors/Certification Levels.

(a) This section identifies the training requirements for doctors to be certified to provide various services within the Texas workers' compensation system.

(b) The commission, in order to ensure that injured employees (employees) have access to health care and insurance carriers (carriers) have access to evaluations of an employee's health care and income benefit eligibility, may grant exceptions that allow a doctor to avoid certain training and registration requirements or to perform functions not normally permitted by the doctor's Certification Level. Such exceptions shall be granted on a per request, per case basis. When an exception is granted, the commission shall provide a copy of the approval to the carrier.

(c) Doctors on the approved doctor list (ADL) shall be classified as either Level 1 or Level 2 doctors.

(1) Level 1 Certification allows a doctor to:

(A) infrequently provide health care to injured employees (providing care, other than emergency or immediate post-injury medical care, to 18 Texas workers' compensation claimants or fewer per calendar year);

(B) perform utilization review or peer review functions for a carrier; and/or

(C) participate in a regional network established under Texas Labor Code §408.0221.

(2) Level 2 Certification allows a doctor to serve in any role authorized in the Texas workers' compensation system with the exception of serving as a designated doctor unless the doctor is also on the designated doctor list which is governed by §180.21 of this title (relating to the Commission Designated Doctor List).

(d) A doctor seeking admission to the ADL shall receive training from the commission and/or a commission-approved trainer.

(e) A person or organization seeking to become a commission-approved trainer shall apply for approval in the form and manner prescribed by the commission.

(f) For each doctor trained, the commission-approved trainer shall file or provide the doctor's training information in the form and manner prescribed by the commission.

(g) Notwithstanding any other subsection of this section:

(1) a doctor not licensed in this state shall not perform utilization reviews and/or peer reviews for an insurance carrier or its agent unless the doctor performs the reviews under the direction of a doctor who:

(A) is licensed in this state,

(B) is on the ADL at Level 2 Certification, and

(C) has agreed to direct the doctor's reviews; and

(2) the commission may restrict or reduce a doctor's privileges or authorizations as provided in the Statute or Rules.

(h) ADL approval at a minimum requires a doctor to successfully complete commission-prescribed training prior to admission and continued approved-status at a minimum requires a doctor to successfully complete follow-up training as required.

(1) Required training shall focus on the requirements of the Texas workers' compensation system with an emphasis on return to work, efficient utilization of care, entitlement to benefits, maximum medical improvement (MMI), and the determination of the existence of permanent impairment.

(2) Training may be completed through either self-study/distance learning (including online) or by attending training in person, as available.

(3) Level 1 Certification requires completing the Limited Participation Doctor Training Module. Level 2 Certification requires completing the Doctor Training Module.

(4) Level 1 Certification requires follow-up training every two years. Level 2 Certification requires follow-up training every four years. Follow-up training will serve as a refresher course but emphasize relevant changes in the statute and rules.

(i) This subsection governs authorization relating to certification of MMI, determination of permanent impairment, and assignment of impairment ratings in the event that a doctor finds permanent impairment exists when the examination of the injured employee occurs on or after September 1, 2003.

(1) Any doctor on the ADL is authorized to determine whether an employee has permanent impairment resulting from a compensable injury. If the doctor finds that the employee does not have permanent impairment, the doctor is also authorized to certify the employee as reaching MMI.

(2) Full authorization to assign an impairment rating and certify MMI in an instance where the employee is found to have permanent impairment requires a doctor to receive commission certification by successfully completing the commission-prescribed Impairment Rating Training Module and passing the test. To remain certified, a doctor is required to successfully complete follow-up training and testing every four years.

(3) A doctor who has not completed the commission-prescribed training under subsection (i)(2) of this section but who has had similar training in the *AMA Guides* from a commission-approved vendor within the prior two years may submit the syllabus and training materials from that course to the commission for review. If the commission determines that the training is substantially the same as the commission-prescribed training and the doctor passes the commission-prescribed test, the doctor is fully authorized under this subsection. The ability to substitute training only applies to the initial training requirement, not the follow-up training.

(4) Notwithstanding any other provision of this subsection, a doctor who has not successfully completed training and testing required by this subsection for authorization to assign impairment ratings and certify MMI when there is permanent impairment may receive permission by exception to do so from the commission on a specific case basis.

(5) Full authorization under this section is one of the minimum requirements to be on the Designated Doctor List (DDL). §180.21 of this title governs DDL membership requirements and procedures.

§180.24. Financial Disclosure.

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

(1) Compensation arrangement--any arrangement involving any remuneration between a health care practitioner (or a member of a health care practitioner's immediate family) and a health care provider.

(2) Financial interest means:

(A) an interest of a health care practitioner, including an interest of the health care provider who employs the health care practitioner, or an interest of an immediate family member of the health care practitioner, which constitutes a direct or indirect ownership or investment interest in a health care provider, or

(B) a direct or indirect compensation arrangement between the health care practitioner, the health care provider who employs the referring health care practitioner, or an immediate family member of the health care practitioner and a health care provider.

(3) Immediate family member--Immediate family member or member of a doctor's immediate family means husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.

(b) Submission of Financial Disclosure Information to the Commission.

(1) If a health care practitioner refers an injured employee (employee) to another health care provider in which the health care practitioner has a financial interest, the health care practitioner shall file a disclosure with the commission within 30 days of the date the first referral is made unless the disclosure was previously made. This disclosure shall be filed for each health care provider to whom an employee is referred and shall include the information in subsection (b)(3) of this section.

(2) In addition, as a condition for a certificate of registration for the approved doctor list (ADL), the doctor shall file with the commission at the time of application for a certificate of registration for the ADL in accordance with §180.20 of this title (relating to Commission Approved Doctor List) a disclosure of financial interests of the doctor in the form and manner prescribed by the commission. Thereafter, a doctor registered on the ADL shall report to the commission

within 30 days, on the doctor's own initiative, any changes in the information the doctor previously provided when applying for registration.

(3) The health care practitioner's disclosures in paragraphs (1) and (2) of this subsection shall at a minimum include:

(A) the disclosing health care practitioner's name, business address, federal tax identification number, professional license number, and any other unique identification number;

(B) the name(s), business address(es), federal tax identification number(s), professional license number(s), and any other unique identification number of the health care provider(s) in which the disclosing health care practitioner has a financial interest as defined in subsection (a)(2) of this section; and

(C) the nature of the financial interest including, but not limited to, percentage of ownership, type of ownership (e.g., direct or indirect, equity, mortgage), type of compensation arrangement (e.g, salary, contractual arrangement, stock as part of a salary payment) and the entity with the ownership (disclosing health care practitioner, the health care provider who employs the health care practitioner, or an immediate family member of the health care practitioner).

(c) Failure to disclose. On or after September 1, 2003, in addition to any penalties provided by the statute and rules, failure to disclose a financial interest when the health care practitioner had actual knowledge of the financial interest or acted in reckless disregard or deliberate ignorance as to the existence of the financial interest is subject to a penalty of forfeiture of the right to reimbursement for any services rendered on the claim during the period of noncompliance, regardless of whether the circumstances of the services themselves were subject to disclosure, and regardless of whether the services were medically necessary.

(1) Limitations on billing. A health care practitioner who rendered services on a claim during a period in which the practitioner was out of compliance with the disclosure requirements under this section for that claim, regardless of whether the circumstances of the services themselves were subject to disclosure, shall not present or cause to be presented a claim or bill to any individual, third party payer, or other entity for those services (regardless of whether the services were medically necessary).

(2) Refunds. If a health care practitioner collects any amounts that were billed for services on a claim provided during a period in which the practitioner was in noncompliance with the disclosure requirements of this section for that claim, regardless of whether the circumstances of the services themselves were subject to disclosure, the practitioner shall be liable to the individual or entity for, and shall timely refund, any amounts collected (regardless of whether the services were medically necessary).

(3) Rebuttable Presumption. A referral for services to a health care provider by a health care practitioner under circumstances which required a disclosure under this section, but which was not timely disclosed as required, creates a rebuttable presumption that the services were not medically necessary unless one of the statutory and regulatory exceptions that apply to referrals in Title 42, United States Code §1395nn(b)-(e) applies to the referral in question Whenever one of these exceptions is revised and effective, the revised exception shall be effective for referrals made on or after the effective date of the revision.

§180.25. Improper Inducements, Influence and Threats.

(a) Offering, paying, soliciting, or receiving an improper inducement relating to medical benefit delivery is prohibited as are improper attempts to influence medical benefit delivery, including through the making of improper threats. This section applies to all participants in the workers' compensation system and their agents.

(b) The following specific acts will be deemed to be an improper inducement, influence or threat:

(1) Intentionally, knowingly, or willfully soliciting or receiving any remuneration (including, but not limited to, any kickback, bribe, or rebate) in return for referring an injured employee (employee) to a person (either the person soliciting or receiving the inducement or another person):

(A) for the furnishing or arranging for the furnishing of any item, treatment, or service constituting a medical benefit for which payment may be made in whole or in part under the Statute or Rules; or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, treatment or item constituting a medical benefit for which payment may be made in whole or in part under the Statute or Rules.

(2) Intentionally, knowingly, or willfully offering or paying any remuneration (including, but not limited to, any kickback, bribe, or rebate) in return for referring an employee to a person (either the person offering or paying the inducement or another person):

(A) for the furnishing or arranging for the furnishing of any item, treatment or service constituting a medical benefit for which payment may be made in whole or in part under the Statute or Rules; or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, treatment, or item constituting a medical benefit for which payment may be made in whole or in part under the Statute or Rules.

(3) Except as provided by Texas Labor Code §408.0222, providing any financial incentive or promising or threatening to provide employee evaluation reports or other medical opinions that could enhance or reduce the employee's income benefits or affect the employee's work release status as an inducement to have the employee treat with or be evaluated by the provider or comply with the provider's proposed treatment.

(4) Intentionally, knowingly, or willfully offering or soliciting an inducement in return for selecting a particular health care provider for the furnishing or arranging for the furnishing of any item, treatment, or service (including purchasing or leasing) for which payment may be made in whole or in part under the Statute or Rules; or intentionally, knowingly, or willfully offering or soliciting an inducement which may reasonably tend to cause a particular provider to be selected (excluding a convenience necessary to allow for the provision of health care, such as transportation to and from the provider's facility, translator services related to evaluation and treatment, providing claim filing forms or information on rights and responsibilities under the statute and rules, if generally available to all patients). Such inducement is improper whether offered directly or indirectly, overtly or covertly, in cash or in kind.

(5) Intentionally, knowingly, or willfully making, presenting, filing, or threatening to make, present, or file any frivolous claim or assertion against a system participant, medical peer reviewer, or any other person performing duties arising under the Statute or Rules, with the commission or any licensing, certifying, regulatory, or investigatory body.

(6) Intentionally, knowingly, or willfully making or causing to be made a threat against life, safety, or property directed to a

system participant related to their performance of duties arising under the Statute or Rules.

(c) The exceptions that apply to subsections (b)(1) and (b)(2) of this section are those that apply to analogous provisions in Title 42, United States Code §1320a-7b(3). The exceptions shall apply to subsections (b)(1) and (b)(2).

(d) Nothing in this section prohibits an employer or carrier from offering employees an incentive to obtain health care from doctors within an insurance carrier network established under Texas Labor Code §408.0223. However, such incentives shall not:

(1) limit the right of the employee to request the authority to select an alternate treating doctor under Texas Labor Code §408.023 (including to change to a doctor out of the network); or

(2) require the employee to give up entitlement to or refund the incentive the employer or carrier offered or provided to the employee during the period that the employee's treating doctor was within the network.

§180.26. Doctor and Insurance Carrier Sanctions.

(a) This section is in addition to and does not affect other sanctions provided by statute or by rules adopted under §415.023(b) or other Rules and it establishes:

(1) the grounds (conduct, actions, inactions, and events) that will require the Executive Director to delete a doctor from the Approved Doctor List (ADL);

(2) the grounds that allow the commission to delete a doctor from the ADL or otherwise issue a sanction against a carrier or doctor;

(3) the evidence the commission may consider as establishing the grounds to delete a doctor or issue a sanction (including the evidence that conclusively establishes the grounds); and

(4) the types of sanctions the commission may recommend or impose.

(b) The Executive Director shall delete from the ADL a doctor:

(1) who fails to meet the registration and certification requirements (which also includes required testing/training) of §180.20 of this title (relating to Commission Approved Doctor List);

(2) who is deceased;

(3) who requests to be removed from the ADL; or

(4) whose license to practice in this state is revoked, suspended, or not renewed by the appropriate licensing or certification authority. This includes, but is not limited to, suspensions or revocations that are stayed, deferred, or probated and voluntarily relinquishment of the license to practice.

(c) Except as provided by subsection (e) of this section, the Medical Advisor (as defined by Texas Labor Code §413.0511) shall recommend deletion of a doctor from the ADL if any of the following occurs:

(1) significant violation(s) of the statute, rules, or a commission decision or order or agreement including, but not limited to:

(A) committing a willful or intentional violation(s) of the statute, rules, or a commission decision or order or agreement;

(B) having an uncorrected pattern of practice of violating the statute, rules, or commission decisions or orders or agreements;

(2) significant violation of other statutes or rules not administered by the commission but relevant to the provision of and payments for health care including, but not limited to:

(A) committing an offense that results in the doctor being sanctioned by the Medicare or Medicaid program;

(B) being convicted of a violation of state or federal statutes relating to:

(i) dangerous drugs, controlled substances, or any other drug-related offense;

(ii) fraud;

(iii) moral turpitude; or

(iv) conduct that either resulted in physical harm to or otherwise endangered a person;

(C) committing an act that results in suspension, revocation of license, or issuance of a practice restriction(s) or other limitation(s) by the appropriate licensing or certification authority (even if stayed, deferred, or probated);

(D) being convicted of a criminal offense that indicates an unwillingness or inability to provide quality treatment or to abide by the statute, rules or a commission decision or order;

(3) professional failure to practice medicine or provide health care, including chiropractic care, in an acceptable manner consistent with the public health, safety, and welfare, including but not limited to:

(A) engaging in any negligent practice resulting in death, significant injury, or substantial probability of death or significant injury to the provider's patient(s);

(B) providing substandard clinical care as evidenced by:

(i) excessive or deficient care;

(ii) an excessive complication rate such as having to repeat surgeries or treat post-operative infections in excess of relevant benchmarks;

(iii) practicing beyond the doctor's scope of licensure or certification; or

(iv) having three or more final adverse malpractice judgments against the doctor during the doctor's career;

(C) having an uncorrected pattern of practice of failing to timely and appropriately release employees to return to work as compared to relevant benchmarks or based upon the work release guidelines adopted by the commission;

(D) being excluded or removed from participation in other health plans for cause;

(E) losing hospital privileges for cause;

(F) abusing drugs, alcohol, or other substances;

(G) having a medical or other condition that impacts the doctor's judgment or ability to safely practice medicine;

(H) willfully over-prescribing potentially dangerous medications such as narcotics or doing so as a pattern of practice;

(4) having a significant (uncorrected or willful) pattern of practice relating to the delivery or evaluation of health care that the commission finds is not fair and reasonable or that the commission determines does not meet professionally recognized standards of health care including, but not limited to:

(A) having unjustifiable differences between the doctor's diagnoses or treatments and acceptable standards of care;

(B) having unjustifiable differences between the doctor's billing practices and the commission's Rules or Fee Guidelines such as by submitting medical bills that demonstrate a pattern of practice of inappropriate coding or which is abusive or violates Rules and Guidelines, including but not limited to, such practices as upcoding and unbundling as defined in §133.1 (relating to Definitions for chapter 133) and that, if relied upon by the carrier, has the potential of unlawfully increasing the doctor's reimbursement;

(C) administering improper, unreasonable, or medically unnecessary health care and/or seeking approval for same;

(D) failing to fulfill responsibilities set out in §180.22 of this title (relating to Health Care Provider Roles and Responsibilities);

(E) submitting medical bills that demonstrate a pattern of practice of coding or billing for noncompensable injuries, conditions, or body areas;

(F) improperly or unjustifiably denying requests for preauthorization or concurrent review or issuing peer review or utilization review opinions improperly or unjustifiably denying payment for reasonable and necessary health care (as evidenced by denial rates significantly higher than relevant benchmarks);

(G) certifying MMI and/or assigning impairment ratings in violation of the statute and rules, including, but not limited to, not complying with the applicable *AMA Guides* when assigning an impairment rating;

(H) making improper or unjustifiable recommendations regarding the reasonableness and medical necessity of care provided or proposed to be provided to an employee;

(I) making unnecessary referrals;

(5) dishonest conduct including but not limited to:

(A) submitting a false statement or misrepresentation, or omitting pertinent facts when claiming payment under the Texas Workers' Compensation Act or when supplying information used to determine the right to payment under the Texas Workers' Compensation Act;

(B) submitting a false statement, incorrect information, or misrepresentation, or omitting pertinent facts that, if relied upon by the carrier, has the potential of unlawfully increasing the doctor's reimbursement;

(C) submitting a false statement, incorrect information, or misrepresentation, or omitting pertinent facts that, if relied upon by the insurance carrier, has the potential to result in approval of requests for health care that is not reasonable and necessary or the denial of health care that is reasonable and necessary;

(D) submitting a false statement or misrepresentation or omitting pertinent facts to the commission that could affect the commission's decision to:

(i) include the doctor on the ADL (per §180.20 of this title);

(ii) certify the doctor for a specific certification level (per §180.23 of this title (relating to commission Approved Training for Doctors /Certification Levels)); or

(iii) otherwise allow the doctor to provide health care in the Texas workers' compensation system;

(E) practicing without credentials or practicing with falsified credentials;

(6) refusing to refund monies improperly paid to the doctor in compliance with an order; or

(7) other activities that warrant deletion.

(d) The Medical Advisor may recommend a sanction against a doctor or a carrier or the deletion or suspension of a doctor from the ADL if any of the following occurs:

(1) violation of the statute, rules, or a commission decision or order or agreement;

(2) violation of other statutes or regulations not administered by the commission but relevant to the provision of and payments for health care;

(3) conduct relating to the delivery, evaluation, or remuneration of health care that the commission finds is not fair and reasonable or that the commission determines does not meet professionally recognized standards of health care;

(4) refusing to pay monies owed under the Statute or Rules to a health care provider for reasonable and necessary health care related to the compensable injury; or

(5) other activities that warrant sanction.

(e) A carrier or doctor (sanctionee) may enter into a progressive disciplinary agreement with the commission if the commission believes such an agreement will achieve the goals of improving medical quality and cost containment in the Texas workers' compensation system. An agreement reached under this section may be entered into before or after formal notification under §180.27 of this title (relating to Sanctions Process/Appeals/Restoration/Reinstatement) and:

(1) may include any sanction(s) authorized by the statute and rules or agreed to by the commission and the sanctionee;

(2) shall include a description of the action(s)/behavior(s) which was the grounds for the sanction(s) and not include language in which the sanctionee denies the grounds,

(3) shall describe: what sanction(s) were agreed upon, the duration of the agreement, the specific goal(s) of the agreement, the way that progress towards the goal(s) shall be measured, and the consequences of failing to meet the goals or breaking the agreement; and

(4) shall provide that the sanctionee shall pay the commission for costs associated with:

(A) the review that resulted in the sanction; and

(B) monitoring compliance with the agreement and the progress towards the goal(s) of the agreement.

(f) The evidence the commission may consider to establish the grounds for the recommendation or imposition of a sanction of a carrier or doctor or the suspension or the deletion of a doctor from the ADL or DDL include, but are not limited to:

(1) the findings of fact and legal conclusions made by a federal, state, or local court, an administrative law judge, an Independent Review Organization (whether considering a Texas workers' compensation matter or a matter from another health care system), or appropriate licensing, certification, or regulatory authority on a matter in which the doctor or carrier was, or had the opportunity to be, a party;

(2) a plea of guilty or nolo contendere (no contest) by the carrier or doctor that has been accepted by a federal, state, or local court, an administrative law judge, an Independent Review Organization (whether considering a Texas workers' compensation matter or matter from another health care system), or appropriate licensing, certification, or regulatory authority;

(3) the findings of experts working for or with the commission to evaluate a doctor or carrier (this includes, but is not limited to, members of the Medical Quality Review Panel or an Independent Review Organization);

(4) the stipulations of an agreement entered into by the carrier or doctor whom the commission is sanctioning (even if the agreement is not with the commission); or

(5) information or documentation from:

(A) the commission's records;

(B) the records of an appropriate licensing or certification authority;

(C) the records of another regulatory or law enforcement authority; or

(D) the records of a system participant or the general public.

(g) The existence of a finding, conclusion, plea, or stipulation under subsections (f)(1), (2), or (4) of this section that establishes the existence of grounds for sanction, deletion, or suspension under this section is conclusive evidence until and unless the finding, conclusion, plea, or stipulation is subsequently overturned.

(h) The sanctions that the commission may recommend or impose against a doctor or carrier under this section include but are not limited to:

(1) reduction of allowable reimbursement to a doctor (such as an automatic percentage reduction on all or some types of health care);

(2) mandatory preauthorization or utilization review of all or certain health care treatments and services (such as mandatory treatment plans);

(3) required supervision or peer review monitoring, reporting, and audit (by the carrier, the commission, or an independent auditor/reviewer);

(4) deletion or suspension from the approved doctor and/or designated doctor lists;

(5) restrictions on appointment (such as reducing the roles the doctor is allowed to play in a claim or reducing the number of workers' compensation claimants the doctor will be allowed to treat except in an emergency);

(6) conditions or restrictions on a carrier regarding actions by carriers under the Act and rules in accordance with a memorandum of understanding adopted between the commission and the Texas Department of Insurance regarding Article 21.58A, Insurance Code; and

(7) mandatory participation in training classes or other courses as established or certified by the commission.

(i) A doctor who has been deleted or suspended from the ADL shall not directly or indirectly provide services under the Statute or Rules (other than emergency or immediate post-injury medical care) or receive direct or indirect remuneration under the Statute or Rules while suspended or deleted and shall, within seven days of deletion or suspension, notify all employees the doctor is treating that they must receive health care from a different doctor.

§180.27. Sanctions Process/Appeals/Restoration/Reinstatement.

(a) If the commission intends to take action under §180.26 (relating to Doctor and Insurance Carrier Sanctions) or action against a designated doctor under §180.21 (relating to Commission Designated Doctor List), other than in the case where a progressive disciplinary agreement under §180.26(e) was entered into, the commission shall notify the person ("person" also includes a carrier) to be sanctioned by verifiable means of the commission's intent.

(1) Not later than 20 days after receiving the notice, a doctor may request a hearing at the State Office of Administrative Hearings by filing such a request with the Chief Clerk of Proceedings at the commission.

(2) If no request for hearing is filed within the time allowed, the recommendation for sanction will be reviewed by the commissioners at a public meeting and a decision made. If a hearing was held, the commissioners shall review the decision of the administrative law judge (ALJ) after the hearing is held.

(b) If the commission modifies, amends, or changes a recommended finding of fact or conclusion of law, or order of the ALJ, the commission's final order shall state the legal basis and the specific reasons for the change.

(c) If the commissioners vote to impose the sanction, the commission shall notify the person by issuing an order of which describes the effects of the sanction. This order shall be delivered by verifiable means with a copy to the appropriate licensing or certification authority and, if the sanction is against a doctor, copies shall be delivered to those injured employees the commission is aware are being treated by that doctor.

(d) Failure to comply with the sanction may result in further sanctioning by the commission.

(e) A person who was sanctioned can apply to have the sanction lifted (whether through restoration of privileges or recertification) by applying in the form and manner prescribed by the commission.

(1) The request shall be evaluated by the Medical Advisor and /or members of the Medical Quality Review Panel. The requestor shall be liable for the cost of the review, which may include an audit of the records of the requestor.

(A) If, in the Medical Advisor's opinion, the person has all the appropriate unrestricted licenses/certifications, has overcome the conditions that resulted in sanction, and should be reinstated, the Medical Advisor shall recommend that the commissioners reinstate the doctor or restore the privileges removed or restricted by the sanction.

(B) If, in the Medical Advisor's opinion, the person has not met the requirements for reinstatement or restoration of privileges, the commission shall notify the person by verifiable means of the intent to recommend to the commissioners that the sanctions not be lifted. Within 14 days after receiving the notice, a doctor may file a response that addresses the reasons given that the recommendation was to be made. The Medical Advisor shall review the response and make a final recommendation to the commissioners. A copy of the requestor's response to the commission shall be provided to the commissioners for consideration.

(2) The commissioners shall consider the matter in a public meeting and shall notify the requestor by verifiable means with a copy to the appropriate licensing or certification authority. If the commissioners choose to not lift the sanction, the commissioners may include in their final decision the conditions that the sanctioned person must meet before the commission will reconsider lifting the sanctions including, but not limited to, the amount of time that the person must wait prior to rerequesting lifting the sanction.

(f) Notwithstanding any other provision of this section, deletion from the Approved Doctor List by the Executive Director pursuant to §180.26(b) shall be governed by this subsection.

(1) Prior to deletion, the Executive Director or designee shall notify a doctor of the intention to delete the doctor and the grounds for that action.

(2) Within 14 days after receiving the notice of intent, a doctor may file a response to the reasons given as grounds for the deletion with the Executive Director or designee.

(A) If a response is not received by the 15th day after the date the doctor received the notice of intent, the doctor is deleted and no subsequent notice will be sent.

(B) If the response is agreement, the doctor will be deleted effective on the earlier of the date the doctor agrees to the deletion or the 15th day after the date the doctor received the notice of intent and no subsequent notice will be sent.

(C) If a response which disagrees with the grounds for deletion is timely received and after reviewing the response, the Executive Director or designee determines:

(i) that the grounds do not exist for deletion under §180.26(b), the doctor shall be notified that he was not deleted under §180.26(b); or

(ii) that the grounds for deletion do exist, the doctor shall be notified of the deletion and the notice shall identify the effective date of the deletion.

(3) All notices under this subsection shall be delivered by a verifiable means. 1

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 February 22, 2002.

TRD-200201091
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: March 14, 2002
Proposal publication date: August 31, 2001
For further information, please call: (512) 804-4287

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 365. INVESTMENT RULES

The Texas Water Development Board (the board) adopts amendments to 31 TAC §§365.2, 365.11, and 365.12 concerning Investment Rules without change to the proposed text which was published in the December 28, 2001 issue of the *Texas Register* (26 TexReg 10796) and will not be republished. The amendments provide clarification and compliance with the Public Funds Investment Act (PFIA), Government Code, Chapter 2256.

Section 365.2 is amended to reflect the Legislature's change in the name of the state agency from the General Services Commission to the Building and Procurement Commission. Section 365.11 is amended to combine registration requirements items in paragraphs (4) and (6) for a more concise and applicable requirement of the selection process.

Section 365.12 is amended to delete a duplicate registration requirement and the requirement of one year's registration in Texas. Registration with the National Association of Security Dealers is required in §365.11(4). The requirement of one year's registration in Texas is not required by law and serves no useful purpose in selecting dealers. Section 365.12 requires one year's experience in government securities and changes to §365.11(4) require registration in Texas.

No comments were received on the proposed amendments.

SUBCHAPTER A. GENERAL PROVISIONS

31 TAC §365.2

The amendments are adopted under the authority of the Texas Water Code §6.101 which provide the Texas Water Development 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 require each State agency to adopt rules regarding the investment of its funds.

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 February 20, 2002.

TRD-200201045
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: March 12, 2002
Proposal publication date: December 28, 2001
For further information, please call: (512) 463-7981

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SUBCHAPTER B. SELECTION OF AUTHORIZED DEALERS

31 TAC §365.11, §365.12

The amendments are adopted under the authority of the Texas Water Code §6.101 which provide the Texas Water Development 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 require each State agency to adopt rules regarding the investment of its funds.

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 February 20, 2002.

TRD-200201046

Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: March 12, 2002
Proposal publication date: December 28, 2001
For further information, please call: (512) 463-7981

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CHAPTER 367. AGRICULTURAL WATER CONSERVATION PROGRAM
SUBCHAPTER A. GRANTS FOR EQUIPMENT PURCHASES

31 TAC §§367.1, 367.2, 367.21, 367.22, 367.27

The Texas Water Development Board (the board) adopts amendments to 31 TAC §§367.1, 367.2, 367.21, 367.22 and 367.27 concerning Grants for Equipment Purchases of the Agricultural Water Conservation Program without change to the proposed text as published in the December 28, 2001 issue of the *Texas Register* (26 TexReg 10797) and will not be republished. The amendments provide cleanup and reflect expanded purposes of grants approved by the 77th Texas Legislature.

The amendments to §367.1 expand the policy statement to reflect recent changes by the Legislature in the purposes for which grants may be made and to correct the Water Code cite. Section 367.2 is amended to remove definitions that are no longer used and to incorporate new purposes of measuring and collecting data on groundwater conservation for which grants may be used as added to Texas Water Code §15.471 by the 77th Texas Legislature. The definition of political subdivision is added to define entities eligible for grants under the Agricultural Water Conservation Grants for Equipment Purchases Program. The amendment reflects changes made by the 77th Texas Legislature. The definition is identical to the Texas Water Code Chapter 15 definition. The amendment to §367.21 incorporates this expanded use of grants.

Section 367.22 expands the entities eligible to receive grants to include all political subdivisions (as defined by Chapter 15 of the Texas Water Code). This reflects changes made by the 77th Texas Legislature. Because the definition for political subdivision includes both underground water conservation districts and other districts, §367.22 is amended to remove specific reference to those entities as eligible. The amendments to §367.27 remove reference to the executive administrator's award of grants because the Board may not delegate this responsibility to the executive administrator.

There were no comments received on the proposed amendments.

The amendments are adopted under the authority of the Texas Water Code §6.101 and Texas Water Code §§15.435, 15.472, and 15.541 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 February 20, 2002.

TRD-200201047
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: March 12, 2002
Proposal publication date: December 28, 2001
For further information, please call: (512) 463-7981

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF NEW AND/OR ADJUSTED 2002 MODEL PRIVATE PASSENGER AUTOMOBILE PHYSICAL DAMAGE RATING SYMBOLS FOR THE TEXAS AUTOMOBILE RULES AND RATING MANUAL

The Commissioner of Insurance, at a public hearing under Docket No. 2510 held at 9:30 a.m., February 12, 2002 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, adopted amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual). The amendments consist of new and/or adjusted 2002 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-1201-22-I) was published in the December 28, 2001, issue of the *Texas Register* (26 TexReg 11055).

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the 2002 model year of the listed vehicles.

The amendments as adopted by the Commissioner of Insurance are shown in exhibits on file with the Chief Clerk under Ref. No. A-1201-22-I, which are incorporated by reference into Commissioner's Order No. 02-0158.

The Commissioner of Insurance has jurisdiction over this matter pursuant to Insurance Code Articles 5.10, 5.96, 5.98, and 5.101.

This notification is made pursuant to Insurance Code Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with Insurance Code Article 5.96(h), the Department will notify all insurers writing automobile insurance of this adoption by letter summarizing the Commissioner's action.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, and the amendments are adopted to become effective on the 60th day after publication of the notification of the Commissioner's action in the Texas Register.

TRD-200201124
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 22, 2002

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Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE, CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF WORKERS' COMPENSATION ENDORSMENT: TEXAS - AUDIT PREMIUM AND RETROSPECTIVE PREMIUM ENDORSEMENT WC 42 04 07

The Commissioner of Insurance adopted Texas - Audit Premium and Retrospective Premium Endorsement WC 42 04 07 to be added to the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (the Manual). The staff of the Workers' Compensation Division of the Texas Department of Insurance proposed the endorsement in a petition filed on December 14, 2001. Notice of the proposal (Reference No. W-1201-23-1) was published in the December 28, 2001, issue of the *Texas Register* (26 TexReg 11055). The adoption of the endorsement was considered at a public hearing held under Docket No. 2511 on February 12, 2002 at 9:30 a.m. in Room 100 of the William P. Hobby Building, 333 Guadalupe Street in Austin, Texas.

The purpose of the endorsement being added to the Manual is to establish a due date for audit premiums and retrospective premiums pursuant to the National Association of Insurance Commissioners (NAIC) Statement of Statutory Accounting Principles (SSAP) No. 6. According to SSAP No. 6, the policy or contract provisions governing the audit premiums and retrospective premiums must address the due date for these types of premium if the uncollected premium (either accrued or billed) is to be considered an admitted asset by the insurance company.

The staff recommended two nonsubstantive changes to the endorsement filed with its petition on December 14, 2001. The proposed endorsement was entitled "Texas - Audit Additional Premium and Retrospective Additional Premium Endorsement." The staff recommended

changing name of the endorsement by eliminating the word "additional" both times it is used in the title of the endorsement. Staff recommended this change so that the title of the endorsement would conform to the language of SSAP No. 6. With this change, the name of the endorsement is "Texas - Audit Premium and Retrospective Premium Endorsement." In addition, staff recommended that the typographical error in the first line of the endorsement be corrected to change the "of" to "or."

The endorsement as adopted by the Commissioner of Insurance is on file with the Chief Clerk under Reference No. W-1201-23-I, which is incorporated by reference in Commissioner's Order No. 02-0175.

The Commissioner has jurisdiction over this matter pursuant to the Insurance Code, Articles 5.56, 5.57 and 5.96.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Texas - Audit Premium and Retrospective Premium Endorsement WC 42 04 07 be added to the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance, which is attached and incorporated hereto is hereby adopted to be effective fifteen days after notice of this adoption is published in the *Texas Register*.

TRD-200201198
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 26, 2002

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 Review

Department of Information Resources

Title 1, Part 10

The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision or repeal Title 1, Texas Administrative Code, Chapter 201, §201.14, "Digital Signatures." The review and consideration are being conducted in accordance with Texas Government Code §2001.039. The review will include, at a minimum, an assessment by DIR of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted.

Any questions or written comments pertaining to this rule review may be submitted to Renee Mauzy, General Counsel, via mail at P. O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail at renee.mauzy@dir.state.tx.us. The deadline for comments is thirty (30) days after publication of this notice in the *Texas Register*. Any proposed changes to this rule as a result of the rule review will be published in the Proposed Rule section of the *Texas Register*. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Chapter 2001, Texas Government Code. 1 TAC §201.14, Digital Signatures.

TRD-200201151
Renee Mauzy
General Counsel
Department of Information Resources
Filed: February 25, 2002

♦ ♦ ♦

Adopted Rule Reviews

Texas Department of Health

Title 25, Part 1

The Texas Department of Health (department) has reviewed Title 25. Health Services, Part 1. Texas Department of Health, Chapter 37. Maternal and Infant Health Services, Subchapter K. Epilepsy Program, §§37.211 - 37.224.

The notice of intent to review for these sections was published in the August 31, 2001, issue of the *Texas Register* (26 TexReg 6736). No comments were received in regards to the publication of the notice.

This review is in accordance with the requirements of the Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999. The department has determined that reasons for readopting the sections continue to exist. The rules reviewed were determined by the board to continue to be needed, reflective of current legal and policy considerations, and reflective of current procedures of the board.

As a result of the rules review, the department adopted the repeal of §§37.211 - 37.224, and adopted new §§37.211 - 37.222, and were published in the proposed preamble in the November 9, 2001, issue of the *Texas Register* (26 TexReg 9007). The adopted rules are published in this same issue in the Adopted Rules Section, and will become effective March 17, 2002. The rule review completion date for these rules is March 17, 2002.

TRD-200201235
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: February 27, 2002

♦ ♦ ♦

Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy adopts the review Subchapter C of Chapter 291, §§291.51 - 291.55, concerning Nuclear Pharmacy (Class B), pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

In conjunction with this review, the agency is adopting amendments to Subchapter C of Chapter 291 published elsewhere in this issue of the *Texas Register*.

The agency finds the reason for adopting the rule continues to exist. No comments were received regarding adoption of this review.

TRD-200201055

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: February 21, 2002

♦ ♦ ♦

The Texas State Board of Pharmacy adopts the review Chapter 305, §305.1 and §305.2, concerning Educational Requirements, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

The agency finds the reason for adopting the rule continues to exist. No comments were received regarding adoption of this review.

TRD-200201056
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: February 21, 2002

♦ ♦ ♦

The Texas State Board of Pharmacy adopts the review Chapter 309, §§309.1 - 309.8, concerning Generic Substitution, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

In conjunction with this review, the agency is adopting the repeal of Chapter 309 and new Chapter 309 published elsewhere in this issue of the *Texas Register*.

The agency finds the reason for adopting the rule continues to exist. No comments were received regarding adoption of this review.

TRD-200201057
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: February 21, 2002

♦ ♦ ♦

Texas Youth Commission

Title 37, Part 3

In accordance with the General Appropriation Act, Article IX, Section 167, 75th Legislature, the Texas Youth Commission is adopting the review of Title 37, Part 3, Chapters 81, 83, 85, and 87 concerning Interaction With The Public, Purchasing Youth Services, Admission and Placement, and Treatment. The proposed review rules was published in the January 8, 2002, issue of the *Texas Register* (27 TexReg 418).

The Commission has determined that the reason for adopting these rules continues to exist.

The Commission proposes no amendments, repeals, or withdraws to the chapters 81, 83, 85, and 87.

Comments or questions pertaining to this notice should be directed to Sherma Cragg, Policy and Manuals Manager, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765 or e-mail sherma.cragg@tyc.state.tx.us.

TRD-200201033
Steve Robinson
Executive Director
Texas Youth Commission
Filed: February 20, 2002

♦ ♦ ♦

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.

Figure: 7 TAC §1.1207(a)(7)

CONSUMER CREDIT DISCLOSURE – PROMISSORY NOTE

ACCOUNT / CONTRACT NO. _____ DATE OF NOTE _____

CREDITOR / LENDER _____ BORROWER _____

ADDRESS _____ ADDRESS _____

_____ _____

"I" and "me" means each person who signs as a Borrower. "You" means the Lender.

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate. %	FINANCE CHARGE The dollar amount the credit will cost me. $	Amount Financed The amount of credit provided to me or on my behalf. $	Total of Payments The amount I will have paid after I have made all payments as scheduled. $

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the following described collateral _____.
Late Charge: If any part of a payment is unpaid for 10 days after it is due, I may be charged 5% of the amount of payment.
Prepayment: If I pay off early, I may be entitled to a refund of part of the finance charge.
Additional Information: See the contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

ITEMIZATION OF THE FINANCE CHARGE

Acquisition Charge$_____
Installment Account Handling Charge$_____

ITEMIZATION OF THE AMOUNT FINANCED

Previous Account # _____
Late Charge on Previous Account $ _____
Previous Balance $ _____
Less Refund $ _____
Net Balance Renewed $ _____
Cash to me $ _____
Amount Financed $ _____

I promise to pay the Total of Payments to the order of you, the Lender. I will make the payments at your address above. I will make the payments on the dates and in the amounts shown in the Payment Schedule. If I don't pay an entire payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment. If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be at a rate of 18% per year and will begin the day after the final payment becomes due.

I can make any payment early. The acquisition charge on this loan will not be refunded if I pay off early. If I pay all I owe before the beginning of the last monthly period, I will save part of the installment account handling charge. You will figure the amount I save by the Sum of the Periodic Balances Method. This method is explained in the Finance Commission rules. You don't have to refund or credit any amount less than $1.

If I ask for more time to make any payment and you allow me more time, I will pay additional interest to extend the payment. The additional interest will be figured as provided in the Finance Commission rules. I agree to pay you a reasonable fee of up to $25 for a returned check. You can add the fee to the amount I owe under this agreement or collect it separately.

If I break any of my promises in this document, you can demand that I immediately pay all that I owe. You can also do this if you in good faith believe that I am not going to be willing or able to keep all of my promises. I agree that you don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe.

If I am giving collateral for this loan, I will see the separate security agreement for more information and agreements.

I will keep all of my promises in this document. If there is more than one Borrower, each Borrower agrees to keep all of the promises in this document, even if the other Borrowers do not. I promise that all information I gave you is true.

If you don't enforce your rights every time, you can still enforce them later. Federal law and Texas law apply to this contract. I don't have to pay interest or other amounts that are more than the law allows.
Any change to this agreement has to be in writing. Both you and I have to sign it. You can mail any notice to me at my last address in your records.

This lender is licensed and examined by the State of Texas – Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207; http:\\ www.occc.state.tx.us; (512) 936-7600 – (800) 538-1579

Reciba la Forma Informa de Prestamo _____
I received the Spanish Disclosure.

X_____
Borrower

X_____
Co-Borrower

Figure: 7 TAC §1.1207(a)(8)

SECURITY AGREEMENT

ACCOUNT / CONTRACT NO. _____ DATE OF NOTE _____

CREDITOR / LENDER _____ BORROWER _____

ADDRESS _____ ADDRESS _____

_____ _____

"I" and "me" means each person who signs as a Borrower. "You" means the Lender/Secured Party.

We are entering into this security agreement at the same time that we are entering into a loan.

In exchange for the loan referenced above, I agree to the following terms and conditions:

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

DESCRIBE THE COLLATERAL COVERED BY THIS SECURITY AGREEMENT:

_____
_____
_____
_____
_____

Borrower acknowledges receipt of a signed copy of this Security Agreement, signed this ____ day of _____, 200__.

Accepted by Secured Party:

X_____ By:_____
Borrower

X_____ Name & Title:_____
Co-Borrower

Figure: 7 TAC §25.2(c)

Model Waiver of Right to Cancel in English.

To use this form: You must reproduce this form on ONE PAGE. The caption in this form is in Arial 14pt, the narrative paragraphs are in Times 12pt, and the consumer inquires and complaints disclosure is in Arial 9pt fonts.

Waiver of Right to Cancel
(For Prepaid Funeral Benefit Contracts)

Name of Purchaser: _____

Contract Number: _____

Contract Effective Date: _____

Seller: _____

1. I am the purchaser of the Contract listed above. By signing my name below, I am waiving my right to cancel the Contract, as permitted by the Texas Finance Code, Section 154.155.

2. I understand that I will **NOT** be able to cancel the Contract and receive any refund from the Seller in the future **even if I move out of the community in which I currently live or change my mind.**

3. This waiver is not valid unless both you and the Seller signed it at least 15 days after the date the Contract is effective. The effective date is when both parties accept the Contract.

_____	_____
My signature as Purchaser	Acknowledgement of Seller (Or Seller's Agent)
Date Signed: _____	Date Signed: _____

The Seller is required to deliver a copy of this signed Waiver to the Purchaser.

The Texas Department of Banking regulates the sale of prearranged funeral contracts and has approved the form of this Waiver. You can file a consumer complaint with the Department by calling (877) 276-5554 (a toll free call). The Department's website address is http:\\www.banking.state.tx.us.

[Form # 9/01 Waiver]

Figure: 7 TAC §25.3(b)

Funeral Goods And Services Selected.

To use this form: You must reproduce this form on ONE PAGE. The caption in this form is in Arial 10pt, the narrative paragraphs are in Times 8.5pt, and the section detailing the funeral goods and services selected is in Arial 8.5pt fonts.

Statement of Funeral Goods and Services Selected

The Total Contract Price below includes the goods and services to be delivered at the time of the Contract Beneficiary's death. You are not purchasing goods and services left blank. You may purchase those goods and services at the time of the funeral service, if desired or required by law or by a cemetery or crematory.

BASIC SERVICES OF FUNERAL DIRECTOR AND STAFF, AND OVERHEAD $_____

EMBALMING: (explanation below)
Embalming services ..... $_____

OTHER PREPARATION OF THE BODY:
Bathing body ..... $_____
Cosmetic/Beautician ..... $_____
Dressing/Casketing ..... $_____
Refrigeration fee (# days_____) ..... $_____
Other _____ $_____

USE OF FACILITIES AND STAFF:
Rosary or prayer service ..... $_____
Viewing/Visitation (# days_____) ..... $_____
Funeral ceremony at funeral home ..... $_____
Funeral ceremony at other facility ..... $_____
Memorial service at funeral home ..... $_____
Memorial service at other facility ..... $_____
Use of equipment and staff for graveside service ..... $_____
Other ..... $_____

TRANSPORTATION SERVICES:
Transfer of remains to funeral home (_____ mile radius) ..... $_____
Hearse (funeral coach) ..... $_____
Funeral Sedan ..... $_____
Limousine ..... $_____
Pallbearer car ..... $_____
Clergy car ..... $_____
Flower car ..... $_____
Other ..... $_____

GOODS:

Casket ..... $_____
□ Wood Type: _____
□ Steel: □ 16 ga □ 18 ga □ 20 ga □ ___ ga □ Stainless
□ Bronze: □ 32 oz □ 48 oz. □ Copper: □ 32 oz □ 48 oz.
□ Other: _____
□ Seal □ Nonseal □ Protective □ Nonprotective □ N/A
Interior Lining: □ Crepe □ Velvet □ Satin □ Other_____
Shell: □ Square □ Round Exterior color: (opt)_____

Outer burial container (explanation below) ..... $_____
□ Liner □ Vault □ Box □ Other (*describe*):
_____
□ Wood Type: _____
□ Concrete
□ Steel: □ 7 ga □ 10 ga □ 12 ga □ 14 ga □ Stainless
□ Bronze _____ oz. □ Copper _____ oz.
□ Other:_____
□ Seal □ Nonseal □ Protective □ Nonprotective □ N/A

Alternative Container (describe)_____ $_____

Urn (Name and Primary Construction)
_____ $_____

Shipping Container (describe)
_____ $_____

Clothing (describe)
_____ $_____

Stationery/Cards (describe)
_____ (#_____) $_____

Memorial Book
_____ (#_____) $_____

Acknowledgement cards (describe)
_____ (#_____) $_____

Other_____ $_____
Other_____ $_____

OTHER SERVICES:
Forwarding of remains to another funeral home (describe method) _____ $_____
Receiving remains from another funeral home... $_____
Other_____ $_____

Immediate Burial (Basic Charge) ..... $_____

Direct Cremation (Basic Charge) ..... $_____

CASH ADVANCE ITEMS: *We charge You for our services in obtaining the items with the boxes marked:*
□ _____ $_____
□ _____ $_____
□ _____ $_____
□ _____ $_____
□ _____ $_____

Subtotal: ..... $_____

Discounts/Adjustments:_____ $_____

TOTAL CONTRACT PRICE:	$

This contract provides only the goods and services itemized ABOVE. A prepaid funeral contract normally does not include the following:

Embalming Due to Autopsy	Cemetery Set-up (tent-chairs-carpet)	Clergy Honorarium
Embalming Due to Organ/Tissue Donor	Cemetery Opening/Closing Fee	Death Certificates
Funeral Home Overtime Fees (e.g. holiday service)	Cemetery Property	Flowers
Donation of Body to Hospital/Medical School	Cemetery Overtime Fees	Newspaper Notices
Special-need Cosmetic Procedures	Crematory Fees	Musicians and Singers
Unforeseen Expenses	Outside Facility Rental	Police Escorts
		Public Transportation

Unless otherwise specified in the Statement of Funeral Goods and Services Selected, the Funeral Home will charge and require payment for any of these items, which may be selected at the time of the funeral. Initial here to confirm You have read this._____

Figure: 7 TAC §25.3(g)

Changes to a Contract at the Death of the Contract Beneficiary.

To use this form: You must reproduce the narrative of this form exactly as written. The caption in this form is in Arial 11pt and the narrative paragraphs are in Times 10pt fonts.

5. Changes to a Contract at the Death of the Contract Beneficiary

If the Seller is required to deliver the funeral goods and services selected with no further payments due at the time of death, then this contract is fully paid.

Relating to fully paid contracts: The law states that the Responsible Person may decide to change the funeral goods or services selected up to 10% of the Total Contract Price at the time of the funeral. Additionally, the Seller, Funeral Home and Responsible Person may agree in writing to more extensive changes. The Responsible Person must pay any increased costs resulting from any changes. The Seller is not required to refund any money, or apply any money to another contract or funeral, if the contract is decreased.

- **If this contract provides a funeral for someone other than You** and the Contract Beneficiary did not leave written directions that meet legal requirements, then the Responsible Person may change the funeral goods and services selected at the time of the funeral service. Changes could include the method of final disposition stated in this contract. (For example, the Responsible Person could exchange a ground burial service and substitute a cremation service.) The Responsible Person can also change other contract selections. (For example, the Responsible Person can change your casket choice.)

- **If this contract provides for YOUR OWN funeral,** then You are the only person who can change the method of final disposition that You have chosen, such as by ground burial or by cremation service. However, the Responsible Person can change other contract selections unless you sign below. (For example, the Responsible Person can change your casket choice.)

Relating to contracts not paid in full: If You do not fully pay for this contract, then the final funeral arrangements could be significantly different from the funeral that You have planned under this contract. However, laws relating to the final disposition of the body of the Contract Beneficiary still remain in effect.

If the selections You made are important to You, You should discuss the funeral goods and services selected with your family and tell them what is important to You. If You wish to prevent changes to this contract, You must sign the space below:

This contract is for my funeral service and, if paid in full at the time of my death, the funeral goods and services selected may not be changed after my death. Sign here if this is your choice. _____

Figure: 7 TAC §25.3(j)

Consumer Inquiries And Complaints Disclosure.

To use these forms: You must reproduce the narrative of the correct form exactly as written. This form is set in Times 8.5pt font.

FOR A TRUST-FUNDED CONTRACT:

Inquiries should be directed as below. All complaints must be in writing.

Concerning the prepaid contract:
Texas Department of Banking
2601 N. Lamar Austin, Texas 78705
1-877-276-5554 (toll free)
http:\\www.banking.state.tx.us

Concerning the funeral service or funeral director:
Texas Funeral Service Commission
P.O. Box 12217, Austin, Texas 78711
1-888-667-4881 (toll free)
http:\\www.tfsc.state.tx.us

FOR AN INSURANCE-FUNDED CONTRACT:

Inquiries should be directed as below. All complaints must be in writing.

Concerning
the prepaid contract:
Texas Department of Banking
2601 N. Lamar Austin, Texas 78705
1-877-276-5554 (toll free)
www.banking.state.tx.us

Concerning
the funeral service or funeral director:
Texas Funeral Service Commission
P.O. Box 12217, Austin, Texas 78711
1-888-667-4881 (toll free)
www.tfsc.state.tx.us

Concerning
the Insurance Policy:
Texas Department of Insurance
P.O. Box 149194, Austin, Texas 78714
1-800-252-3439 (toll free)
www.tdi.state.tx.us

Figure: 25 TAC §221.13(a)(7)(A)

Base Penalty	Range
(A) Level I--$15,000	$10,001 - $25,000
(B) Level II--$10,000	$6,251 - $10,000
(C) Level III--$6,250	$3,751 - $6,250
(D) Level IV--$3,750	$1,251 - $3,750
(E) Level V--$1,250	$100 - $1,250

Figure: 25 TAC §221.14(b)(10)(B)(i)

Internal Temperature	Time
157° F and up	10 seconds
156° F	13 seconds
155° F	16 seconds
154° F	20 seconds
153° F	26 seconds
152° F	32 seconds
151° F	41 seconds
150° F	1 minute
145° F	4 minutes
144° F	5 minutes
143° F	6 minutes
142° F	8 minutes
141° F	10 minutes
140° F	12 minutes
139° F	15 minutes
138° F	19 minutes
137° F	24 minutes
136° F	32 minutes
135° F	37 minutes
134° F	47 minutes
133° F	62 minutes
132° F	77 minutes
131° F	97 minutes
130° F	121 minutes

Figure: 25 TAC §221.14 (b)(10)(B)(ii)

Internal Temperature	Time
145° F and up	instantly
144° F	5 minutes
143° F	6 minutes
142° F	8 minutes
141° F	10 minutes
140° F	12 minutes
139° F	15 minutes
138° F	19 minutes
137° F	24 minutes
136° F	32 minutes
135° F	37 minutes
134° F	47 minutes
133° F	62 minutes
132° F	77 minutes
131° F	97 minutes
130° F	121 minutes

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

Contract Award

This publication is filed pursuant to Texas Government Code, Section 2254.030. The Request for Proposal was published in the December 21, 2001 issue of the *Texas Register* (26 TexReg 10646-10649).

DESCRIPTION OF ACTIVITIES OF PRIVATE CONSULTANT:

The Office of the Attorney General of Texas ("the OAG") has entered into a major consulting services contract for the following services:

The OAG administers millions of dollars of federal funds for the Child Support (Title IV-D) and Medicaid (Title XIX) programs. The OAG recoups its indirect costs from these federal programs based on rates approved by the United States Department of Health and Human Services ("HHS"). Contractor will review the indirect cost methodologies of the OAG to determine areas of cost recovery which will maximize revenue from the recovery of indirect costs and will develop indirect cost rates throughout the OAG, as appropriate. Contractor will prepare Indirect Cost Allocation Plans for FY01 (based on actual expenditures) and for FY03 (based on budgeted expenditures) in accordance with OMB Circular A-87, for submission to HHS for federal approval and will negotiate approval of those plans with HHS. Contractor will also analyze existing legal billing rates of the OAG for purposes of reconciling those existing rates with actual costs of the OAG in providing the legal services and will provide to the OAG a report of that reconciliation. Contractor will develop the FY03 billing rates for legal services. Contractor will negotiate with HHS for approval of the FY03 billing rates. Finally, Contractor will provide guidance to the OAG in the implementation of these plans and billing rates.

NAME AND BUSINESS ADDRESS OF PRIVATE CONSULTANT:

The private consultant engaged by the OAG for these activities is Maximus, Inc., whose business address is 5501 N. 19th Avenue, Suite 208, Phoenix, Arizona 85015-2452.

TOTAL VALUE AND TERM OF THE CONTRACT:

The total value of the contract is $49,000. The term of the contract began on February 12, 2002, and will terminate on August 31, 2002, unless federal approval is still pending for the plans. In such case, the contract will continue until August 31, 2003 for the sole purpose of obtaining the necessary federal approval.

DATES ON WHICH REPORTS ARE DUE:

The Indirect Cost Allocation Plans must be submitted to HHS no later than April 30, 2002. The final report regarding the FY03 billing rates for legal services must be submitted to the OAG no later than July 31, 2002.

For information regarding this publication, please call A.G. Younger, Agency Liaison, at 512/463-2110.

TRD-200201168
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: February 25, 2002

♦ ♦ ♦

Texas Building and Procurement Commission

Notice to Bidders for NTB 96-001N-303, Mechanical Renovations R. E. Johnson Building

SEALED BIDS WILL BE RECEIVED BY THE TEXAS BUILDING AND PROCUREMENT COMMISSION (TBPC), FACILITIES CONSTRUCTION & SPACE MANAGEMENT DIVISION (FCSM) FOR CONSTRUCTION OF PROJECT NO. 96-001N-303, Mechanical Renovations R. E. Johnson Building, 1501 Congress Avenue, Austin, TX 78701. **Both Sealed bids and HUB Subcontracting Plans will be received until 3:00 PM, on March 26, 2002.** At that time, HUB Subcontracting Plans will be reviewed and, if found to be complete and responsive, the Bid will be opened and read.

The approximate total cost for contract: 96-001N-303, Mechanical Renovations R. E. Johnson Building is approximately $300,000.00.

Bid & HUB Subcontracting Plan Receipt Location: Texas Building and Procurement Commission/FCSM will receive bids at the main reception desk at Room 180, Bid Tabulation or, if mailed or shipped, Room 176, Mail Room, Central Services Building, 1711 San Jacinto, Austin, Texas 78701. If items are to be mailed or shipped, please note on the

envelope(s) what it is enclosed, the bid, the HUB plan, or both. Delivery of the bid and the HUB plan at the date and time specified above is the sole responsibility of the bidder.

Contractor Qualifications: Contractors should submit information to FCSM on TBPC's Contractor's Qualifications Form, which can be obtained from FCSM by calling (512) 463-3417. It should be submitted as soon as possible, but no later than 5:00 p.m. on March 19, 2002, to document compliance with contractor's qualification requirements for each project. Information is to be used in determining if a contractor is qualified to receive a contract award for the project. A favorable review by FCSM of contractor qualification statements is required prior to opening bid proposals.

Good Faith Effort for use of Historically Underutilized Businesses (HUB): TEXAS BUILDING AND PROCUREMENT COMMISSION HAS DETERMINED THAT THE WORK TO BE PERFORMED UNDER THIS CONTRACT INCLUDES SUBCONTRACTING OPPORTUNITIES. THEREFORE, A HUB SUBCONTRACTING PLAN WILL BE REQUIRED. THE COMPLETED HUB SUBCONTRACTING PLAN MUST BE SUBMITTED AS PART OF THE CONTRACTOR'S PROPOSAL, OR THE PROPOSAL WILL BE REJECTED AS NON-RESPONSIVE. Prime Contractors are required to perform a Good Faith Effort in providing HUB firms with an opportunity to participate in the bid and construction process. Texas Building and Procurement Commission's goal for HUB participation in Building Construction projects is 26.1% of the total contract. Mr. John D. Davenport, telephone (512) 463-3216, with Texas Building and Procurement Commission can assist in this process by providing lists of approved HUB firms and other sources for identifying HUB firms in the area. A listing of HUB firms is available on the web at www.tbpc.state.tx.us and other web sites, see the Project Manual.

Bid Documents: Plans and specifications are available for prime contractors from Aguirre, Inc. 700 Lavaca Street, Suite 600, Austin, TX 78701, Phone - (512) 478-3020, Fax: (512) 478-4457, upon delivery of a refundable deposit of $25.00 per set. Bid documents will be available for review at the FCSM office, 1711 San Jacinto, Suite 202, Austin, Texas 78701, the architect's office and the Plan Rooms of Associated General Contractors, F. W. Dodge Corporation, the Builder's Exchange of Texas and the Associated Builder's and Contractors in Austin.

Pre-Bid Conference: There will be MANDATORY Pre-Bid Conference on March 7, 2002, at 10:00 AM, at the Central Services Building located on 1711 San Jacinto, Suite 200, Austin, TX 78701. Immediately following the mandatory pre-bid conference, a training session on the HUB Subcontracting Plan will be held. Attendees to the mandatory pre-bid are requested to have the individual(s) attend who will be completing the HUB Subcontracting Plan and the contractor's qualification form.

BIDS ARE TO BE MADE IN ACCORDANCE WITH STATE PROCEDURES.

TO BE RUN IN: Austin American Statesman for 1 TIME on February 22, 2002

TRD-200201072
Juliet U. King
Legal Counsel
Texas Building and Procurement Commission
Filed: February 21, 2002

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Notice to Bidders for NTB 99-015W-303, John H. Reagan Building Pedestrian Tunnel Waterproofing

SEALED BIDS WILL BE RECEIVED BY THE TEXAS BUILDING AND PROCUREMENT COMMISSION (TBPC), FACILITIES CONSTRUCTION & SPACE MANAGEMENT DIVISION (FCSM) FOR CONSTRUCTION OF PROJECT NO. 99-015W-303, John H. Reagan Building Pedestrian Tunnel Waterproofing, 105 W. 15th St. Austin, Texas. Sealed bids and HUB subcontracting plans, if required, will be received until 3:00pm, on Thursday, March 28, 2002. . If your bid proposal (including add alternates) exceeds $100,000.00, a HUB subcontracting plan is required. At that time, HUB Subcontracting Plans will be reviewed and, if found to be complete and responsive, the Bid will be opened and read.

The approximate total cost for contract: 99-015W-303- John H. Reagan Building Pedestrian Tunnel Waterproofing is approximately $35,000.00 - $50,000.00 (base bid).

Bid & HUB Subcontracting Plan Receipt Location: Texas Building and Procurement Commission/FCSM will receive bids at the main reception desk at Room 180, Bid Tabulation or, if mailed or shipped, Room 176, Mail Room, Central Services Building, 1711 San Jacinto, Austin, Texas 78701. If items are to be mailed or shipped, please note on the envelope(s) what it is enclosed, the bid, the HUB plan, or both. Delivery of the bid and the HUB plan at the date and time specified above is the sole responsibility of the bidder.

Contractor Qualifications: Contractors should submit information to FCSM on TBPC's Contractor's Qualifications Form, which can be obtained from FCSM by calling (512) 463-3417. It should be submitted as soon as possible, but no later than 5:00 p.m. on Thursday, March 21, 2002(a week prior to bid opening) to document compliance with contractor's qualification requirements for each project. Information is to be used in determining if a contractor is qualified to receive a contract award for the project. A favorable review by FCSM of contractor qualification statements is required prior to opening bid proposals.

Good Faith Effort for use of Historically Underutilized Businesses (HUB): TEXAS BUILDING AND PROCUREMENT COMMISSION HAS DETERMINED THAT THE WORK TO BE PERFORMED UNDER THIS CONTRACT INCLUDES SUBCONTRACTING OPPORTUNITIES. IF YOUR BID PROPOSAL (INCLUDING ADD ALTERNATES) EXCEEDS $100,000.00, A HUB SUBCONTRACTING PLAN IS REQUIRED. THE COMPLETED HUB SUBCONTRACTING PLAN MUST BE SUBMITTED AS PART OF THE CONTRACTOR'S PROPOSAL, OR THE PROPOSAL WILL BE REJECTED AS NON-RESPONSIVE. Prime Contractors are required to perform a Good Faith Effort in providing HUB firms with an opportunity to participate in the bid and construction process. Texas Building and Procurement Commission's goal for HUB participation in Building Construction projects is 26.1% of the total contract. FCSM, telephone (512) 463-5872, with TBPC can assist in this process by providing lists of approved HUB firms and other sources for identifying HUB firms in the area. A listing of HUB firms is available on the web at www.gsc.state.tx.us and other web sites, see the Project Manual.

Bid Documents: Plans and specifications are available for prime contractors from Graeber, Simmons & Cowan, Inc., 400 Bowie St., Austin, Texas 78703, (512) 477-9417 , Fax: (512) 477-9675, upon delivery of a refundable deposit of $75.00 per set. Bid documents will be available for review at the FCSM office, 1711 San Jacinto, Suite 202, Austin, Texas 78701, the architect's office and the Plan Rooms of Associated General Contractors, F. W. Dodge Corporation, the Builder's Exchange of Texas and the Associated Builder's and Contractors, Hispanic Contractors Association, in Austin, Texas.

Pre-Bid Conference: There will be MANDATORY Pre-Bid Conference on Thursday, at 1:30pm, at the Owner's construction trailer located at 105 w. 15th St., Austin, Texas. Immediately following the mandatory pre-bid conference, FCSM will conduct a training session on the HUB Subcontracting Plan. Attendees to the mandatory pre-bid are requested to have the individual(s) attend who will be completing the HUB Subcontracting Plan and the contractor's qualification form.

BIDS ARE TO BE MADE IN ACCORDANCE WITH STATE PROCEDURES.

TO BE RUN IN: AUSTIN AMERICAN STATESMAN, 2 TIMES: 2/26/2002 and 3/5/202

TRD-200201074
Juliet U. King
Legal Counsel
Texas Building and Procurement Commission
Filed: February 22, 2002

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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 February 15, 2002, through February 21, 2002. The public comment period for these projects will close at 5:00 p.m. on March 29, 2002.

FEDERAL AGENCY ACTIONS: Applicant: Spinnaker Exploration Company; Location: The proposed project would perpendicularly cross a shipping Safety Fairway in High Island OCS Blocks 175, 157 and 156, offshore, Texas, Gulf of Mexico. CCC Project No.: 02-0039-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain a 12-3/4-inch gas/condensate pipeline from High Island Area Block 175 A Platform to High Island Area Block 109 Hot Tap. The pipeline would originate at the applicants proposed SEC-HI-175-A platform in High Island Block 175 and terminate at a proposed Hot Tap on Black Marlin Pipe Line Company's 16-inch pipeline in High Island Block 109. The pipeline would cross a shipping Safety Fairway in High Island Blocks 175, 157, and 156. The pipeline would be buried to a minimum of 10-feet-below the mudline beneath the Safety Fairway and a minimum depth of 3-feet-below the mudline outside the Safety Fairway. No dredging and/or fill would be required for the proposed operations. The applicant would employ the use of jetting for burial of the pipeline. The total length of the pipeline would be 54,975.13 feet (10.41 miles). Type of Application: U.S.A.C.E. permit application #22596 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Paragon Petroleum; Location: The project location is in federal waters of the Gulf of Mexico in the Freeport Anchorage area within the southeast corner of Block 334 approximately 20 miles southeast from Freeport, Texas. The coordinates for the structure will be X=3,204,015.81; Y=359,600.00 (Latitude 28046'08.852"N; Longitude 095014'27.990"W) CCC Project No.: 02-0040-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain a typical jack-up rig, production platform and/or well protector with appurtenant structures and equipment necessary to conduct oil and gas drilling/production operations. The approximate size of the permit area for work being performed is a 500-foot radius from the drill location. Type of Application: U.S.A.C.E. permit application #22586 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: City of Baytown; Location: The project site is located on Cedar Bayou at 100 Roseland Drive in Roseland Park in the City of Baytown, Harris County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled Orange, Louisiana, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 312200; Northing: 3289500. CCC Project No.: 02-0041-F1; Description of Proposed Action: The applicant proposes to construct approximately 830 linear feet of new timber bulkhead; place concrete riprap along 60 feet of shoreline; and construct a 30-foot boardwalk. The new bulkhead will be placed approximately 18 inches waterward of an existing wooden bulkhead. Approximately 4 cubic yards of crushed concrete per linear foot of bulkhead will be placed between the new and existing bulkheads. The new bulkhead is necessary to help protect the existing shoreline from erosion. Approximately 60 cubic yards of concrete riprap, approximately 20 cubic yards of which will be placed below the mean high water mark, will be installed at the south end of the property to stabilize and protect the existing bank. The proposed 30-foot boardwalk will be constructed over an existing drainage swale that flows into Cedar Bayou. The boardwalk is being constructed to improve the park's trail system. No wetlands or vegetated shallows will be impacted by the proposed project. Type of Application: U.S.A.C.E. permit application #22598 is being evaluated §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: PANACO Inc.; Location: The project location is in Galveston Bay, State Tract 72 in Chambers County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled Umbrella Point, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 320407; Northing: 3280527. CCC Project No.: 02-0048-F1; Description of Proposed Action: The applicant proposes to modify Department of the Army (DA) Oil Field Development Permit No. 09219 to add State Tract 72. The applicant proposes to install, operate, and maintain structures and equipment necessary for oil and gas drilling, production, and transportation activities. Such activities include installation of typical marine barges and keyways, shell and gravel pads, production structures with attendant facilities, and flowlines. The applicant would request authorization to conduct specific work activities at specific locations in separate permit applications. Type of Application: U.S.A.C.E. permit application #09219(17) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Reynaldo Fabela; Location: The project location is on the north shoreline of the Lagna Madre near the Flour Bluff Area of Corpus Christi in Nueces County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled Pita Island, Texas. Approximate UTM Coordinates: Zone: 14; Easting: 668020; Northing: 3055132. CCC Project No.: 02-0049-F1; Description of Proposed Action: The applicant proposes to create a marina by mechanical dredging a total of 1,400 cubic yards of material from a 14,388 square foot area (Dredge Area "A") and a 4,500 square foot area (Dredge Area "B"). Each area will be dredged to a depth of 6-foot below the low tide line. Dredging of Area "A" will be for the creation of a new marina. Dredging of Area "B" will be for the maintenance of an existing marina. Placement of the dredged material will occur within two upland areas onsite. The

applicant will also install 388 feet of bulkhead with a concrete apron and create four boat slips within Area "A". The approximate size of the permit area is .75 acre. Type of Application: U.S.A.C.E. permit application #22508 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Texas General Land Office; Location: The project location is in Galveston Bay, on the north side of Galveston Island in two small waterbodies known as Delhide Cove and Starvation Cove in Galveston County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled Lake Como, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 310046; Northing: 3234822. CCC Project No.: 02-0052-F1; Description of Proposed Action: The applicant, in cooperation with the Texas Parks and Wildlife Department, proposes to construct a wetland restoration and protection project. The applicant proposes to construct breakwaters and place dredge material behind these breakwaters. Approximately 14,300 feet of breakwaters would be constructed using geotubes filled with sandy dredged material. The dredged material will be obtained from 4 locations within the project area. Dredged material will be placed between the breakwaters and the existing wetland fringe to create a series of mounds and uniform fill to raise the bottom elevation high enough to support the growth of new wetland habitat. The mounds will have a fringe of wetland vegetation surrounded by shallow water. The uniform fill area will provide a larger vegetated area for marsh development. The applicant proposes to use 25,000 cubic yards (CY) to fill the geotubes, 18,000 CY for the uniform fill areas, and 86,000 CY to construct the mounds. The breakwater would fill approximately 10 acres of shallow water area and the fill for the mounds and uniform fill areas will cover approximately 50 acres of shallow water area. The purpose of the project is to protect the existing wetlands from the erosive forces of wave action and to create new wetlands. The breakwaters will prevent waves from reaching the wetlands habitat. The breakwaters will also provide sheltered, calm water areas that should allow seagrasses to colonize the area. The combination of mounds and vegetated areas will provide aquatic habitats that provide food and shelter for a variety of marine organisms. Type of Application: U.S.A.C.E. permit application #22532 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: National Energy Group, Inc.; Location: The project location is on Sabine Lake in State Tracts (ST) 1,2,5, and 8 in Orange County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled West of Greens Bayou, Texas. Approximate UTM Coordinates: Zone: 15; Easting: 417250; Northing: 3314517. CCC Project No.: 02-0053-F1; Description of Proposed Action: The applicant requests authorization to install 18,981 linear feet of pipeline to support the production of the ST 8 No. 1 Well. A 4 -inch and an 8-inch diameter pipeline will be installed by jetting at a minimum of -3 feet below the mudline. The pipeline trench will measure 4 feet wide at the top of the trench. At the point where the pipelines traverse the Intracoastal Waterway they will be jetted in at a minimum depth of 8 feet below the authorized project depth and the top of the pipe depth will be maintained a distance of 20 feet beyond the authorized channel width on both sides of the channel. The proposed pipeline route will originate at the ST 8 No. 1 Well and will terminate in Old River Cove where the lines will tie into an existing pipeline. At the point where the pipelines meet the shore, the applicant proposes to place 7.5 cubic yards of riprap to provide bank stabilization. No wetlands or vegetated shallows will be impacted by the proposed activity. Type of Application: U.S.A.C.E. permit application #22599 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information 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-200201236
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: February 27, 2002

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Comptroller of Public Accounts

Correction of Error

The Comptroller of Public Accounts proposed new 34 TAC §19.19, concerning state facility energy and water management, in the February 15, 2002, issue of the *Texas Register* (27 TexReg 1107).

Due to an error by the *Texas Register* the text of the rule's certification statement was included as part of the rule text. The text for new §19.19 with the certification statement omitted should read as follows.

§19.19. Extension of Time.

"A state agency or institution of higher education may apply to the State Energy Conservation Office (SECO) for an extension of time to submit any plan or report submission that is required under this chapter. The request should be submitted in writing to SECO prior to the deadline for submission of the plan or report. The request should outline the reasons that support the grant of the extension. SECO may grant the request for good cause shown."

TRD-200201164

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Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter A, and Sections 403.011, Texas Government Code, the Comptroller of Public Accounts (Comptroller) issues this Request for Proposals (RFP #138c) from qualified, independent certified public accountants or firms with demonstrated qualifications, competence, and expertise in the field of indirect cost recovery and cost allocation planning for governmental units, to submit proposals to prepare Comptroller's data processing Statewide Cost Allocation Plan (SWCAP) and update. Respondents must be prepared to develop, update, and negotiate the SWCAP with the federal government pursuant to OMB Circular A-87, for the data processing services for Comptroller for the state fiscal year-ending August 31, 2003, based on the expenditures during the fiscal year-ending August 31, 2001. The SWCAP must enable the state to recover the maximum indirect costs possible from federal programs. Comptroller reserves the right, in its sole discretion, to award one or more contracts for the services requested by this RFP. Successful Respondent(s) will be expected to begin performance of the contract or contracts, if any, on or about April 1, 2002.

Background and Requirements: Successful Respondent will be expected to develop a cost allocation plan for Comptroller's data processing services that enables the state to recover the maximum

indirect costs possible from federal programs. Successful Respondent will be responsible for all aspects of the plan, including obtaining raw cost and statistical data, identifying allocable costs, and preparing and submitting the plan. The data produced by the plan must be in a format that can be readily integrated into the consolidated statewide cost allocation plan for Fiscal Year 2003. All proposals must include a description of the system to be used to extract allowable costs from Comptroller's data processing system and for allocating such costs. Successful Respondent may also be required to prepare alternative allocation tables using different allocation bases to demonstrate maximum feasible recovery options. As a component of the cost allocation plan, Successful Respondent ! must identify costs associated with providing data processing services to each internal user within the Comptroller of Public Accounts, including statewide financial systems. This component must identify costs allocated to each statewide financial system that state agencies use in carrying out their programs and the type and dollar amount of services used. Successful Respondent will be responsible for all aspects of this component, including obtaining raw cost and statistical data and identifying allocable costs. A complete set of work papers used to prepare the cost allocation plan must be kept and provided to Comptroller upon request. A copy of the FY 2000 consolidated statewide cost allocation plan may be viewed or downloaded at: http://www.governor.state.tx.us/Grants/guidelines.html#Statewide Cost Allocation Plans or may be obtained by contacting Denise Francis, Governor's Office of Budget and Planning, P.O. Box 12428, Austin, Texas 78711, telephone: (512) 305-9415.

Contact: Parties interested in submitting a proposal should contact Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, no later than 2 p.m., Central Zone Time (CZT), March 15, 2002. Comptroller also made the complete RFP available electronically on the Texas Marketplace at: http://esbd.tbpc.state.tx.us after 2 p.m. (CZT) on Friday, March 8, 2002.

Non-Mandatory Letters of Intent and Questions: All Non-Mandatory Letters of Intent and questions regarding the RFP must be sent via facsimile to Mr. Harris at: (512) 475-0973, no later than 2:00 p.m. (CZT), on Friday, March 15, 2002. Official responses to questions received by the foregoing deadline will be posted electronically on the Texas Marketplace no later than March 22, 2002, or as soon thereafter as practical. Respondents shall be solely responsible for confirming the timely receipt of Non-Mandatory Letters of Intent and Questions submitted in response to this RFP.

Closing Date: Proposals must be received in Assistant General Counsel's Office at the address specified above (ROOM G-24) no later than 2 p.m. (CZT), on Wednesday, March 27, 2002. Proposals received after this time and date will not be considered. Respondents must submit one (1) original and ten (10) copies of each proposal submitted. Respondents shall be solely responsible for confirming the timely receipt of proposals submitted in response to this RFP.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on proposal content, demonstrated experience, competence, knowledge, and qualifications. Comptroller will make the final decision regarding the award of a contract or contracts. Comptroller reserves the right to award one or more contracts under this RFP.

Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is under no legal or other obligation to execute any contracts on the basis of this RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this RFP.

The anticipated schedule of events is as follows: Publication/Issuance of RFP - March 8, 2002, 2 p.m. CZT; All Non-Mandatory Letters of Intent and Questions Due -March 15, 2002, 2 p.m. CZT; Official Responses to Questions Posted - March 22, 2002, or as soon thereafter as practical; Proposals Due -March 27, 2002, 2 p.m. CZT; Contract Execution - March 29, 2002, or as soon thereafter as practical; Commencement of Project Activities - April 1, 2002.

TRD-200201232
Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: February 27, 2002

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Notice of Request for Proposals

Pursuant to Section 2107.003, Texas Government Code, the Comptroller of Public Accounts (Comptroller), announces its Request for Proposals (RFP) from qualified, independent firms to provide tax collection services to the Comptroller. The successful respondent, if any, will collect delinquent tax obligations owed the Comptroller, that are not collected through normal collection procedures and do not meet the guidelines adopted for collection by the Attorney General. The successful respondent or respondents must be able to begin performance of the contract no later than May 1, 2002, with transition to services under the new contract completed by September 1, 2002. The Comptroller's current contract for similar services expires August 31, 2002 unless terminated sooner according to its terms. The Comptroller reserves the right, in its sole judgment and discretion, to award one or more contracts as a result of the issuance of this RFP. This notice is posted in revision and modification of a previous notice published on Friday, February 22, 2002 concerning this RFP.

Contact: Parties interested in submitting a proposal or reviewing the RFP should contact Pamela Ponder, Deputy General Counsel for Contracts, Comptroller of Public Accounts, 111 E. 17th St., Rm G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The complete RFP will be available for pick-up at the above-referenced address on Friday, March 8, 2002, between 2:00 p.m. and 5:00 p.m., Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the complete RFP available electronically on the Texas Marketplace after Friday, March 8, 2002, 2:00 p.m. CZT.

Questions: All questions concerning the RFP must be in writing and submitted no later than March 28, 2002, 2:00 p.m. Mandatory Letters of Intent to propose are also due by 2:00 p.m. on March 28, 2002. Questions must be faxed to (512) 475-0973, Attn: Pamela Ponder, Deputy General Counsel for Contracts. Proposals will not be accepted from firms that do not submit Mandatory Letters of Intent to propose by this deadline. Respondents shall be solely responsible for confirming the timely receipt of Mandatory Letters of Intent. On or before April 2, 2002 (or as soon thereafter as practical) the Comptroller expects to post answers to these written questions as a revision to the Texas Marketplace notice of the issuance of this RFP. The address of the Texas Marketplace is http://esbd.tbpc.state.tx.us. Contract execution is expected to take place on or before May 1, 2002 (or as soon thereafter as practical).

Closing Date: Proposals must be received in the Deputy General Counsel's Office at the address specified above no later than 2:00 p.m. (CZT), on Friday, April 12, 2002. Proposals received after this time and date will not be considered. Respondents shall be solely responsible for confirming timely receipt of proposals.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. The Comptroller will make the final decision.

The Comptroller reserves the right to accept or reject any or all proposals submitted. The Comptroller is under no legal or other obligation to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller shall pay no costs or any other amounts incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - March 8, 2002, 2:00 p.m. CZT; Voluntary Pre-Proposal Conference- March 22, 2002, 2:00 p.m. CZT; Mandatory Letters of Intent Due:-- March 28, 2002, 2:00 p.m., CZT, Questions Due - March 28, 2002, 2:00 p.m. CZT, Answers to Questions Posted -April 2, 2002, or as soon thereafter as practical; Proposals Due - April 12, 2002, 2:00 p.m. CZT, Contract Execution-May 1, 2002, or as soon thereafter as practical; Commencement of Work - May 1, 2002; Transition Complete - September 1, 2002.

TRD-200201233
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: February 27, 2002

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003, 303.005, 303.008, 303.009, 304.003, and 346.101. Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and 303.009 for the period of 03/03/02 - 03/10/02 is 18% for Consumer [1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and 303.009 for the period of 03/03/02 - 03/10/02 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005 and 303.009[3]for the period of 03/01/02 - 03/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 and 303.009 for the period of 03/01/02 - 03/31/02 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by Sec. 303.008 and 303.009 for the period of 04/01/02 - 06/30/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard quarterly rate as prescribed by Sec. 303.008 and 303.009 for the period of 04/01/02 - 06/30/02 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by Sec. 303.009 [1] for the period of 04/01/02 - 06/30/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The lender credit card quarterly rate as prescribed by Sec. 346.101 Tex. Fin. Code[1]for the period of 04/01/02 - 06/30/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Sec. 303.008 and 303.009 [4]for the period of 04/01/02 - 06/30/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Sec. 303.008 and 303.009 for the period of 04/01/02 - 06/30/02 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by Sec. 303.009[1]for the period of 04/01/02 - 06/30/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 03/01/02 - 03/31/02 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed Sec. 304.003 for the period of 03/01/02 - 03/31/02 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.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in Sec. 301.002(14), Tex. Fin. Code.

TRD-200201200
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 26, 2002

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Court of Criminal Appeals

Bid Award

Contract Awarded for Personnel Analyst

Consultant: Ray Associates, Inc. 1305 San Antonio St. Austin, Tx. 78701

Description of activities to be performed:

A compensation study, addressing both internal equity and external competitiveness, and an analysis of workload and staffing levels for six grantee organizations in the Court of Criminal Appeals' Judicial Education Program.

Total value of contract:

Professional services and expenses not to exceed $25,000.

Beginning date: February 14, 2002

Ending date: June 30, 2002

A final report outlining the methodology, findings, conclusions, and recommendations is due not later than June 30, 2002.

TRD-200201201
Troy Bennett
Clerk of the Court
Court of Criminal Appeals
Filed: February 26, 2002

♦ ♦ ♦

Texas Department of Criminal Justice

Notice of Award Posting

The Texas Department of Criminal Justice hereby gives notice of a Contract Award for replacing underground wiring for the Lindsey State Jail, contract number: 696-FD-2-B005.

The contract was awarded to Acme Electric Company for the amount of $2,890,000.00. The vendor is not a HUB vendor.

TRD-200201138
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: February 25, 2002

♦ ♦ ♦

Request for Design Professional Environmental Engineering Services

Agency Req #: 696-FD-2-Q011

Open Date: April 2, 2002

Open Time: 2:00 pm (cst)

Bid Type: Request for Qualifications (21 days)

Delivery Date (Commencement Date): May 15, 2002 (Estimated)

GSC Classification (class - item): 925-35

The Texas Department of Criminal Justice (TDCJ) announces that it requires professional services for Environmental Engineering, potentially for any or all TDCJ-managed facilities and construction projects, including work for TDCJ, the Texas Youth Commission (TYC), and other state agencies if so directed by the Legislature at various locations throughout the state, pursuant to the provisions of the Texas Government Code, Title 10, Chapter 2254, Subchapter A. The TDCJ intends to contract with one or more firms to provide such services. The proposed contract(s) will be open ended indefinite delivery, indefinite quantity type contracts with a maximum value of $750,000 each and will be for a period of three (3) years from date of award with two (2) one year extension periods. Services will be ordered as needed by issuance of individual Service Authorizations.

Contact Information: Daniel Madison, Two Financial Plaza, Suite 525, Huntsville, Texas 77340. Ph. 936.437.7125. Fax: 936.437.7009

TRD-200201185
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: February 26, 2002

♦ ♦ ♦

Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Miller at (512) 463-5800 or (800) 325-8506.

Deadline: Semiannual J/COH Report due January 16, 2001

Lynda Akin, 5868 Westheimer Rd. #302, Houston, Texas 77057-5641

Billy Clemons, P.O. Box 1306, Groveton, Texas 75845

LeRoy F. Gillam, 9393 Tidwell Rd., Apt. #1211, Houston, Texas 77078-3436

Amy Jacobellis, 148 S. Dowlen Road, PMB 791, Beaumont, Texas 77707

Mike Jacobellis, 148 S. Dowlen Road, PMB 791, Beaumont, Texas 77707

Deadline: Semiannual GPAC Report due January 16, 2001

Richard M. Lannen, Jesse Oliver Campaign, 900 Jackson St. #600, Dallas, Texas 75202

Roberto A. Calderon, El Paso County Sheriff's Officers Assn., Inc., 11536 Spencer, El Paso, Texas 79936

Charles B. Wilkison, Brothers United For Building A Better American, Texas, 400 W. 14th St. #200, Austin, Texas 78701

Kenneth M. Bryan, Gulf Coast, 1122 Colorado #2105, Austin, Texas 78701

Melanie A. Curtsinger, Tarrance For Texas Senate, 716 Hogan Dr., Conroe, Texas 77302

Deadline: Semiannual J/COH Report due July 16, 2001

Lynda Akin, 11203 Lakeside Dr., Quinlan, Texas 75474

David Arevalo, 627 Delaware, San Antonio, Texas 78210

Donna Ballard, 1602 Neely Ave., Midland, Texas 79705-7449

Kathleen Ballanfant, 5160 Spruce, Bellaire, Texas 77401

Boyd W. Bauer, P.O. Box 1436, Beeville, Texas 78104

Burgess Beall, 2428 Central Ave. #201, Alameda, California 94501-4536

Stephen P. Birch, 6200 Eubank Blvd. NE, Apt. 1216, Albuquerque, New Mexico 87111-7316

Howard Bridges Jr., 434 W. Kiest Blvd. #100, Dallas, Texas 75224

Ronald S. Buffum, 3016 Rock Rose Pl., Round Rock, Texas 78664-3821

Maria D. Burbridge, 7202 Smokey Hill Rd., Austin, Texas 78736

Mary D. Guevara Capello, P.O. Box 6031, Laredo, Texas 78042-6031

Shannon L. Carr, 800 N. LBJ Dr. #1234, San Marcos, Texas 78666

Shene Casey, 256 CR 3101, Greenville, Texas 75402

Billy Clemons, P.O. Box 1306, Groveton, Texas 75845

Chloe N. Daniel, P.O. Box 810570, Dallas, Texas 75381-0570

Jeanne M. Doogs, 300 Trinidad Ct., Fort Worth, Texas 76126

Richard N. Draheim Jr., 339 Henry M. Chandler's Dr., Rockwall, Texas 75032-2439

Russell L. Duerstine II, 3202 Sunset Dr., San Angelo, Texas 76904

Deborah Dunsinger, 450 El Dorado, #1303, Webster, Texas 77598

Philip L. Durgin, 31 Laurel Hill, Austin, Texas 78737-9309

William M. Eastland, P.O. Box 13162, Arlington, Texas 76094-0162

Dan Engel, 2608 Greenwood, Arlington, Texas 76013

Jack D. Ewing, 2938 Meadowbrook Dr., League City, Texas 77573

Diana L. Flores, 1134 Mountain Lake, Dallas, Texas 75224

Baltazar Garcia, 712 McDaniel, Houston, Texas 77022

Edward T. Garcia, P.O. Box 3202, Freeport, Texas 77541

Juan A. Garcia, 1101 S. Cameron, Alice, Texas 78332

Mario Garcia, 735 W. 10th St., Mercedes, Texas 78570

Edgar J. Garrett Jr., P.O. Box 465, Cooper, Texas 75432

Thomas L. Gatton, 2320 Southwest Fwy. #C, Houston, Texas 77098

LeRoy F. Gillam, 9393 Tidwell, Apt. #1211, Houston, Texas 77078-3436

Samuel Gonzalez, 15721 Maiden Lane, Houston, Texas 77053

Arthur Granado, P.O. Box 638, Corpus Christi, Texas 78403

William E. Grisham, 4154 Swans Landing, San Antonio, Texas 78217

Anton E. Hackebeil, P.O. Box 220, Hondo, Texas 78861-0220

David M. Hart, P.O. Box 79034, Saginaw, Texas 76179

Fanniece Hawkins, 645 Goodhue, Beaumont, Texas 77706

Robert Ashton Herrera, P.O. Box 37177, San Antonio, Texas 78237-0177

Samuel W. Hudson III, P.O. Box 150972, Dallas, Texas 75315-0972

Elizabeth C. Jandt, 112 N. Austin St., Seguin, Texas 78155

Dennis Jones, P.O. Box 1027, Lufkin, Texas 75902

V. Sue Koenig, 360th Court, 100 N. Houston, Fort Worth, Texas 76102

S. Christopher LaRue, 10878 Westheimer Rd. #373, Houston, Texas 77042-3202

David M. Leibowitz, 111 Soledad St., Ste. 2000, San Antonio, Texas 78205-2293

Raymundo Mancera, 2319 Tremont Ave., El Paso, Texas 79930-1113

Alberto T. Martinez, P.O. Box 549, San Diego, Texas 78384

Michael E. McLelland, 918 Antelope, Corpus Christi, Texas 78401

David M. Medina, 952 Echo Ln. #350, Houston, Texas 77024

Robert H. Mendoza, P.O. Box 5566, Brownsville, Texas 78523-5566

Steve Mendoza, P.O. Box 291216, San Antonio, Texas 78229-1216

Norbon E. Mitchell, 1709 Martel, Fort Worth, Texas 76103

Nancy Moffat, 1414 Whispering Dell Court, Southlake, Texas 76092

William E. Muirhead, 158 Countrywood Est., Cleveland, Texas 77327

Pat Mullen, P.O. Box 160910, Austin, Texas 78716-0910

Alice Oliver-Parrott, 480 Thunder Canyon Rd., Canyon Lake, Texas 78133-5459

Morris L. Overstreet, P.O. Box 12817, Austin, Texas 78711

James Partsch-Galvan, 1611 Holman, Houston, Texas 77004

Robert L. Penrice, 2000 Professional Bldg., Loop 197, Texas City, Texas 77590

Fernando R. Ramirez, 2735 Lakeshore Dr., Port Arthur, Texas 77640

Christina M. Ryan, 27129 Paula Lane, Conroe, Texas 77385

Victor Smith, 1423 W. Red Bird Ln., Dallas, Texas 75232

Juan F. Solis III, 907 W. Kirk, San Antonio, Texas 78226

Aubrey R. Thoede, 1408 South Eldridge Parkway, PMB 138, Houston, Texas 77077

Jose E. Troche, 1013 Montana, El Paso, Texas 79902

Rudy G. Vasquez, P.O. Box 3664, Houston, Texas 77253-3664

Melva Washington-Becnel, 2403 Arbor, Houston, Texas 77004

Larry M. Wessells, P.O. Box 340, LaGrange, Texas 78945

Ron Wilson, P.O. Box 2910, Austin, Texas 78768

Paul Womack, P.O. Box 774, Georgetown, Texas 78627

Michael Yarbrough, 1314 Texas Ave. #515, Houston, Texas 77002

Deadline: Semiannual GPAC Report due July 16, 2001

Sheila A. Holbrook-White, Texas Citizen Action PAC, P.O. Box 10231, Austin, Texas 78756

W. Howell Branum, PSI PAC, 510 E. 22nd St., Lombard, Illinois 60148

Marian K. Stanko, Republican Party of Bexar County (CEC), 900 NE Loop 410 #D-105, San Antonio, Texas 78209

Angie S. Perez, Ysleta Educators PAC, 10110 Montwood #D, El Paso, Texas 79925

Richard M. Lannen, Jesse Oliver Campaign, 3800 Marin St., Ste. E, Dallas, Texas 75226

Josephine Z. Chavez, Texas Political & Legislative Committee, USA District #12 PAC Fund, 12821 Industrial Rd., Houston, Texas 77015

Darwin McKee, Central Texas PAC Centre Development, P.O. Box 2513, Austin, Texas 78758-2513

Joe P. Barnett, Citizens for Honesty In Taxation, P.O. Box 13162, Arlington, Texas 76094

G. Daniel Mena, Unity 94 El Paso County, 3233 N. Piedras, El Paso, Texas 79930-3703

Bernard Rapoport, Garry Mauro Campaign, P.O. Box 2608, Waco, Texas 76797

Jack Baxley, Fort Worth Associated General Contractors PAC, 417 Fulton St., Fort Worth, Texas 76104

Vicki L. Hoover, Rockwall County Democratic Party PAC, 6209 Scenic Dr., Rowlett, Texas 75088

Berry R. James, Hays County Democratic Party Executive Committee (CEC), P.O. Box 1309, San Marcos, Texas 78667-1309

Sherry Griffith, Houston Heights PAC, 626 Algregg, Houston, Texas 77008

Emil Pena, Hispanic PAC, 1111 Caroline #2507, Houston, Texas 77010

Joan Auld, Travel, Recreation & Vacation PAC, 3709 Promontory Point Dr. #200, Austin, Texas 78744

Steven A. Bennett, Friends of Sandy Kress, John Sharp, Paul Hobby, David Cain, & Royce West, 1700 Pacific Ave. #4100, Dallas, Texas 75201

William M. Eastland, Texans for Freedom, P.O. Box 13162, Arlington, Texas 76094-0162

Alfred Adask, Equity Under All Law, 9794 Forest Lane #159, Dallas, Texas 75243

David W. Gilbreath, Taxpayers for Economic Accountability, 801 Norton, Mesquite, Texas 75149

Fred Lehmann, Grayson County Democratic Party PAC, 100 N. Travis St. #206, Sherman, Texas 75090-0014

Eartha Dotson, Galveston County Democrats Club, 1405 Appomattox Dr., Texas City, Texas 77591

Vidal G. De Leon, McLennan County Mexican Americans for Better Government PAC, 1619 Baylor Ave., Waco, Texas 76706

Pat Stevens, South Denton County PAC, 2025 Aspen Dr., Highland Village, Texas 75067

Keith Hogan, Friends of Education, 1011 Great Britian Blvd., Austin, Texas 78748

William M. Eastland, Texans for Freedom In Education, P.O. Box 13162, Arlington, Texas 76094-0162

William M. Eastland, Free Republican Caucus, P.O. Box 13162, Arlington, Texas 76094-0162

Richard Gatewood, Sheet Metal Workers Local Union #68 Political Action League, 1205 Rockmoor Dr., Fort Worth, Texas 76134

J. R. Tyson, DOG PAC, P.O. Box 1326, Alvin, Texas 77512

H. J. Johnson, Pleasant Wood Pleasant Grove PAC, P.O. Box 150408, Dallas, Texas 75306-0408

Janice L. Burkholder, Pathfinders Republican Women's Club, 21 Towering Pines Dr., The Woodlands, Texas 77381

Richard A. Solo, 8th District Democrats, P.O. Box 802048, Dallas, Texas 75380-2048

Todd M. Smith, Taxpayers Defense Fund, 2204 Hazeltine Lane, Austin, Texas 78747

James S. Ranes, Central Austin Democrats, 1501 Barton Springs #233, Austin, Texas 78704

Kenneth Stinson, Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local Union #284, 208 Eckman, Longview, Texas 75602

Edwin O. Fulton, Recycling Council of Texas PAC, 1404 Fort Worth Dr., Denton, Texas 76215

William E. Muirhead, Muirhead Election Committee, 158 Countrywood Est., Cleveland, Texas 77327

Joe P. Barnett, Independent Committee Supporting John B. Hawley For Supreme Count, Pl. 1, P.O. Box 13162, Arlington, Texas 76094

Wendy L. Brown, Government Interests, Inc. PAC, 910 Knox, Houston, Texas 77007

Edward T. Wendler Sr., 21st Century Democrats, 106 Golden Cove, Kyle, Texas 78640

Fred Lehmann, Texoma PAC, 100 N. Travis St. #206, Sherman, Texas 75090-0014

Randhir Sahni, Indo American PAC, 1990 Post Oak Blvd. #1200, Houston, Texas 77056-3812

Caryl Bunton, ASSIST PAC, P.O. Box 55763, Houston, Texas 77255

Rayette M. Fulk, Houston Friends For Better Education, 1220 Augusta, Houston, Texas 77057

Rayette M. Fulk, Houston Friends For Good State Government, 1220 Augusta, Houston, Texas 77057

Rayette M. Fulk, Houston Citizens For Better Education, 1220 Augusta, Houston, Texas 77057

Rayette M. Fulk, Houston Taxpayers For Better Education, 1220 Augusta, Houston, Texas 77057

Rayette M. Fulk, Houston Education Fund, 1220 Augusta, Houston, Texas 77057

Charles B Wilkison, Brothers United For Building A Better America, Texas, 400 W. 14th St. #200, Austin, Texas 78701

Michael H. Jones, Voice Of The Elephant, 5744 Danciger Dr., Fort Worth, Texas 76112-3951

Rayette M. Fulk, Houston Parents For Better Education, 1220 Augusta, Houston, Texas 77057

Arnold Pedraza, American Hispanics On Reform & Accountability, P.O. Box 3916, McAllen, Texas 78502

Clarence B. Bagby, Houston Historic Preservation PAC, 2003 Kane St., Houston, Texas 77007-7612

Rene A. Ronquillo, Quality Education PAC, 400 S. Zang Blvd. #829, Dallas, Texas 75208-6643

David Jackson, Republican Communications Network PAC, P.O. Box 703936, Dallas, Texas 75370-3936

Fernando Contreras Jr., Southside Democrats, P.O. Box 37278, San Antonio, Texas 78237-0278

Nancy Hrobar, Van Zandt County Assn. Of Taxpayers, 14232 FM 773, Ben Wheeler, Texas 75754

Daniel K. Cook, Green Party Of Dallas/Fort Worth, P.O. Box 2501, Arlington, Texas 76004

Frank Fuentes, Hispanic Contractors Assn. De Tejas, Inc. PAC, 4100 Ed Bluestein #201, Austin, Texas 78721

Robert E. Long, Tejas Energy, LLC and Coral Energy, L.P. Texas PAC, 909 Fannin #700, Houston, Texas 77010

Brad Bacom, TALI-PAC, 275 Circle Drive, Bridge City, Texas 77611

Raul E. Ruiz, Stonewall Democrats - Houston, 3730 Kirby Dr. #418, Houston, Texas 77098

Floyd E. Hodges Jr., Texans For Good Government, 280 W. Renner Rd. #2611, Richardson, Texas 75081

Todd M. Smith, Majority 2000 Committee, 2204 Hazeltine Ln., Austin, Texas 78747

H.R. Moseley, Vidor Police Assn. PAC, P.O. Box 1266, Mauriceville, Texas 77626

Peter L. Bargmann, Judicial Elections For Texas PAS, 660 Preston Forest Center #LB 362, Dallas, Texas 75230-2718

Karen K. Tarry, Doctors For Better Government, 5615 Morningside Dr. #402, Houston, Texas 77005

James R. Reynolds, Texans for Quality Health PAC, 4600 Tamarisk Cove, Austin, Texas 78747

Robert Hernandez, Money Trail Org PAC, P.O. Box 2382, Austin, Texas 78768

Patricia L. Wagner, AFGE 1920 PAC, P.O. Box 841, Killeen, Texas 76540-0841

Morris W. Petty Jr., Public Workers For A Better Workplace, 622 W. Main #200-A, Arlington, Texas 76010

John D. Poole II, Southern Party Of Texas PAC, P.O. Box 7452, Huntsville, Texas 77342

Lance R. West, Lead America Political Action Committee, 2300 14th St., Brownwood, Texas 76801-8022

Anthony R. Godinez, Judge Murray Moore Campaign Committee, 815 Produce Rd., Hidalgo, Texas 78557

David T. LaPlante, San Antonio Coalition Of Politically Active Christians, P.O. Box 460834, San Antonio, Texas 78246

Estefana Martinez, Committee To Elect Jose Menendez, 114 Olga Dr., San Antonio, Texas 78237

Reginald K. Reynolds, Black Ecumenical Leadership, 1901 Willow Park, Fort Worth, Texas 76134

James Logan, Travis County Republican PAC, PMB 198, 8024 Mesa Drive, Austin, Texas 78731

Harry H. Nelson, First Monday PAC, 613 Santa Monica Place, Corpus Christi, Texas 78411

Irene Morales-Russell, Citizens For Legal Ethics And Neutrality, 600 Toronto Ave., Apt. 36, McAllen, Texas 78503-3072

Leslie J. Baldwin, El Paso Pachyderms Pack Fund, 1033 Hawkins, El Paso, Texas 79915

Michael J Warner, Texas Amusement Association PAC, P.O. Box 92167, Austin, Texas 78709

Curtis B. Carden, Texas Tax Relief, 16350 Park Ten Place, Suite 100-15, Houston, Texas 77084

John Carpenter, Pecos County Greens, P.O. Box 501, Fort Stockton, Texas 79735-0501

Brande C. Yarnell, Capital Area Democratic Women PAC, 7708 Kincheon Ct., Austin, Texas 78749

Kay C. Copeland, Dallas County Partners for Justice, 3306 Camelot, Dallas, Texas 75229

John R. King, Committee for Private Property Rights, P.O. Box 93652, Lubbock, Texas 79493-3652

Deadline: Monthly MPAC Report due September 5, 2001

Jeffrey J. Benavidez, San Antonio Ironworkers PAC, 4318 Clark Ave., San Antonio, Texas 78223

Jay S. Simpson, Houston Gay & Lesbian Political Caucus PAC, 3911 Marlowe, Houston, Texas 77005

Don L. King, Sensitive Care PAC, 500 N Akard St. #3960, Dallas, Texas 75201-6604

Michael B. Pesses, Sheriff's Deputies of Bexar County Law Enforcement Organization PAC, 19 Rustic Bend, San Antonio, Texas 78245

Leonard T. Dunnahoe, Uncommon Sense, 214 St. Mary's Place, Rockwall, Texas 75087

Chris D. Walling, Friends of Law Enforcement, P.O. Box 276, Wall, Texas 76957

Deadline: Monthly MPAC Report due October 5, 2001

Jeffrey J. Benavidez, San Antonio Ironworkers PAC, 4318 Clark Ave., San Antonio, Texas 78223

Don L. King, Sensitive Care PAC, 500 N. Akard St. #3960, Dallas, Texas75201-6604

Kathleen P. Batchelor, Bedford Leadership Forum, 23251 County Road 460, Mineola, Texas 75773-9799

Leonard T. Dunnahoe, Uncommon Sense, 214 St. Mary's Place, Rockwall, Texas 75087

Alfred Herron, Black Business Network, P.O. Box 764265, Dallas, Texas 75376-4265

Chris D. Walling, Friends of Law Enforcement, P.O. Box 276, Wall, Texas 76957

TRD-200201146

Tom Harrison
Executive Director
Texas Ethics Commission
Filed: February 25, 2002

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Golden Crescent Workforce Development Board

Public Notice

The Golden Crescent Workforce Development Board announces the availability of their Program Year 2002 Integrated Plan Modification for public comment beginning March 13 through April 12, 2002. The plan can be viewed at the Golden Crescent Workforce Centers at one of the following locations:

· 120 S. Main #501, Victoria, TX

· 1800 S. Highway 35 #H, Pt. Lavaca, TX

· 1137 N. Esplanade, Cuero, TX

· 329 W. Franklin, Goliad, TX

· 427 St. George #101, Gonzales, TX

· 903 S. Wells, Edna, TX

· 414 N. Texana #B, Hallettsville, TX

· http://www.gcworkforce.org/

Programs provided by the GCWDB are Wagner-Peyser Employment Services; Career Center services for the general public; Workforce Investment Act services for adults, dislocated workers, and youth; Temporary Assistance for Needy Families CHOICES; Welfare-to-Work; Food Stamp Employment & Training; Child Care Management Services; Communities In Schools; and School-to-Career programs for an operation period of July 1, 2002, to June 30, 2003. Eligible program beneficiaries who reside in Calhoun, DeWitt, Goliad, Gonzales, Jackson, Lavaca, and Victoria Counties may be provided appropriate employment and educational services through these programs. All persons wishing to view and comment on the Plan should do so at one of the above addresses no later than April 12, 2002.

TRD-200201219
Isabel Simmons
Administrative Clerk
Golden Crescent Workforce Development Board
Filed: February 27, 2002

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Texas Department of Health

Notice of Emergency Cease and Desist Order on Farid Noie, D.D.S., P.C., dba Unicare Dental Group

Notice is hereby given that the Bureau of Radiation Control (bureau) ordered Farid Noie, D.D.S., P.C., doing business as Unicare Dental Group (registrant-R26333) of Webster to cease and desist performing dental x-ray procedures with the Belmont Cephalometric x-ray unit (Model Number 071A; Serial Number 096) until the collimation for the unit is within regulatory limits. The bureau determined that improper machine collimation may cause radiation exposure to patients in excess of that required to produce a diagnostic image, which constitutes an immediate threat to public health and safety, and the existence of an emergency. The order will remain in effect until the bureau authorizes the registrant to perform the procedure.

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-200201195
Susan Steeg
General Counsel
Texas Department of Health
Filed: February 26, 2002

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Notice of Intent to Revoke the Certificate of Registration of Jerry Watkins, R.T., dba Cornerstone Mobile X-Ray

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: Jerry Watkins, R.T., doing business as Cornerstone Mobile X-Ray, Wichita Falls, R26203.

The department intends to revoke the certificate of registration; order the registrant to cease and desist use of such 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.

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 , 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-200201194
Susan Steeg
General Counsel
Texas Department of Health
Filed: February 26, 2002

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Notice of Public Hearing Regarding the 2002 Ryan White Title II Plan

The Texas Department of Health (department) will hold a public hearing to receive comments on the 2002 plan for funding the twelfth year of the Ryan White CARE Act/Title II activities in Texas.

The hearing will be held Monday, March 11, 2002, from 2:00 p.m. to 4:00 p.m., at the department's Classroom E1-2, 2115 Kramer Lane, Austin, Texas. To request an accommodation under the Americans with Disabilities Act, please contact Suzzanna Cortez Currier, ADA Coordinator in the Office of Equal Opportunity, Texas Department of Health, (512) 458-7627, toll free (888) 388-6332, or TDD (877) 432-7232, at least four days prior to the meeting.

Copies of the proposed plan for distribution of Title II funds to 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 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: Finally, the plan may be viewed 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 Daylight Saving Time, on Tuesday, April 30, 2002.

The department will make copies of the Title II Grant Application to HRSA available for public review at the administrative agencies and the department's funding information center. All written comments on the grant application must be submitted to Casey S. Blass at the above address on or before Friday, May 31, 2002.

TRD-200201197
Susan Steeg
General Counsel
Texas Department of Health
Filed: February 26, 2002

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Notice of Request for Proposals to Provide Early Access to Primary Care for Persons With Human Immunodeficiency Virus Disease

INTRODUCTION

The Texas Department of Health (department), Bureau of Human Immunodeficiency Virus (HIV) and Sexually Transmitted Diseases (STD) Prevention, HIV/STD Clinical Resources Division (CRD), announces the availability of fiscal year 2003 state funds from the Texas Department of Health to provide Early Access to Primary Care for Persons with HIV Disease (EAP).

GENERAL PURPOSE AND PROGRAM GOALS

Early access is a strategy of service delivery to persons with HIV disease that focuses on ambulatory care. Services provided in EAP include HIV-related clinical care, health maintenance activities, prevention of acute and chronic illness, and the integration of the client into a system that provides support services. Early health care and psychosocial intervention is most effective in delaying the onset of life-threatening symptoms and diseases, and in achieving and maintaining the optimum level of health possible for each client. Early medical intervention, when combined with effective clinical case management strategies and psychosocial support, appears to slow disease progression and can enhance adherence with medical regimens. It also promotes healthy behaviors and may improve the quality of life.

Psychosocial interventions are a critical adjunct to clinical, diagnostic, and therapeutic services and can promote active participation in the clinical management of the disease. Psychosocial interventions may include psychological counseling, transportation, nutritional counseling and support and other services which sustain the client's health.

ELIGIBLE APPLICANTS

Eligible applicants include governmental, public or private non-profit entities located within the state of Texas who deliver services to Texas residents. Applicants must have demonstrated the delivery of quality services to clients with HIV disease or to similar populations of clients. Agencies that have had state or federal contracts terminated within the last 24 months for deficiencies in fiscal or programmatic performance are not eligible to apply. Applicants must not have had punitive sanctions imposed on them from a funding source over the past six months

before the EAP grants are awarded. Direct recipients of Ryan White Title I funded projects are not eligible to apply for this grant. (Title I sub-recipients may apply for services not covered under Title I). If the applicant is currently debarred, suspended, or otherwise excluded or ineligible for participation in federal or state assistance programs, applicant is ineligible to apply for funds under this Request for Proposals (RFP).

PROJECT AND BUDGET PERIODS

Approximately $1,000,000 is expected to be available to fund up to eight projects with a 12-month budget. The specific dollar amount to be awarded to each applicant will depend upon the merit and scope of the proposed project. The maximum grant will be $125,000. It is expected that contracts will be for a 12-month budget period, with a project period of four years beginning September 1, 2002 through August 31, 2006.

SCHEDULE OF EVENTS

March 8, 2002 - Publication in the Texas Register

March 8, 2002 - Electronic State Business Dailey

March 22, 2002 - Issuance of RFP

April 22, 2002 - Letter of Intent Due

April 22, 2002 - Written Inquiries on the RFP

April 25, 2002 - Answers posted on Bureau website

May 17, 2002 - Deadline for Submission of Applications

May 20-24, 2002 - Review Process

May 27-31, 2002 - Site Visits

June 7, 2002 - Written Notification to All Applicants

June 10-September 1, 2002 - Contract Development and Execution

June 15-19, 2002 - Regional Public Hearings

September 1, 2002 - Expected Contract Begin Date

FOR INFORMATION

Interested parties may obtain a copy of the RFP at the website: http://www.tdh.state.tx.us/hivstd/grants/default.htm; or, contact Laura Ramos at (512) 490-2525 or by E-mail at laura.ramos@tdh.state.tx.us. Request RFP Number 0031.

TRD-200201225
Susan Steeg
General Counsel
Texas Department of Health
Filed: February 27, 2002

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Notice of Uranium Byproduct Material License Amendment on Everest Exploration, Incorporated

The Texas Department of Health (department) gives notice that it has amended uranium by- product material license L03626 issued to Everest Exploration, Incorporated (mailing address: P.O. Box 1339, Corpus Christi, Texas, 78403). Amendment seven authorizes the licensee to remediate three former irrigation projects utilizing soil homogenization, and updates standard 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 of this 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 amendment will remain in effect.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, §401.264, the Administrative Procedure Act (Texas Government Code, Chapter 2001), the formal hearing procedures of the department (25 Texas Administrative Code, §1.21. et seq.), and the procedures of the State Office of Administrative Hearings (1 Texas Administrative Code, Chapter 155).

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; E-mail: Chrissie.Toungate@tdh.state.tx.us; by calling (512) 834-6688; or by visiting 8407 Wall Street, Austin, Texas.

TRD-200201196
Susan Steeg
General Counsel
Texas Department of Health
Filed: February 26, 2002

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Texas Health and Human Services Commission

Notice of Adopted Medicaid Provider Payment Rates

Proposal. As single state agency for the state Medicaid program, the Texas Health and Human Services Commission (HHSC) adopts a per day payment rate for the nursing facility pediatric care facility special rate class for Truman W. Smith Children's Care Center in the amount of $165.85. The payment rate is effective September 1, 2001.

Methodology and justification. The adopted rate was determined in accordance with the rate setting methodology at 1 Texas Administrative Code (TAC), Chapter 355, Subchapter C (relating to Reimbursement Methodology for Nursing Facilities), §355.307(c) adopted in the August 24, 2001, issue of the *Texas Register* (26 TexReg 6296).

TRD-200201199
Marina Henderson
Deputy Commissioner
Texas Health and Human Services Commission
Filed: February 26, 2002

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Request for Proposals

This notice announces the availability of funds to be awarded on behalf of the Health and Human Services Commission (HHSC) by the Guardianship Alliance of Texas.

The purpose of this Request for Proposals (RFP) is twofold. The first purpose is to solicit proposals for new local guardianship programs to provide guardianship, less restrictive guardianship alternative services, and legal assistance for incapacitated persons who (1) do not have family members who are willing or able to be appointed as guardians and/or (2) have family members who are unable to afford the costs associated with obtaining a guardianship. The second purpose is to solicit proposals from existing guardianship programs that will expand to serve additional counties or to serve additional populations of incapacitated persons.

The review panel will choose at least four sites. The review panel will score the proposals on demonstrated need (with preference and additional points given if there is no existing local guardianship program in the county), comprehensive proposals, creative collaborative efforts, professional expertise and continued viability.

Applications must be received by HHSC, Guardianship Alliance of Texas, 4900 N. Lamar, 4th Floor, Austin, TX 78751, no later than 5:00 p.m., April 5, 2002. Applications submitted after the deadline will not be considered. Proposals must be typewritten or word-processed and not exceed 20 single-sided, 8.5 by 11 inch pages. An original and three (3) copies (a total of four (4) copies) are required when submitting a proposal. Faxed copies of proposals will not be accepted.

Copies of the RFP will be available on March 1, 2002, and may be obtained by (1) contacting Kathleen Anderson, Director of the Guardianship Alliance of Texas at Texas Health and Human Services Commission, 4900 North Lamar, Blvd., 4th Floor, Austin, Texas, 78751, 512-424-6599, via facsimile 512-424-6589, via E-mail at kathleen.anderson@hhsc.state.tx.us; or (2) on the HHSC website at www.hhsc.state.tx.us for a complete RFP. All questions relating to the RFP must to be submitted in writing by 5:00 p.m. on March 29, 2002.

TRD-200201226
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: February 27, 2002

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Texas Department of Housing and Community Affairs

Announcement of the Public Hearing Schedule

The Texas Department of Housing and Community Affairs (TDHCA) announces public hearings on all TDHCA Programs.

The following public hearings encompass all TDHCA Programs. The Department encourages the public to submit comment on various Department initiatives. Comment will also be taken at these hearings on the 2002 Low Income Housing Tax Credit applications and the draft proposed rule concerning Housing Sponsor Reports. Copies of TDHCA plans are available at http://www.tdhca.state.tx.us or directly from the Department.

Monday, April 8

3:00 p.m.

Abilene

West Central Texas Council of Governments

1025 East North 10th

Abilene, Texas 79601

(915) 672-8544

Tuesday, April 9

1:00 p.m.

Lufkin

City Council Chambers

300 East Shepherd

Lufkin, Texas 75904

(936) 633-0244

Wednesday, April 10

11:00 a.m.

Victoria

Golden Crescent Regional Planning Commission

568 Big Bend Drive

Victoria, TX 77904

(361) 578-1587

Please direct any questions regarding these hearings to the Housing Resource Center at (512) 475-3976. Written comment on all TDHCA Programs may be submitted via:

MAIL: Texas Department of Housing and Community Affairs, Housing Resource Center, PO Box 13941, Austin, TX 78711-3941

FAX: (512) 475-3746

EMAIL: info@tdhca.state.tx.us

Individuals who require auxiliary aids or services should contact Gina Esteves, ADA-Responsible Employee, at (512) 475-3941 or Relay Texas at 1-800-735-2989 at least two days prior to the scheduled hearing so that appropriate arrangements can be made.

TRD-200201228
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: February 27, 2002

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Announcement of the Public Hearing Schedule for the Low Income Housing Tax Credit Program, the 2002 Low Income Housing Tax Credit Applications and the Draft Rule for the Housing Sponsor Report

The Low Income Housing Tax Credit (LIHTC) Program assists in building affordable housing through the issuance of federal tax credits used to fund new construction and rehabilitation of multifamily residential developments. The tax credits allow the developments to be leased to qualified families at or below market rents. The Program has received 139 preliminary applications and anticipates receiving 40 to 50 more applications on or before March 1, 2002. A submission log listing all 180 anticipated applications should be available on the LIHTC Program web site by March 11 at http://www.tdhca.state.tx.us/lihtc.htm.

The following public hearings are provided to gather input on the 2002 LIHTC applications, the program's practices and procedures for Carryovers and Cost Certifications, and any other program issues. Comment will also be accepted on the draft proposed rule concerning Housing Sponsor Reports. The public comment period for the 2002 LIHTC Applications and program processes will close on May 15, 2002. Three of the public hearings (located in Abilene, Lufkin and Victoria) are being held in conjunction with the Texas Department of Housing and Community Affairs consolidated public hearings on all TDHCA programs.

Thursday, April 4

10:00 a.m.

Dallas

Dallas Public Library

1515 Young Street

Dallas, Texas 75201

(214) 670-7846

Friday, April 5

1:00 p.m.

Austin

TDHCA Board Room

507 Sabine, Suite 400

Austin, Texas 78701

(512) 475-2124

Monday, April 8

3:00 p.m.

Abilene

West Central Texas Council of Governments

1025 East North 10th

Abilene, Texas 79601

(915) 672-8544

Tuesday, April 9

1:00 p.m.

Lufkin

City Council Chambers

300 East Shepherd

Lufkin, Texas 75904

(936) 633-0244

Wednesday, April 10

11:00 a.m.

Victoria

Golden Crescent Regional Planning Commission

568 Big Bend Drive

Victoria, TX 77904

(361) 578-1587

Wednesday, April 10

10:00 a.m.

El Paso

City of El Paso Council Chambers

2 Civic Center Plaza, 2nd Floor

El Paso, Texas 79901

(915) 541-4127

Thursday, April 11

6:00 p.m.

McAllen

Palmview Community Center

3401 Jordan

McAllen, Texas 78503

(956) 972-7980

Friday, April 12

11:30 a.m.

Conroe

City of Conroe Council Chambers

300 West Davis

Conroe, Texas 77301

(936) 760-4602

Please direct any questions regarding these hearings to the LIHTC Program at (512) 475-3340. Written comment on the LIHTC Program and the 2002 Applications should be submitted to Brooke Boston via:

MAIL: Texas Department of Housing and Community Affairs, LIHTC Program, PO Box 13941, Austin, TX 78711-3941

FAX: (512) 475-0764 or (512) 476-0438

EMAIL: bboston@tdhca.state.tx.us

Written comment on the draft proposed rule concerning Housing Sponsor Reports should be submitted to Sara Newsom, Compliance Division, at the address noted above.

Individuals who require auxiliary aids or services should contact Gina Esteves, ADA-Responsible Employee, at (512) 475-3941 or Relay Texas at 1-800-735-2989 at least two days prior to the scheduled hearing so that appropriate arrangements can be made.

TRD-200201227
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: February 27, 2002

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Notice of Public Hearing

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at the Aldine Branch Harris County Public Library, 11331 Airline Drive, Houston, Texas 77037 at 6 p.m. on March 25, 2002 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Texas Department of Housing and Community Affairs (the "Issuer"). The proceeds of the

Bonds will be loaned to Trails of Sycamore Townhomes Limited Partnership, a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing project (the "Project") described as follows: 250-unit multifamily residential rental development to be constructed on approximately 23 acres of land located on the southwest corner of the intersection of Veterans Memorial Drive and Gears Road, Houston, Harris County, Texas 77067. The project will be initially owned and operated by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or requests for additional information may be directed to Robert Onion at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-3872 and/or ronion@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robert Onion in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robert Onion prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1 (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200201183
Ruth Cedillo
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: February 26, 2002

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Texas Department of Human Services

Request for Proposal for Commercial Delivery and Storage of USDA Commodities

The Texas Department of Human Services (DHS) announces a request for proposal (RFP) for Commercial Delivery and Storage of USDA Commodities.

This RFP is to solicit bids from Texas-based commercial food distributors who meet minimum requirements as stipulated in the RFP to warehouse and deliver USDA commodities (food items) to statewide designated recipient agencies. This bid is for the Commercial Delivery Program in Regions 2, 9, and 10 within Texas, to distribute USDA commodities to approximately 244 public and private schools.

Delivery volume for the total of the three regions last year was 187,860 cases. For storage purposes commodities are categorized as dry-regular care (canned items), dry-special care (flour, rice, pasta, non-fat dry milk), chilled (cheeses), and frozen. Requests from schools may arrive daily by telephone, fax, or mail 48 hours in advance of the school's regular delivery day. Delivery drops are made year-round between 6:30 a.m. and 3:00 p.m., Monday through Friday, as requested by the school.

The closing date for bid submissions is March 25, 2002, by 5:00 pm.

The contract term will begin June 1, 2002, and continue through May 31, 2003. Federal regulations allow for contract extensions at the option of both parties for three (3) additional periods. The contract type is fixed price.

There will be a pre-bid conference on Monday, March 11, 2002, at 2:00 p.m. in Room 203 E (2nd floor East Tower) of the Twin Towers Building, 1106 Clayton Lane, Austin, Texas. It is suggested that prospective bidders request a bidders package before attending the pre-bid conference.

Awards shall be made to the bidder whose proposal is determined in writing to be most advantageous to DHS based on capacity for storage and delivery of dry, cool, and frozen commodities; quoted price for pickup, delivery, and storage of commodities; personnel; and logistics information. Bids will be screened initially to meet minimum federal requirements.

Bid opening will take place on Wednesday, March 26, 2002, and contracts will be awarded April 4, 2002.

The RFP and bidder's package may be obtained by contacting the Food Distribution Program or from the DHS website at: http://www.dhs.state.tx.us/programs/snp/.

Contact: Brad Francis, Mailing address: Texas Department of Human Services, Food Distribution Program, P.O. Box 149030, MC Y906, Austin, Texas 78714-9030. Telephone: (512) 420-2421, FAX: (512) 371-9684, E-mail: brad.francis@dhs.state.tx.us. Overnight delivery address: 1106 Clayton Lane Suite 325E, Austin, Texas 78723.

TRD-200201217
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Filed: February 27, 2002

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by DAKOTA TRUCK UNDERWRITERS, a foreign reciprocal company. The home office is in Sioux Falls, South Dakota.

Application for admission to the State of Texas by GENERAL FIRE & CASUALTY COMPANY, a foreign fire and casualty company. The home office is in Boise, Idaho.

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-200201073
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 21, 2002

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Company Licensing

Application for admission to the State of Texas by FLORIDA SELECT INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Sarasota, Florida. 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-200201229
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 27, 2002

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by The Hanover Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percentage of +45 for all coverages, classes, and territories. The overall rate change is +11.5%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by March 25, 2002.

TRD-200201221
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 27, 2002

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Hanover Lloyds Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percentage of +35 for all coverages, classes, and territories. The overall rate change is +3.8%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by March 25, 2002.

TRD-200201222
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 27, 2002

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Pinnacle Independent Physicians Association, (doing business under the assumed name of Pinnacle IPA), a domestic third party administrator. The home office is Houston, Texas.

Application for incorporation in Texas of Integrated Mental Health Management, LLC, a domestic third party administrator. The home office is Austin, Texas.

Application for incorporation in Texas of Integrated Mental Health Services, a domestic third party administrator. The home office is Austin, Texas.

Application for admission to Texas of Group Practice Affiliates, LLC, a foreign third party administrator. The home office is Rancho Cordova, California.

Application for admission to Texas of Continuous Care, L.L.C., a foreign third party administrator. The home office is Dearborn, Michigan.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200201184
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 26, 2002

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Texas Lottery Commission

Instant Game 278 "Bluebonnet Bucks"

1.0 Name and Style of Game.

A. The name of Instant Game No. 278 is "BLUEBONNET BUCKS". The play style is a "key number match and match three with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 278 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 278.

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, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $200, $2,000, $20,000, and SUN 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:

Table 1 of this section Figure 1:16 TAC GAME NO. 278 - 1.2D

Figure 1: GAME NO. 278 – 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO HUND
$2,000	TWO THOU
$20,000	20 THOU

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:

Table 2 of this section. Figure 2:16 TAC GAME NO. 278 - 1.2E

Figure 2: GAME NO. 278 – 1.2E

CODE	PRIZE
$2.00	TWO
$4.00	FOR
$5.00	FIV
$10.00	TEN
$20.00	TWN

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00, $20.00.

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 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A twenty-two (22) digit number consisting of the three (3) digit game number (278), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 278-0000001-000.

L. Pack - A pack of "BLUEBONNET BUCKS" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 000-001 will be on the top page. Tickets 002-003 will be on the next page and so forth and ticket 248-249 will be on the last page. The books will be in an A - B configuration.

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 "BLUEBONNET BUCKS" Instant Game No. 278 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 "BLUEBONNET BUCKS" Instant Game is determined once the latex on the ticket is scratched off to expose twenty-three(23) play symbols. In Game 1, if any of the player's YOUR NUMBERS match either WILDFLOWER NUMBER, the player will win the prize shown for that number. In Game 2, if the player gets three (3) like amounts, the player will win that amount. If the player gets two (2) like amounts and a "sun" symbol, the player will win double that amount. 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 twenty-three (23) 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 twenty-three (23) 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 twenty-three (23) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the twenty-three (23) 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. In Game 1, there will be no duplicate non-winning Your Numbers play symbols on a ticket.

C. In Game 1, there will be no duplicate Wildflower Numbers play symbols on a ticket.

D. In Game 1, there will be no duplicate non-winning prize symbols on a ticket .

E. In Game 2, there will be no four or more like play symbols on a ticket.

F. In Game 2, the doubler symbol will never appear on a ticket which contains three like play symbols.

G. In Game 2, there will be no more than one doubler symbol on a ticket.

H. In Game 2, no more than one pair will appear on a ticket containing the doubler symbol.

I. In Game 2, there will be no more than two pairs of like play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "BLUEBONNET BUCKS" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $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 "BLUEBONNET BUCKS" 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 "BLUEBONNET 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

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 "BLUEBONNET 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 "BLUEBONNET 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 12,226,500 tickets in the Instant Game No. 278. The approximate number and value of prizes in the game are as follows:

Table 3 of this section Figure 3:16 TAC GAME NO. 278- 4.0

Figure 3: GAME NO. 278 – 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$2.00	1,467,478	8.33
$4.00	1,222,501	10.00
$5.00	195,624	62.50
$10.00	146,718	83.33
$20.00	48,906	250.00
$50.00	32,643	374.55
$200	12,750	958.94
$2,000	80	152,831.25
$20,000	14	873,321.43

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.91. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 278 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 278, 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-200201224

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 27, 2002

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Instant Game 283 "Luck of the Dice"

1.0 Name and Style of Game.

A. The name of Instant Game No. 283 is "LUCK OF THE DICE". The play style is a "add up with all win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 283 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 283.

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, $1.00, $2.00, $5.00, $8.00, $10.00, $20.00, $100, $200, $500, $1,000, $2,000, $60,000, and STAR 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:

Table 1 of this section Figure 1:16 TAC GAME NO. 283 - 1.2D

Figure 1: GAME NO. 283 – 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
$1.00	ONE$
$2.00	TWO$
$5.00	FIVE$
$8.00	EIGHT$
$10.00	TEN$
$20.00	TWENTY
$100	ONE HUND
$200	TWO HUND
$500	FIV HUND
$1,000	ONE THOU
$2,000	TWO THOU
$60,000	60 THOU
Star symbol	WIN

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:

Table 2 of this section. Figure 2:16 TAC GAME NO. 283 - 1.2E

Figure 2: GAME NO. 283 – 1.2E

CODE	PRIZE
$5.00	FIV
$8.00	EGT
$16.00	SXN
$24.00	TFR

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $8.00, $16.00, or $24.00.

H. Mid-Tier Prize - A prize of $40.00, $100, $500.

I. High-Tier Prize - A prize of $2,000 or $60,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A twenty-two (22) digit number consisting of the three (3) digit game number (283), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 283-0000001-000.

L. Pack - A pack of "LUCK OF THE DICE" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 000 and the back of ticket 074, while the other fold will show the back of ticket 000 and front of 074.

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 "LUCK OF THE DICE" Instant Game No. 283 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 "LUCK OF THE DICE" Instant Game is determined once the latex on the ticket is scratched off to expose twenty-four (24) play symbols. If the total of each of the player's roll equals 7 or 11, the player will win prize shown. If the player gets a "star" symbol in any roll, the player will win all eight prizes. 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 twenty-four (24) 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 twenty-four (24) 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 twenty-four (24) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the twenty-four (24) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning games in any order on a ticket.

D. When a Star symbol appears on a ticket, there will be no occurrences of a roll totaling 7 or 11.

E. The Star symbol will only appear once on a winning ticket as dictated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "LUCK OF THE DICE" Instant Game prize of $5.00, $8.00, $16.00, $24.00, $40.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "LUCK OF THE DICE" Instant Game prize of $2,000 or $60,000, 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 "LUCK OF THE DICE" 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 "LUCK

OF THE DICE" 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 "LUCK OF THE DICE" 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 8,197,350 tickets in the Instant Game No. 283. The approximate number and value of prizes in the game are as follows:

Table 3 of this section Figure 3:16 TAC GAME NO. 283- 4.0

Figure 3: GAME NO. 283 – 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$5.00	1,420,806	5.77
$8.00	983,712	8.33
$16.00	109,317	74.99
$24.00	81,965	100.01
$40.00	20,521	399.46
$100	26,659	307.49
$500	7,529	1,088.77
$2,000	46	178,203.26
$60,000	10	819,735.00

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.09. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 283 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 283, 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-200201223

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 27, 2002

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Public Hearing

A public hearing to receive public comments regarding proposed new rules, 16 TAC §§402.590 - 402.596, relating to bingo audits will be held at 10:00 a.m. on Thursday, March 7, 2002 at the Texas Lottery Commission headquarters building, first floor auditorium, 611 E. 6th Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200201078
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 22, 2002

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Manufactured Housing Division

Notice of Administrative Hearing

Wednesday, March 20, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor,

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Fitzbert L.C. dba I-35 Homes and Land Depot to hear alleged violations of Sections 14(f) and 14(j) of the Texas Manufactured Housing Standards Act and Sections 80.131(b) and 80.132(3) of the Texas Manufactured Housing Administrative Rules regarding not properly complying with the initial report and warranty orders of the Director and providing the Department with copies of completed work orders, in a timely manner. SOAH 332-02-1795. Department MHD2000001634-HB.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-2894, jschroed@tdhca.state.tx.us

TRD-200201192
Bobbie Hill
Executive Director
Manufactured Housing Division
Filed: February 26, 2002

♦ ♦ ♦

Notice of Administrative Hearing

Thursday, March 21, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor,

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Payless Housing, Inc. dba American Spirit Homes to hear alleged violations of Sections 4(f)(amended 1999)(current version 4(d) of the Act), 14(f) and 14(j) of the Texas Manufactured Housing Standards Act and Sections 80.51(amended 1998)(current version at Section 80.54(a) of the Rules), 80.131(b) and 80.132(3) of the Texas Manufactured Housing Administrative Rules regarding not properly complying with the initial report and warranty orders of the Director and providing the Department with copies of completed work orders in a timely manner and not properly installing a manufactured home and not responding with corrective action in a timely manner.. SOAH 332-02-1794. Department MHD2000000684-W, MHD2000001391-IV, MHD2001000578-W.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-2894, jschroed@tdhca.state.tx.us

TRD-200201193
Bobbie Hill
Executive Director
Manufactured Housing Division
Filed: February 26, 2002

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Texas Natural Resource Conservation Commission

Enforcement Orders

An agreed order was entered regarding Erasmo Yarrito, Sr., Docket No. 2000-0534-WTR-E on February 15, 2002.

Information concerning any aspect of this order may be obtained by contacting Elisa Roberts, Staff Attorney at (512)239-6939, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ann Harp dba Kountry Korners, Docket No. 2000- 0725-PST-E on February 15, 2002 assessing $15,000 in administrative penalties with $14,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Robert Hernandez, Staff Attorney at (210)403-4016, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Henry Speights, Docket No. 2000-1323-OSI-E on February 15, 2002 assessing $1,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gitanjali Yadav, Staff Attorney at (512)239-2029, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tony Torres dba Tony and Son, Docket No. 2000- 0754-AIR-E on February 15, 2002 assessing $2,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Darren Ream, Staff Attorney at (817)588-5878 Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Zulfiqar Enterprises, Inc. dba Mac Pac and Shabbir Ali, Docket No. 2000-0585-PST-E on February 15, 2002 assessing $28,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shannon Strong, Staff Attorney at (512)239-6201, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bayou Incorporated dba Bayou Food Store, Docket No. 2001-0201-PST-E on February 15, 2002 assessing $4,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713)422-8914, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ronald C. Wahle, Docket No. 2001-0628-MSW-E on February 15, 2002 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Darren Ream, Staff Attorney at (817)588-5878, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rodolfo Avila, Sr. dba La Moderna Grocery, Docket No. 2000-0988-PST-E on February 15, 2002 assessing $24,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Elisa Roberts, Staff Attorney at (512)239-6939, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Upinder K. Singh dba One Stop & Go, Docket No. 2000-1032-PST-E on February 15, 2002 assessing $13,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Judy Fox, Enforcement Coordinator at (817)588-5825, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ronnie Bailey dba Bailey's Brokerage, Docket No. 2000-1303-MLM-E on February 15, 2002 assessing $12,000. in administrative penalties with $11,400 deferred.

Information concerning any aspect of this order may be obtained by contacting James Biggins, Staff Attorney at (210)403-4017 Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron USA Products Company, Docket No. 2001- 0123-AIR-E on February 15, 2002 assessing $26,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Bethany Carl, Enforcement Coordinator at (915)834-4965, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Devereux Foundation, Docket No. 2001-0775- MWD-E on February 15, 2002 assessing $6,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Audra Baumgartner, Enforcement Coordinator at (361)825-3312, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding E. I. Du Pont de Nemours and Co., Inc., Docket No. 2001-1015-MWD-E on February 15, 2002 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Toni Toliver, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District No. 58, Docket No. 2000-1360-MWD-E on February 15, 2002 assessing $7,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512)239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Itasca, Docket No. 2001-0296-MWD-E on February 15, 2002 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Toni Toliver, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Daniel & Elvira Maldonado, Nat & Ruby Rodriquez, and James & Barbara Penn dba Smyler's West, Docket No. 2001-0459-PST-E on February 15, 2002 assessing $13,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting George Ortiz, Enforcement Coordinator at (915)698-9674, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rip Griffin Truck Service Center, Inc., Docket No. 2001-0976-PST-E on February 15, 2002 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Gary Shipp, Enforcement Coordinator at (806)796-7092, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bobby Barnard Clifton dba Cliff's Feedlot and The A.G. and Polly Cummings Trust, Docket No. 2001-0772-MWD-E on February 15, 2002 assessing $6,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michelle Harris, Enforcement Coordinator at (512)239-0492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding National Instruments Corporation, Docket No. 2001- 0576-EAQ-E on February 15, 2002 assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lawrence King, Enforcement Coordinator at (512)339-2929, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mauriceville Special Utility District, Docket No. 2001-0808-PWS-E on February 15, 2002 assessing $2,6000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Toni Toliver, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Merkel, Docket No. 2001-0003-MWD-E on February 15, 2002 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Toni Toliver, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Mission, Docket No. 2001-0289-MWD-E on February 15, 2002 assessing $25,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Toni Toliver, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Action Oil Services, Inc., Docket No. 2001-0354- AIR-E on February 15, 2002 assessing $1000. in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Susan Kelly, Enforcement Coordinator at (409)899-8704 Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Austin Highway Water Supply Corporation, Docket No. 2001-0637-PWS-E on February 15, 2002 assessing $3,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sheila Smith, Enforcement Coordinator at (512)239-1670, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BC Utilities, Incorporated, Docket No. 2001-0686- PWS-E on February 15, 2002 assessing $2,025 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sandy Van Cleave, Enforcement Coordinator at (512)239-0667, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C&L Investment Co., Inc., Docket No. 2001-0226- OSS-E on February 15, 2002 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joseph Daley, Enforcement Coordinator at (512)239-3308, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Pottsboro, Docket No. 2000-1017-MWD-E on February 15, 2002 assessing $20,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Toni Toliver, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding W. Silver Inc, Docket No. 1999-1584-MLM-E on February 15, 2002 assessing $21,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Toni Toliver, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Van Alstyne, Docket No. 2000-1186-MWD-E on February 15, 2002 assessing $27,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Toni Toliver, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Presidio, Docket No. 2001-0312-MWD-E on February 15, 2002 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jaime Garza, Enforcement Coordinator at (956) 430-6030, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oliver Tyson dba Woodland Waste & Ronald C. Wahle, Docket No. 2000-0228-MLM-E on February 15, 2002 assessing $4,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Darren Ream, Staff Attorney at (817)588-5878 Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Samuel Alba dba Alba's Custom Iron Works, Docket No. 2000-1358-AIR-E on February 15, 2002 assessing $3,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713)422-8914 Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ubaldo Gomez dba JLG Trucking, Docket No. 2001- 0161-AIR-E on February 15, 2002 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Hernandez, Staff Attorney at (210)403-4016 Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200201202
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: February 26, 2002

♦ ♦ ♦

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 15, 2002**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code

(THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 15, 2002**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: A.A.A. Navi Corporation dba AAA Food Mart; DOCKET NUMBER: 2001- 0827-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 39215; LOCATION: Bullard, Smith County, Texas; TYPE OF FACILITY: retail gasoline station; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate evidence of financial assurance; 30 TAC §334.8(c)(4)(A)(vi)(I) and (5)(A)(i), and the Code, §26.3467(a), by failing to submit a underground storage tank (UST) registration and self-certification form and make available to a common carrier a valid, current delivery certificate; and 30 TAC §334.22(a), by failing to submit payment of outstanding UST fees; PENALTY: $5,600; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(2) COMPANY: Anadarko Petroleum Corporation; DOCKET NUMBER: 2001-1190-AIR-E; IDENTIFIER: Air Account Numbers FI-0126-F, JE-0695-T, and WM-0176-K; LOCATION: Kermit, Winkler County, Texas; TYPE OF FACILITY: natural gas processing and transmitting station; RULE VIOLATED: 30 TAC §101.10 and THSC, §382.085(b), by failing to submit an emissions inventory questionnaire; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705- 5404, (915) 570-1359.

(3) COMPANY: Atlas Roofing Corporation; DOCKET NUMBER: 2001-1257-AIR-E; IDENTIFIER: Air Account Number AC-0055-Q; LOCATION: Diboll, Angelina County, Texas; TYPE OF FACILITY: foam insulation board manufacturing; RULE VIOLATED: 30 TAC §101.10(b)(1) and THSC, §382.085(b), by failing to submit an initial emissions inventory report; PENALTY: $1,800; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: Mohsen Mousaui dba Barnard's Liquor Store; DOCKET NUMBER: 2001- 1377-PST-E; IDENTIFIER: PST Facility Identification Number 67439; LOCATION: Lubbock, Lubbock County, Texas; TYPE OF FACILITY: liquor store; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vi)(I), (4)(B), and (5)(A)(i), and the Code, §26.3467(a), by failing to submit a UST registration and self-certification form and make available a valid, current delivery certificate; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Mark Newman, (915) 655-9479; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(5) COMPANY: Luis Aguilar dba Cactus Grocery; DOCKET NUMBER: 2001-1435-PST-E; IDENTIFIER: PST Facility Identification Number 16333; LOCATION: Cactus, Moore County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.3467(a), by failing to submit a UST registration and self-certification form and make available to a common carrier a valid, current delivery certificate; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353- 9251; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(6) COMPANY: Cerrito Gathering Company, Ltd.; DOCKET NUMBER: 2001-1265-AIR-E; IDENTIFIER: Air Account Number WE-0047-N; LOCATION: Encinal, La Salle County, Texas; TYPE OF FACILITY: natural gas production; RULE VIOLATED: 30 TAC §122.121, §122.130, and THSC, §382.054, by failing to obtain a Title V operating permit; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: Chemical Specialties Inc.; DOCKET NUMBER: 2001-0839-IWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 01878-002; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: mineral research and development; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 01878, and the Code, §26.121, by failing to comply with the daily maximum total zinc limit of 3.5 milligrams per liter (mg/l); PENALTY: $1,500; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Craft Oil Company; DOCKET NUMBER: 2001-1322-PST-E; IDENTIFIER: Enforcement Identification Number 16815; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: transporter of petroleum products; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator of regulated USTs had a valid, current delivery certificate; PENALTY: $4,800; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: Dean Word Company, Ltd.; DOCKET NUMBER: 2001-1173-EAQ-E; IDENTIFIER: Edwards Aquifer Protection Program Project Number 1603.00; LOCATION: New Braunfels, Comal County, Texas; TYPE OF FACILITY: limestone quarry; RULE VIOLATED: 30 TAC §313.4(a) (now 30 TAC §213.4(a)), by failing to obtain approval for the excavation of a quarry and operation of a rock crusher; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Malcolm Ferris, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(10) COMPANY: City of Denton; DOCKET NUMBER: 2001-1260-AIR-E; IDENTIFIER: Air Account Number DF-0012-T; LOCATION: Denton, Denton County, Texas; TYPE OF FACILITY: electric power generating plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification; and 30 TAC §122.145(2) and THSC, §382.085(b), by failing to submit a deviation report; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Donna Independent School District; DOCKET NUMBER: 2001-0812-MWD- E; IDENTIFIER: Water Quality Permit Numbers 13680-002 and 13680-003 (Issued November 13, 1998); LOCATION: Donna, Hidalgo County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), §319.4, Water Quality Permit Number 13680-002, and the Code, §26.121, by failing to comply with permitted effluent limits for the Munoz and Garza facilities, monitor sewage sludge polychlorinated

biphenyls, determine application rates and maintain accurate records of the volume of effluent applied, submit the results of the soil sample analysis from the root zones of the disposal site, maintain a record of all grease removed from the grease trap, submit a groundwater monitoring plan, and maintain and operate the treatment facility in order to achieve optimum efficiency; and 30 TAC §334.21, by failing to pay all outstanding UST fees; PENALTY: $19,000; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(12) COMPANY: Evco Fabrication, Inc.; DOCKET NUMBER: 2001-1203-AIR-E; IDENTIFIER: Air Account Number ML-0164-B; LOCATION: Midland, Midland County, Texas; TYPE OF FACILITY: oil and gas metal fabrication and spray painting operation; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by allegedly having created a nuisance condition by allowing over-spray from the surface coating operation; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Dan Landenberger, (915) 470-1359; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(13) COMPANY: Shahji Investment Co. dba EZY Stop; DOCKET NUMBER: 2001-1351-PST- E; IDENTIFIER: PST Facility Identification Number 0009041; LOCATION: Baytown, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B), (5)(A)(i), and the Code, §26.3467(a), by failing to submit a UST registration and self-certification form and make available to a common carrier a valid, current delivery certificate; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767- 3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: Derek Sean Mizert dba Family Tire and Service; DOCKET NUMBER: 2001- 1208-AIR-E; IDENTIFIER: Air Account Number TA-4142-Q; LOCATION: Grapevine, Tarrant County, Texas; TYPE OF FACILITY: general automotive repair station; RULE VIOLATED: 30 TAC §114.50(d)(1) and THSC, §382.085(b), by allowing the issuance of a vehicle inspection report, without conducting all of the required emission tests on a covert vehicle; PENALTY: $625; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Farmland Transportation, Inc.; DOCKET NUMBER: 2001-1000-PST-E; IDENTIFIER: Enforcement Identification Number 16746; LOCATION: Post, Garza County, Texas; TYPE OF FACILITY: trucking company; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator of the regulated UST systems had a valid, current delivery certificate; PENALTY: $6,400; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(16) COMPANY: The City of Forney; DOCKET NUMBER: 2001-0757-MWD-E; IDENTIFIER: Enforcement Identification Number 16529; LOCATION: Forney, Kaufman County, Texas; TYPE OF FACILITY: sewage collection; RULE VIOLATED: the Code, §26.121, by failing to prevent unauthorized discharges from the sewage collection system; and 30 TAC §317.2(b)(2), by failing to adequately maintain the sewage collection equipment; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: David Friesenhahn; DOCKET NUMBER: 2001-0517-MSW-E; IDENTIFIER: Enforcement Identification Number 15930; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste disposal; RULE VIOLATED: 30 TAC §330.5 and the Code, §26.121, by allowing disposal of municipal solid waste on two different properties; PENALTY: $41,250; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(18) COMPANY: GLI Distributing, Inc.; DOCKET NUMBER: 2001-1117-PST-E; IDENTIFIER: PST Facility Identification Number 57306; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B), (5)(A)(i), and the Code, §26.3467(a), by failing to ensure that a UST registration and self-certification form is fully and accurately completed and submitted and make available to a common carrier a valid, current delivery certificate; PENALTY: $2,800; ENFORCEMENT COORDINATOR: Alita Champagne, (512) 239-0784; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(19) COMPANY: City of Gatesville; DOCKET NUMBER: 2001-1230-MWD-E; IDENTIFIER: Water Quality Permit Number 10176-001 (Expired); LOCATION: Gatesville, Coryell County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.42(a), §305.125(2), and the Code, §26.121, by failing to submit an application for renewal prior to expiration of the existing permit; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Gilbert Angelle, (512) 239-4489; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20) COMPANY: Haigood & Campbell L.L.C.; DOCKET NUMBER: 2001-1531-PST-E; IDENTIFIER: Enforcement Identification Number 17178; LOCATION: Wichita Falls, Wichita County, Texas; TYPE OF FACILITY: fuel distribution operation; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to observe that the owner or operator has a valid, current delivery certificate; PENALTY: $400; ENFORCEMENT COORDINATOR: Carolyn Easley, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(21) COMPANY: Koy Concrete, Inc.; DOCKET NUMBER: 2001-1053-PST-E; IDENTIFIER: PST Facility Identification Number 0019878; LOCATION: Katy, Harris County, Texas; TYPE OF FACILITY: concrete hauling and sales; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; and 30 TAC §334.8(c)(4)(B), (5)(A)(i), and the Code, §26.3467(a), by failing to submit a UST registration and self-certification form and make available a valid, current delivery certificate; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Kevin Keyser, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023- 1486, (713) 767-3500.

(22) COMPANY: Lakeway Airpark, Incorporated; DOCKET NUMBER: 2001-1349-PST-E; IDENTIFIER: PST Facility Identification Number 20296; LOCATION: Lakeway, Travis County, Texas; TYPE OF FACILITY: underground storage tank; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.346(a), by failing to obtain a delivery certificate before receiving delivery of a regulated substance; PENALTY: $400; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(23) COMPANY: North Central Oil Corporation; DOCKET NUMBER: 2001-1034-AIR-E; IDENTIFIER: Air Account Number BL-0690-L; LOCATION: Manvel, Brazoria County, Texas; TYPE

OF FACILITY: gas compressor station; RULE VIOLATED: 30 TAC §101.360(a) and THSC, §382.085(b), by failing to submit the level of activity certification form; PENALTY: $600; ENFORCEMENT COORDINATOR: John Mead, (512) 239-6010; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Wanda Allen dba Northridge Quick Stop; DOCKET NUMBER: 2001-126- PST-E; IDENTIFIER: PST Facility Identification Number 0055008; LOCATION: Crockett, Houston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a)(2) and (b)(1), by failing to demonstrate the required financial responsibility; and 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to ensure the UST registration and self-certification form is fully and accurately completed; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(25) COMPANY: Nottingham Country Municipal Utility District; DOCKET NUMBER: 2001- 0904-MWD-E; IDENTIFIER: National Pollutant Discharge Elimination System (NPDES) Permit Number TX0089346 and Water Quality Permit Number 12479-001; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: NPDES Permit Number TX0089346, Water Quality Permit Number 12479-001, and the Code, §26.121, by failing to comply with the permitted limits for ammonia-nitrogen, total residual chlorine, and five-day carbonaceous biochemical oxygen demand; and 30 TAC §290.51(a)(6), by failing to pay past due public health service fees; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: Marshall Distributing Company, Inc.; DOCKET NUMBER: 2001-1266-PST- E; IDENTIFIER: Enforcement Identification Number 16928; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator has a valid, current delivery certificate; PENALTY: $400; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(27) COMPANY: Mohammad H. Ghazipura dba O.S.T. Fuel; DOCKET NUMBER: 2001-1155- PST-E; IDENTIFIER: PST Facility Identification Number 0057398; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to perform the annual pressure decay test; PENALTY: $720; ENFORCEMENT COORDINATOR: Trina Greico, (713) 767- 3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(28) COMPANY: O'Rourke Dist. Co. Inc.; DOCKET NUMBER: 2001-0630-MSW-E; IDENTIFIER: Used Oil Handler Registration Number A85068; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: used oil; RULE VIOLATED: 30 TAC §37.2011 and §324.22, by failing to provide an original financial assurance mechanism for the active area of the facility; PENALTY: $180; ENFORCEMENT COORDINATOR: Bill Davis, (512) 239-6793; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(29) COMPANY: Oxy Vinyls, LP; DOCKET NUMBER: 2001-1450-AIR-E; IDENTIFIER: Air Account Number HG-1451-S; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: plastics materials and resins manufacturing; RULE VIOLATED: 30 TAC §101.20(2), §116.115(c), TNRCC Air Permit Number 18384, 40 Code of Federal Regulations (CFR) §61.65(a), and THSC, §382.085(b), by failing to prevent an avoidable emergency relief valve discharge of vinyl chloride to the atmosphere; PENALTY: $7,500; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(30) COMPANY: Pactiv Corporation; DOCKET NUMBER: 2001-1263-AIR-E; IDENTIFIER: Air Account Number NB-0111-S; LOCATION: Corsicana, Navarro County, Texas; TYPE OF FACILITY: polyethylene bubble manufacturing; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification; and 30 TAC §122.145(2) and THSC, §382.085(b), by failing to submit a deviation report; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(31) COMPANY: Phillips Petroleum Company; DOCKET NUMBER: 2001-0514-AIR-E; IDENTIFIER: Air Account Number WG-0008-B; LOCATION: near New Mobeetie, Wheeler County, Texas; TYPE OF FACILITY: natural gas treater station; RULE VIOLATED: 30 TAC §122.146(1) and THSC, §382.085(b), by failing to submit two annual compliance certification reports; and 30 TAC §122.145(2)(B) and THSC, §382.085(b), by failing to submit two deviation reports; PENALTY: $4,400; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(32) COMPANY: John Worsham dba Quick Stop Model Market #584; DOCKET NUMBER: 2001-1162-PST-E; IDENTIFIER: PST Facility Identification Number 23903; LOCATION: Sandia, Jim Wells County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to obtain a valid, current delivery certificate; PENALTY: $600; ENFORCEMENT COORDINATOR: Audra Baumgartner, (361) 825-3100; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(33) COMPANY: Sandel Energy, Inc.; DOCKET NUMBER: 2001-1256-AIR-E; IDENTIFIER: Air Account Number BL-0779-R; LOCATION: Sweeny, Brazoria County, Texas; TYPE OF FACILITY: compressor station; RULE VIOLATED: 30 TAC §101.360(a) and THSC, §382.085(b), by failing to timely submit the level of activity certification; PENALTY: $600; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(34) COMPANY: The City of San Marcos; DOCKET NUMBER: 2001-0825-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 1050001; LOCATION: San Marcos, Hays County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(3)(E)(i), (iv), (j)(2), (s)(2)(C)(i), by failing to retain copies of the customer service inspection reports, adopt an adequate plumbing ordinance, regulations, or service agreement by allowing physical connections to exist between the distribution system and other sources of untreated water, and verify the accuracy of the manual disinfectant residual analyzers; 30 TAC §290.42(c), (d)(6)(C), and THSC, §341.0315(c), by failing to provide the minimum required treatment for water and label all chemical bulk storage tanks; 30 TAC §290.43(c)(8), by failing to maintain the exterior surface of storage tanks; and 30 TAC §290.111(b)(1)(A)(ii) and THSC, §341.0315(c), by allowing the turbidity of the raw water to exceed 0.5% in more than 5.0% of the samples taken; PENALTY: $10,763; ENFORCEMENT

COORDINATOR: Larry King, (512) 339- 2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(35) COMPANY: Scenic Point Northview Inc. dba Scenic Point Northview Lodge; DOCKET NUMBER: 2001-1113-PWS-E; IDENTIFIER: Public Water Supply Number 1820016; LOCATION: Graford, Palo Pinto County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a) (now 30 TAC §290.109(c)) and THSC, §341.033(d), by failing to collect and submit samples for bacteriological analysis; and 30 TAC §290.103(5) (now 30 TAC §290.109(g)), by failing to provide public notice of its failure to collect and submit samples for bacteriological analysis; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Chris Friesenhahn, (512) 239-4471; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(36) COMPANY: Severn Trent Environmental Services, Inc.; DOCKET NUMBER: 2001-0612- MWD-E; IDENTIFIER: Certificate of Competency Number 20035; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §325.11(e) (now 30 TAC §325.128(b)) and §325.424(e), and the Code, §26.121, by failing to perform adequate process control of the facility; PENALTY: $18,750; ENFORCEMENT COORDINATOR: John Mead, (512) 239-6010; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(37) COMPANY: Faye Shipp dba Shipp's Trading Post Grocery; DOCKET NUMBER: 2001- 1389-PST-E; IDENTIFIER: PST Facility Identification Number 0034114; LOCATION: Granbury, Hood County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B), (5)(A)(i), and the Code, §26.3467(a), by failing to ensure that the UST registration and self-certification form was fully and accurately completed and make available to a common carrier a valid, current delivery certificate; and 30 TAC §37.815(a) and (b), by failing to demonstrate financial responsibility; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Gloria Stanford, (512) 239-1871; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(38) COMPANY: Smith Family Interests, Ltd. dba Petroleum Distributing of Texas; DOCKET NUMBER: 2001-1489-PST-E; IDENTIFIER: Enforcement Identification Number 17010; LOCATION: Katy, Waller County, Texas; TYPE OF FACILITY: retail gasoline dispensing; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator of a UST system has a valid, current delivery certificate; PENALTY: $4,400; ENFORCEMENT COORDINATOR: Carol Harkins, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(39) COMPANY: Speedy Stop Food Stores, Ltd. dba Speedy Stop No. 48; DOCKET NUMBER: 2001-1289-PWS-E; IDENTIFIER: PWS Number 0150515; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(b)(4), (c)(5)(B), and §290.46(d)(2)(A), by failing to maintain the disinfectant residual concentration and perform a disinfection residual test; 30 TAC §290.41(c)(3)(O), by failing to lock the well house; 30 TAC §290.39(j), by failing to notify the executive director prior to making any significant change or addition to the system's production, treatment, storage, or distribution facilities; and 30 TAC §290.51(a)(6), by failing to pay past due public health service fees; PENALTY: $1,438; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(40) COMPANY: Stephens Fuel Company; DOCKET NUMBER: 2001-1388-PST-E; IDENTIFIER: Enforcement Identification Number 16806; LOCATION: Granbury, Hood County, Texas; TYPE OF FACILITY: underground storage tank; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator of the facility had a valid, current delivery certificate; PENALTY: $400; ENFORCEMENT COORDINATOR: Gloria Stanford, (512) 239-1871; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(41) COMPANY: Tempe Water Supply Corporation; DOCKET NUMBER: 2001-0818-PWS-E; IDENTIFIER: PWS Number 1870105 and Certificate of Convenience and Necessity Number 11579; LOCATION: Livingston, Polk County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(C)(ii) - (iv), and Agreed Order Docket Number 1997-1082- PWS-E, by failing to provide a total storage capacity of 200 gallons per minute, (gpm) per connection, provide two or more service pumps having a total capacity of two gpm per connection, and provide an elevated storage capacity of 100 gallons or a pressure tank capacity of 20 gallons; 30 TAC §290.46(d)(2)(A), (f)(3)(A)(iv) and (v), and §290.110(b)(4), by failing to maintain a minimum chlorine residual of 0.2 mg/l, maintain operational records detailing the dates dead-end mains were flushed, and install electrical wiring in securely mounted conduit; 30 TAC §290.42(e)(3)(D), by failing to provide facilities for determining the amount of disinfectant used daily; 30 TAC §290.41(c)(3)(K) and (N), by failing to seal the wellhead and provide a flow measuring device to measure the production yields; 30 TAC §290.43(c)(6), by failing to ensure that clearwells or potable water storage tanks and all associated appurtenances are thoroughly tight against leakage; 30 TAC §290.110(c), by failing to monitor the disinfection levels; 30 TAC §290.121(a), by failing to maintain a complete monitoring plan; and 30 TAC §291.93(3), Agreed Order Docket Number 1997-1082-PWS-E, and the Code, §26.121, by failing to submit a planning report; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Shawn Stewart, (512) 239-6684; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

TRD-200201220
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: February 27, 2002

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Notice Of Water Rights Application

Notices mailed during the period February 19,2002 through February 26, 2002.

Application No. 5761 Rayzor Ranch L.P., on behalf of Lantana Golf Club, 800 Golf Club Drive, Argyle, Texas 76226 seeks a Water Use Permit pursuant to Texas Water Code (TWC) 11.121 and Texas Natural Resource Conservation Commission Rules 30 TAC 295.1, et seq. Published and mailed notice of the application are given pursuant to 30 TAC 295.152 and 295.153 to all of the water right holders in the Trinity River Basin. Applicant seeks to maintain an existing reservoir on Loving Branch, tributary of Hickory Creek, tributary of the Trinity River (Lake Lewisville), Trinity River Basin and impound therein not to exceed 100 acre-feet of water with a lake surface area of approximately 10 acres for recreation/ aesthetics and irrigation purposes. Station 2+15 on the centerline of the dam is located at latitude 33.0972 degree N, longitude 97.1286 degree W, also bearing S 81.4867 W, 1,914 feet from the corner of the Fred Hyatt Survey, Abstract No. 560 in Denton County approximately 9.3 miles south of Denton and 1.5 miles NNE of Bartonville. Based on an upstream water sales contract with the City of

Dallas, applicant seeks to divert and use not to exceed 300 acre-feet of water per annum from the aforesaid reservoir on Loving Branch, using 4 pumps at a maximum diversion rate of 8.47 cfs (3,800gpm), to irrigate 134 acres of land out of a 217.8 acre tract in the BBB&C Railroad Survey, Abstract No. 560, and the E.P. Holman Survey Abstract No. 645 in Denton County. Diversion point of the water from Loving Branch is located at Latitude 33.0908 degrees N and Longitude 97.1281 degrees W. If granted, the permit shall be in effect as long as a valid water supply contract is maintained between the applicant and the City of Dallas. The application was submitted on August 22, 2001 and found to be administratively complete on February 1, 2002. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk at the address provided in the information section below within 30 days of the date of newspaper publication of the notice. 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.

APPLICATION 5754 Scott Kellam,et ux, 13023 Independence, San Antonio, Texas 78233 , have applied to the Texas Natural Resource Conservation Commission (TNRCC) for a Water Use Permit pursuant to 11.121, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC 295.1, et seq. Notice of the application shall be published pursuant to 30 TAC 295.152 and should be mailed pursuant to 30 TAC 295.153 (a) and (b) to the water right holders of record in the San Antonio River Basin. Applicants seek authorization to divert and use 10 acre-feet of water per annum at a maximum diversion rate of .223 cfs (100 gpm) from Martinez Creek, tributary of Cibolo Creek, tributary of San Antonio River, San Antonio River Basin, Bexar County, Texas, for dust control and irrigation of 40 acres of land out of a 60.39 acre-tract of land. The location of the diversion point is 27 miles in a northeast direction from Bexar County Courthouse, or 8 miles in a southerly direction from Shertz, Texas, at Latitude 29.45 degrees N, Longitude 98.20 degrees W, bearing North, 750 feet from the Southwest corner of the Jose Maria Buscillos Original Survey No. 39, Abstract No. 49, Bexar County, Texas. The application was received on March 19, 2001. The Executive Director of the TNRCC has reviewed the application and has declared it to be administratively complete on July 10, 2001. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. 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 of the date of newspaper publication of the notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed.

APPLICATION 3931B George Chase, for himself and on behalf of Evelyn Wilie Moodie, 3524 Carondolet Drive, Waco, Texas, 76710, seeks and amendment pursuant to Texas Water Code (TWC) 11.122, and Texas Natural Resource Conservation Commission Rules 30 Texas Administative Code (TAC) §295.1, et seq. Notice of the application shall be published pursuant to 30 TAC 295.158 (b)(8) and mailed to the water right holders of record in the Brazos River Basin pursuant to 30 TAC 295.158 (b)(8.) Water Use Permit No. 3636, as amended, authorizes permittees to construct and maintain a SCS Dam on Live Oak Creek, tributary of Hog Creek, tributary of South Bosque River, tributary of Bosque River, tributary of Brazos River, Brazos River Basin, Bosque County, Texas, designated as Site No. 2, of the Hog Creek Watershed Project, and to impound 419 acre-feet of water in the reservoir at an elevation of 812 feet above mean sea level (ports close) in the Henry Murdoff Survey, Abstract No. 563, and the John Letcher Survey, Abstract No. 909, Bosque County, Texas. Station 64 + 94 on the centerline of the dam is bearing N 5ø E, 3217 feet from the southwest corner of the aforesaid Murdoff Surevey, 21 miles SE of the Meridian, Bosque County, Texas. Permittee, George Chase, is authorized to divert and use not to exceed 109 acre-feet of water per annum from the perimeter of the aforesaid reservoir to irrigate 60 acres in Bosque County. Permittee, Evelyn Wilie Moody, is authorized to divert and use not to exceed 110 acre-feet of water per annum from the perimeter of the aforesaid reservoir to irrigate 200 acres of land all being in Bosque County at a maximum combined rate of 1.1 cfs (500 gpm.) A special condition of the permit states that authorization to use water shall expire and become null and void on December 31, 2000, unless an application for an extension of the permit is received by the Commission prior to the expiration date. Applicant seeks authorization to amend Water Use Permit No. 3636, as amended, to extend the term permit for an additional 10 years. No changes are requested to the amount and rate of diversion. Pursuant to TAC 297.45 and TWC 11.122, granting of an application for an amendment to a water right shall not cause an adverse impact to an existing water right. The application was received on December 04, 2000. The Executive Director of the TNRCC has reviewed the application and has declared it to be administratively complete on January 02, 2002. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. 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 of the date of newspaper publication of the notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed.

Information Section

A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in an application.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement [I/we] request a contested case hearing; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the 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 permit 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-200201203
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: February 26, 2002

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North Texas Workforce Development Board

Request for Proposals--Child Care Delivery Services

North Texas Workforce Development Board is seeking proposals for the management and operation of its Child Care Delivery Services Program. The contracting period will begin September 1, 2002 through August 31, 2007, with a one-year renewal option. Proposals will be accepted until 4:00 p.m., Friday, April 12, 2002 at 1101 Eleventh Street, Wichita Falls, TX 76301.

The North Texas Workforce Development Board area includes the following counties: Archer, Baylor, Clay, Cottle, Foard, Hardeman, Jack, Montague, Wichita, Wilbarger and Young.

To ensure that information relevant to this procurement is disseminated to all bidders through the RFP process a Bidders' Conference will be held Tuesday, March 12, 2002, 10:00 a.m., at the address above. No questions will be answered over the phone, but the Board will accept written questions until 5:00 p.m., Friday, March 08, 2002

Request for Proposal packets may be obtained by written or faxed requests only, contact the North Texas Workforce Development Board, address above, Fax (940) 322-2683.

Child Care Delivery Services are offered in accordance with Equal Employment Opportunity policies. Auxiliary aids and services are available upon request to individuals with disabilities. Program operation is dependent upon the availability of funds from the Texas Workforce Commission.

TRD-200201241
Mona Williams Statser
Executive Director
North Texas Workforce Development Board
Filed: February 27, 2002

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Texas Department of Public Safety

Request for Proposal - Consultant Services

1. Subject.

The Texas Department of Public Safety (TxDPS) and the Texas Department of Transportation (TxDOT) have embarked on a joint initiative to improve the efficiency of processes and procedures used to capture, manage and disseminate data regarding the safety of Texas roadways. This is the vision of the Crash Records Information System (CRIS) Project. The TxDPS will serve as the primary issuing agency for this RFO.

The CRIS Project seeks consulting services to conduct a "Study and Recommend" analysis (hereafter referred to as "the Study") that will assist the CRIS Steering Committee in making its' solution approach decision. The selected vendor will be required to:

A. review and refine the TxDOT "As-Is" Model

B. assess and review current and anticipated initiatives/approaches

C. compare those initiatives/approaches

D. assess the cost/benefit of those initiatives/approaches

E. provide a comprehensive report detailing results of analysis

2. Purpose.

The CRIS Project was initiated in 1996 and 1997 with an extensive study of the existing Crash Records System through the use of a formal Business Process Re-engineering approach. The assessment resulted in the following deliverables, which comprise much of the basis for the CRIS Project today:

A. " As-Is" Model

B. "To-Be" Model

C. Summary Report

D. System Requirements

E. Organizational Model

F. Benchmarking Report

G. Vision Document

H. Data Model

I. System Architecture

J. Implementation Strategies Plan

With the emphasis on Year 2000 remediation, the CRIS Project was put on hold until June of 2001. Much of the work that was accomplished in the first phase of the CRIS Project remains valid today. However, new initiatives and technologies have emerged that provide the CRIS Steering Committee with a variety of possible solutions to meet the CRIS Project's goals.

The selected vendor shall be required to satisfy the requirements within 90 calendar days of award. The selected vendor will not be eligible to bid on subsequent new development phases of the CRIS Project, but will be eligible to bid on additional work involving ongoing support of the project.

3. SUBMISSION OF PROPOSAL.

The deadline for submitting a response for this procurement is April 8, 2002 at 5:00 PM. Proposals received after this deadline will not be considered under any circumstances.

4. PROCUREMENT AND CONTRACT DOCUMENTS.

A. This procurement shall be conducted in accordance with the Professional Services Procurement Act (Texas Government Code, Chapter 2254).

B. Vendors shall supply eight (8) copies of the proposal for evaluation purposes, two (2) of which shall be in binders to the address below. Proposals must be submitted in a sealed envelope clearly marked with the RFO number, date and time of opening. Proposals will not be accepted by facsimile transmission.

C. DPS has determined that subcontracting opportunities are probable under the proposed contract. Therefore, a HUB Subcontracting Plan (HSP) requirement is to be part of the specifications. Failure to comply

with the requirements of the HUB Subcontracting Plan will result in rejection of submitted proposal. In no event will any subcontracting by the vendor relieve the vendor from any obligations or conditions of this contract on its part to be performed. As between parties hereto, any of the vendor's subcontractors will be considered an agent and employee of the vendor. Any acts or omissions of the subcontractors and any person directly or indirectly acting for them will be deemed to be the acts or omissions of the vendor, and the vendor will remain liable and responsible to the State as if no subcontracting had been made.

D. This is not a complete bid package. For a complete copy of package, including specifications, terms and conditions, and the HUB Subcontracting Plan documents, go to the Electronic State Business Daily at www.esbd.tbpc.state.tx.us.

5. POINT OF CONTACT.

Vickie Johnson Accounting and Budget Control 5805 N. Lamar Blvd Building A Austin, TX 78752 (512) 424-2305

6. INQUIRIES.

All inquiries shall be directed to the contact individual. Specific questions regarding the RFO shall be submitted in writing. Questions may be received by fax, letter, or e-mail. Telephone inquiries shall not be responded to. Responses will be delivered by fax if appropriate information is provided, or by e-mail. Only answers that are provided in writing from the contact individual shall be considered official responses.

7. ORAL PRESENTATIONS.

The TxDPS may, at its discretion, elect to have Vendors provide oral presentations of their response.

8. ADDENDA TO THE RFO.

The TXDPS may, by written addendum, change any portion of the RFO.

9. TXDPS RIGHTS.

The TxDPS reserves the right to use any an all ideas presented in any response to the RFO. Selection or rejection of any offer does not affect this right.

The rights of the TxDPS include, but are not limited to:

A. cancellation of the RFO at its sole discretion;

B. rejection of any and all proposals received in response to this RFO;

C. utilization of any and all ideas submitted in the proposals received;

D. elimination of any requirements that are not met by all Vendors upon notice to all parties submitting offers;

E. making typographical corrections to offers, with the concurrence of the Offeror;

F. changing computational errors with the written concurrence of the Offeror;

G. requesting vendors to clarity their proposals and/or submit additional information pertaining to their offer.

10. COST OF PROPOSAL PREPARATION.

The TxDPS shall not be responsible for any costs incurred by a vendor in preparing and submitting a response to this RFO.

11. EVALUATION CRITERIA FOR AWARD.

A. The award will be made to the vendor whose proposal offers the best value for the state and is in the state's best interest. In determining the proposals that offer the best value and are in the state's best interest the TxDPS will consider the below listed criteria. The relative weights of each criterion are listed.

1) Price/Cost (25%);

2) Experience, Responsibility and Past Performance (25%);

3) Workplan (25%);

4) Quality and acceptability of those portions of the vendor's response addressing: the Project Overview, Project Understanding, Documentation Standards, and Personnel (25%)

B. The determination of which proposal offers the best value and is in the state's best interest will be based not only upon the submitted proposal but through speaking with contacts and references submitted by the vendor, from TxDPS and TxDOT historical knowledge, or from other information sources which may come to the attention of the TxDPS or the TxDOT.

C. The TxDPS reserves the right not to award to any vendor that the TxDPS or TxDOT considers to be non- responsible and/or to make no award at all.

12. CONTRACT TERMS.

The award shall be for a term of 90 days beginning on issuance of a purchase order.

13. CHANGES.

A. The TxDPS may at any time by written order designated or indicated to be a change order, make changes within the general scope of the contract, including but not limited to changes:

1) In the specifications;

2) In the manner of the performance of the work; or

3) Directing acceleration in the performance of the work.

B. If any change under this section causes an increase or decrease in the vendor's costs of any part of the work under this contract, an equitable adjustment shall be made and the Contract modified in writing accordingly.

C. If the vendor intends to assert a claim for an equitable adjustment under this section, the vendor, shall within thirty (30) days after receipt of a written change order submit to the TxDPS a written statement setting forth the general nature and monetary extent of such claim.

14. OVERVIEW OF CURRENT ENVIRONMENT.

A. Accident data is the primary source for statistics used in evaluating the effectiveness of safety programs and obtaining funding to support traffic safety. It is also critical for:

1) State and local transportation project planning and prioritization

2) Highway and railroad crossing safety evaluation

3) Identification of target areas for enhanced traffic enforcement

4) Crash records data is required to receive federal highway funds

5) Crash records data are the primary source for TxDOT and private traffic safety studies

B. The current TxDPS procedures for processing crash record data are characterized by manual labor-intensive processes that utilizes outdated location source documents. The systems in use today were designed in the early 1970's using technologies appropriate for that time period.

C. Each facet of the Accident Records process presents a unique set of demands and issues. There are several major issues that affect all the

facets and processes that go into collecting, managing and disseminating accident information. Some of these issues are:

1) Electronic Reporting can not be accepted by TxDPS at this time

2) Some local law enforcement agencies have established sophisticated systems for the collection and management of accident information

3) Manual processing results in delays in availability of accident information

4) Manual processes negatively impact accuracy and reliability of accident data

5) Computer systems used for the managing of accident records data is inflexible and leads to redundant processing

6) Roadway Inventory Documents to determine the location of accidents on the State Highway system have not been updated since 1992. (On-System)

7) Accident locations maintained by local government entities are based on limited site descriptions. (Off- System)

8) Accident data utilization is fragmented into numerous components. Consistency among the various files and databases is insured only by the vigilance of the individuals managing the information.

15. EXPERTISE REQUIRED.

The Vendor selected must utilize personnel with expertise and training in the following areas:

A. Business Process Re-engineering

B. Cost/Benefit Analysis

C. Benchmarking

D. GIS/GPS technology

E. Database Design

F. Remote/Mobile Data Capture technologies

G. Imaging and Document Management

H. Dynamics of Change

16. TXDPS RESPONSIBILITES.

A. The TxDPS will provide a CRIS Project Manager who will assist, advise, and arrange scheduling and or/clear roadblocks to the successful accomplishment of this study.

B. The TxDPS will provide all available data and information regarding the 1997 Study and information on current and emerging initiatives under consideration.

17. SCOPE OF SERVICES.

The selected vendor will perform the following:

A. Review and refine the 'As-Is' model as it relates to TxDOT processes and interfaces that impact the project

B. Review the recommendations for new development that were made after the original CRIS Study

C. Review existing initiatives or outsourcing opportunities that have become available in the intervening years since the original CRIS Study was conducted

D. Review emerging initiatives that are being proposed currently

E. Analyze and recommend scenario's, solutions or combinations that would provide the best value to the State justified by a cost/benefit analysis

18. DELIVERABLES.

A. Upon conclusion of the study, a draft report will be presented first for review and discussion to the CRIS Project Manager. Upon approval of the draft report, a final written report will be due.

B. The final report will include the following:

1) An Executive Summary

2) Findings and Recommendations

3) TXDOT "As-Is" Model Update

4) Prioritized Top 3 Strategies

5) How the Top 3 Strategies link to the Vision

6) Cost/Benefit Analysis for each of the Top 3 Strategies (includes multi-year financial impact)

C. The selected vendor will, with the assistance of the internal CRIS Project Manager, present the final report to the CRIS Project Steering Committee.

19. INSTRUCTIONS TO BIDDERS: RESPONSE TO THIS RFO SHOULD INCLUDE:

A. Proposed methodology to be used should be clearly presented. The Study Outline should address the scope of services, but bidders may recommend modifications based on their experience in similar studies. Bidders should indicate the services, resources, information, etc. that the TxDPS would be expected to provide.

B. Proposal and attached supporting documents should be kept concise, under 50 pages, but should provide sufficient information so that we may make a proper evaluation of your proposal. Bidders shall submit eight (8) copies of proposal for evaluation purposes, two (2) of which should be in binders.

C. A statement of the experience, capabilities and resources of the firm, outlining its qualifications to perform the work described in the scope of the services, should be provided. A list of public and private institutions, with references, for which similar work has been conducted in the last 3-5 years, should be provided. Include a list of all firms and individuals that would be involved in the Study, describe their roles, qualifications, and relevant experience. Individual resumes for each team member should be submitted including professional and educational background. A team organizational chart should also be submitted. If appropriate, include copies or excerpts of past studies (which TxDPS will return, if requested) that are directly related to the work proposed.

D. Provide a schedule that specifies the time that will be required for each task or work element keeping within the 90-day study period. Include a timetable with significant milestones that outline the priority, sequencing, overlapping, etc. of the individual elements of the proposal.

E. Provide a detailed budget including total fee and breakdown of fee by work part, task, firm and individual. If there are contingency fees, cost-plus or management coordination fee elements of the proposal they should be clearly identified. Individual, firm and total person-hours to be employed in the work along with hourly rates, should be specified on the budget or on a separate schedule for work elements. Reimbursable expenses should be identified. The total project cost should be clearly presented with all applicable fees and good faith maximums for allowed billable expenses.

20.

EVALUATION CRITERIA

CATEGORY	CRITERIA	Possible Points	X Weight (Relative Importance)	= Total Points Given
	Scoring: 0-1 = Minimally addressed requirements, 2-4, Meets requirements, 5-6, Exceeds requirements	**0-6 pts**	**1= low 2=medium 3=high**	
PRICE/COST (weighting 25 % of total points)	Hourly rates must be comparable with rates for skill set/expertise in Austin area. No hidden fees (Travel contingency fees, etc.)		X 2	
	(Low bid/this bid) x total maximum points for cost = points		X 2	
	Total Price/Cost Points (A)			
Experience, Responsibility and Past Performance (weighting 25% of total points)	The vendor has a positive reputation in the industry and state government. (Trustworthy, value-added service, etc.)		X 3	
	Vendor demonstrates experience with clients similar to the size and scope required for this RFO.		X 2	
	The vendor has a proven track record of success.		X 2	
	The vendor has supplied references and those references have given positive feedback.		X 3	
	The vendor has conducted similar work in the past.		X 3	
	The vendor has provided references based on past experience.		X 2	
	The vendor is not associated with a vendor who may bid on other phases of the project (parent company, sub-contractor, etc)		X 3	
	The vendor has experience with Business Process Re-engineering, cost/Benefit Analysis, and Impact Analysis.		X 3	
	The vendor has experience with GIS/GPS systems.		X 2	
	Total Experience, Responsibility & Past Performance Points (B)			

CATEGORY	CRITERIA	Possible Points	X Weight (Relative Importance)	=Total Points Given
	Scoring: 0-1 = Minimally addressed requirements, 2-4, Meets requirements, 5-6, Exceeds requirements	**0-6 pts**	**1= low 2=medium 3=high**	
Workplan (weighting 25% of total points)	The workplan is complete and explains in detail how the work is to be accomplished.		X 3	
	The workplan narrative identifies staff, time lines, equipment, supplies, strategies, and reporting.		X 2	
	The workplan reflects quality standards to be utilized and describes procedures for implementation.		X 3	
	Total Workplan Points (C)			
Quality (weighting 25% of total points)	The vendor has demonstrated through the proposal a thorough understanding of the work to be performed.		X 3	
	The vendor has a formal methodology or approach that has been outlined clearly in the proposal.		X 3	
	The vendor utilizes configuration management and version control.		X 2	
	The vendor has documentation standards.		X 1	
	Proposed personnel and consultants resumes demonstrate appropriate credentials, training, qualifications and experience.		X 3	
	Total Quality Points (D)	**Total**		
		Overall Score		

TRD-200201204
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: February 26, 2002

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On February 15, 2002, McLeodUSA Telecommunications Services, 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 60078. Applicant intends to transfer control to Forstmann Little as the result of a reorganization.

The Application: Application of McLeodUSA Telecommunications Services, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 25469.

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 March 13, 2002. 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 25469.

TRD-200201044
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 20, 2002

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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 February 22, 2002, 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 ValuTel Communications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 25502.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance, and wireless 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 March 13, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200201139
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 25, 2002

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Notice of Application for Waiver of Denial by NANPA of NXX Code Requests

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on February 15, 2002, for waiver of denial by the North American Numbering Plan Administrator (NANPA) of applicant's request for NXX codes.

Docket Title and Number: Application of Allegiance Telecom of Texas, Inc. for Waiver of Denials by NANPA of NXX Code Requests. Docket Number 25468.

The Application: Allegiance Telecom of Texas, Inc. (Applicant or Allegiance) stated that the NANPA denied Allegiance's request for an NXX code in the Kennedale rate center to support provision of Extended Metropolitan Service (EMS). The NANPA also denied Applicant's request for an NXX code to support a second switch that Allegiance intends to deploy in the San Antonio rate center. The Applicant stated that it applied for but was denied the additional NXXs on the basis of Section 4.2.1 of the Central Office Code Assignment Guidelines, which requires code holders requesting growth codes to demonstrate that their existing codes within the rate center will exhaust within six months. Applicant stated that it cannot make this showing. Likewise, Applicant cannot demonstrate that it has utilized at least 60% of the telephone numbers in the initial NXX code in order to receive additional numbering resources.

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 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. The deadline for comment is March 18, 2002. All comments should reference Docket Number 25468.

TRD-200201131
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 22, 2002

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Notice of Application to Relinquish 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 February 7, 2002, for an amendment to 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 Net2000 Communications Services, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 25300.

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 March 13, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200201152
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 25, 2002

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Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a petition on January 15, 2002, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Bettie Exchange for Expanded Local Calling Service, Project Number 25297.

The petitioners in the Bettie Exchange request ELCS to the exchange of Tyler.

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 March 21, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200201137
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 25, 2002

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Notice of Remand of Docket Number 14965

On February 13, 2002, the Public Utility Commission (commission) initiated Docket Number 25451, *Remand of Docket Number 14965 (Application of Central Power and Light Company for Authority to Change Rates)*, as a result of a mandate by the 345th District Court of Travis County returning Docket Number 14965 to the commission for the rendition of judgment pertaining to certain issues.

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, 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. Intervention deadline/notice of intent to participate deadline is March 15, 2002. All correspondence should refer to Docket Number 25451.

TRD-200201186
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 26, 2002

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Public Notice of Amendment to Interconnection Agreement

On February 21, 2002, Southwestern Bell Telephone Company and TXU Communications Telecom Services Company, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 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 & Supplement 2002) (PURA). The joint application has been designated Docket Number 25491. 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 25491. 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 March 22, 2002, 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 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 25491.

TRD-200201118
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 22, 2002

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Public Notice of Cancellation and Rescheduling of Workshop and Request for Comments in Rulemaking to Address the Redefinition of "Access Line"

The Public Utility Commission of Texas (commission) will hold a workshop on April 9, 2002, at 10:00 a.m. in the Commissioner's Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 to discuss whether changes in technology, facilities, or competitive or market conditions justify a modification in the categories of access lines or whether there is a need to modify the definition of "access line." Project Number 25450, *Rulemaking to Address the Redefinition of "Access Line,"* has been established. This proceeding to review Texas Local Gov't Code, §283.002 is made under the authority of §283.003. This workshop is rescheduled for April 9, 2002; therefore, no workshop related to this project will be held on April 11, 2002.

The commission requests interested persons file comments by March 25, 2002 to the following questions:

1. Have there been any changes in technology or facilities that would justify a modification to the categories of access lines as developed by the commission?

2. Have there been any changes in the competitive or market conditions that would justify a modification to the categories of access lines as developed by the commission?

3. In situations where a certificated telecommunications provider (CTP) end-use customer is geographically located in a different exchange than the CTP's serving switch, should the end-use customer's line be classified as an access line? If not, how should it be classified?

4. Considering line sharing or line splitting scenarios:

a. What is the appropriate quantification of the line(s)?

b. What compensation is appropriate?

5. What, if any, other issues regarding redefinition of access lines should be addressed by the commission?

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. Electronic copies should be submitted, as well. All responses should reference Project Number 25450.

Questions concerning the workshop or this notice should be referred to Hayden Childs, Telecommunications Policy Analyst, Telecommunications Division, (512) 936-7390, hayden.childs@puc.state.tx.us, or Michelle Lingo, Senior Attorney, Policy Development Division, (512) 936-7217, michelle.lingo@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200201216
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 26, 2002

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. United Telephone Company of Texas, Inc. doing business as Sprint Application for Approval of LRIC Study for ISDN-PRI Service Pursuant to P.U.C. Substantive Rule §26.214 on or after March 4, 2002.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 25497. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at 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.

TRD-200201170
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 25, 2002

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214

Docket Title and Number. Central Telephone Company of Texas doing business as Sprint Application for Approval of LRIC Study for ISDN-PRI Service Pursuant to P.U.C. Substantive Rule §26.214 on or after March 4, 2002.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 25499. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at 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.

TRD-200201171
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 25, 2002

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215.

Docket Title and Number. Southwestern Bell Telephone Company's Application for Approval of LRIC Study for Prompted Auto Redial Pursuant to P.U.C. Substantive Rule §26.215 on or about March 1, 2002, Docket Number 25472.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 25472. Written comments or recommendations should be filed no later than 45 days after the date of sufficiency and should be filed at 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.

TRD-200201066
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 21, 2002

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215.

Docket Title and Number. Southwestern Bell Telephone Company's Application for Approval of LRIC Study for Customer Rearrangement Service Pursuant to P.U.C. Substantive Rule §26.215 on or about March 4, 2002.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 25501. Written comments or recommendations should be filed no later than 45 days after the date of sufficiency and should be filed at 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.

TRD-200201172
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 25, 2002

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Public Notice of Interconnection Agreement

On February 19, 2002, Southwestern Bell Telephone Company and TXU Communications Telecom Services Company, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 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 & Supplement 2002) (PURA). The joint application has been designated Docket Number 25471. 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 25471. 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 March 22, 2002, 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 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 25471.

TRD-200201065
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 21, 2002

♦ ♦ ♦

Public Notice of Interconnection Agreement

On February 19, 2002, United Telephone Company of Texas, Inc. d/b/a Sprint, Central Telephone Company of Texas d/b/a Sprint, and Viteris, Incorporated, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 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 & Supplement 2002) (PURA). The joint application has been designated Docket Number 25475. 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 25475. 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 March 22, 2002, 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 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 25475.

TRD-200201067
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 21, 2002

♦ ♦ ♦

Public Notice of Interconnection Agreement

On February 21, 2002, United Telephone Company of Texas, Inc. doing business as Sprint, Central Telephone Company of Texas doing business as Sprint, and Quality Telephone, Inc., collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 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 & Supplement 2002) (PURA). The joint application has been designated Docket Number 25494. 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 25494. 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 March 22, 2002, 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 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 25494.

TRD-200201119
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 22, 2002

♦ ♦ ♦

Public Notice of Interconnection Agreement

On February 25, 2002, Southwestern Bell Telephone Company and Alltel Communications, Inc., collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 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 & Supplement 2002) (PURA). The joint application has been designated Docket Number 25505. 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 25505. 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 March 26, 2002, 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 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 25505.

TRD-200201218
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: February 27, 2002

♦ ♦ ♦

Research and Oversight Council on Workers' Compensation

Notice of Contract for Professional Services

The Research and Oversight Council on Workers' Compensation (ROC) provides notice that it has entered into a Professional Services contract with the Workers Compensation Research Institute (WCRI), a non-profit research organization, located at 955 Massachusetts Avenue, Cambridge, MA 02139. This contract allows Texas to participate in the third edition of the WRCI CompScope* project, a multi-state workers' compensation benchmarking effort. The funding appropriated for participation in the WCRI project is specifically described in Senate Bill 1 (General Appropriations Act) Section VIII-88, Rider 2, Seventy-seventh Legislature Regular Session. This contract is executed under the provisions of Chapter 2254 Subchapter A of the Texas Government Code. The contract began 12/15/01 and will end 1/15/03. Under no circumstance will this contract exceed $185,000.00 for Fiscal Year 2002, and $185,000.00 for Fiscal Year 2003.

The following is a description of the nature of work for this project and the proposed timing of deliverables:

• Taking samples of administrative and financial data from each state using existing data sharing arrangements with insurance carriers

• Re-coding data for consistency

• Preparing a qualitative assessment of findings for each state based on a set of standardized measures - status report and preliminary findings on or before 07/15/02

• Preparing a descriptive comparison of the features of the Workers' Compensation system in each state that has a bearing on the differences identified in the analysis - draft report on or before 08/31/02

• Conducting briefings in each state to inform stakeholders and interested legislators of the findings - on or before 01/01/03

• Delivering the final report - on or before 01/15/03

Research and Oversight Council on Workers' Compensation

9800 North Lamar Blvd., Suite 260

Austin, Texas 78753

(512) 469-7811 Phone

(512) 469-7481 Fax

TRD-200201048
Anthony Haynes
Business Manager
Research and Oversight Council on Workers' Compensation
Filed: February 20, 2002

♦ ♦ ♦

South East Texas Regional Planning Commission

Public Opening of Request for Proposal for 9-1-1 Mapping Application

South East Texas Regional Planning Commission 9-1-1 Emergency Communications will open submitted proposal responses to their mapping application Request for Proposal No. 02-911-01 issued on February 21, 2002, on **Monday, March 25, 2002 at 2:00 p.m. central time at 2210 Eastex Freeway, Beaumont, Texas.**

TRD-200201231
Chester Jourdan
Executive Director
South East Texas Regional Planning Commission
Filed: February 27, 2002

♦ ♦ ♦

Texas Department of Transportation

Correction of Error

The Texas Department of Transportation proposed new 43 TAC §26.82, concerning annual audits, in the February 15, 2002, issue of the *Texas Register* (27 TexReg 1149).

Due to typographical error, the deadline of documents is incorrect under §26.82(b) and (e). In subsection (b), "60" days should read "90" days. In subsection (e) "90 days" should read "30 days".

The proposed new text should read as follows.

"(b) Submission date. The annual audit shall be submitted to the executive director within 90 days after the end of the fiscal year."

"(e) Availability of audit work papers. If requested by the department, audit work papers shall be made available to the executive director within 30 days of request, at any time during the retention period."

TRD-200201234

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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 26 (2001) is cited as follows: 26 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 "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). 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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